IN THE 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)

Re: Docket Nos. 14, 40 & 47
Final Hearing Date: December 9, 2011 at 9:30 a.m.
Objection Deadline: December 6, 2011 at 12:00 noon

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (A) AUTHORIZING THE DEBTORS TO OBTAIN POSTPETITION FINANCING ON A SENIOR SECURED AND SUPERPRIORITY BASIS, (B) AUTHORIZING THE USE OF CASH COLLATERAL, (C) GRANTING ADEQUATE PROTECTION TO CERTAIN PREPETITION SECURED PARTIES, (D) GRANTING RELATED RELIEF, AND (E) SCHEDULING FINAL HEARING THEREON

The Official Committee of Unsecured Creditors (the "Committee") appointed in the chapter 11 cases (the "Chapter 11 Cases") of Blitz U.S.A., Inc., *et al.*, the above-captioned debtors and debtors-in-possession (collectively, the "Debtors"), by and through its undersigned proposed counsel, submits this objection (the "Objection") to the Debtors' *Motion for Entry of Interim and Final Orders (A) Authorizing the Debtors to Obtain Postpetition Financing on a Senior Secured and Superpriority Basis, (B) Authorizing the Use of Cash Collateral, (C) Granting Adequate Protection to Certain Prepetition Secured Parties, (D) Granting Related Relief and (E) Scheduling Final Hearing Thereon* (the "DIP Motion") [Docket No. 14]. In support of this Objection, the Committee respectfully states as follows:

[1] 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. (8825); Blitz Acquisition, LLC (8979); Blitz RE Holdings, LLC (9071); Blitz U.S.A., Inc. (8104); and F3 Brands 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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PRELIMINARY STATEMENT

1. The Committee is mindful of the Debtors' need for sufficient cash to fund their operations, engender vendor support and provide necessary liquidity during these Chapter 11 Cases.[2] However, the DIP Financing Facility proposed herein is at best premature and at worst illusory. Incredibly, despite the high fees, high interest rate, tight sale deadlines, and other onerous terms imposed by the DIP Credit Agreement, the Budget annexed to the DIP Motion reflects that the Debtors will not draw down a single dollar under the DIP Financing Facility during the thirteen (13) week projection period, and will in fact end the projection period with $1.9 million in cash on hand. Rather than providing the Debtor with financing necessary to fund their Chapter 11 Cases, the DIP Financing Facility is nothing more than an illusion designed to give the Lenders complete control over the Chapter 11 Cases without injecting any additional funds into this reorganization.

2. Alternatively, the Debtors and Lenders have asserted in informal discussions with the Committee that approval of the DIP Financing Facility is necessary due to the ongoing dispute with Wal-Mart Stores, Inc. ("Wal-Mart"), the Debtors's largest customer, whereby Wal-Mart is seeking to set-off pre-petition accounts payable due to the Debtors against pre-petition indemnification obligations allegedly due to Wal-Mart. The Debtors assert that if Wal-Mart is authorized to exercise set-off rights or otherwise does not continue to purchase and pay for the Debtors' goods, draws on the DIP Financing Facility will be necessary before the end of December. However, the Debtors have not produced a budget reflecting this scenario, and under the present Budget no such draws would be authorized. Considering that sales to Wal-Mart allegedly comprise approximately twenty-five percent (25%) of the Debtors' revenue, it appears that a disruption in the Wal-Mart business would likely render the proposed DIP Financing Facility grossly inadequate to accomplish and fulfill all of the requirements mandated

[2] Capitalized terms used but not otherwise defined in this Objection shall have the meanings ascribed to such terms in the DIP Motion.

by the DIP Credit Agreement, including the sale of Debtor F3 Brands, LLC's ("F3 Brands") assets, the sale of non-debtor affiliate Reliance Products Holdings, Inc.'s ("Reliance") assets, and the reorganization or liquidation of the Debtors' remaining business.

3. Accordingly, the Committee believes that entry into the proposed DIP Financing Facility and related proposed sale of some of the Debtors' assets and business operations is not a reasonable exercise of the Debtors' business judgment. Rather, the DIP Motion appears to set forth a thinly-disguised effort by the proposed DIP Lenders (defined below)--who are also three of the Debtors' four pre-petition lenders--to impermissibly use chapter 11 to dispose of the Debtors' assets through an abbreviated sale process without making any effort to pay the administrative costs associated therewith, and thereafter leaving behind administratively insolvent estates. Any such sale would clearly be for the sole benefit of the DIP Lenders and Pre-Petition Lenders (the DIP Lenders, with the Pre-Petition Lenders, collectively the "Lenders") and to the detriment of all other creditors--administrative, priority and unsecured.

4. If the Court is inclined to consider approval of the DIP Financing Facility notwithstanding the overarching objections set forth above, the Committee objects to the following specific provisions of the proposed DIP Financing Facility set forth in detail below:

- The proposed Final DIP Order inappropriately precludes the assessment of administrative claims against the DIP Lenders' collateral pursuant to section 506(c). The waiver of such rights is unfair and prejudicial to creditors. Likewise, the waiver of rights under Section 552(b) is unfair and prejudicial to creditors.
- The proposed Benchmark Requirements are too aggressive to allow for a robust sale process. Rather, such milestones in connection with the marketing and sale of F3 Brands and non-Debtor affiliate Reliance, and the liquidation of the Excess Equipment will only serve to "set up" the Debtors for an event of default or result in an unnecessarily hasty liquidation of the Debtors' assets that will benefit no one other than the Lenders.
- The Court should not approve the DIP Financing Facility as proposed because the Debtors may already be in default under the unreasonable Benchmark Requirements set forth in the DIP Credit Agreement.

- The proposed $5.0 million DIP Financing Facility is illusory as it will only provide the Debtors with $3.5 million of working capital availability because the Lenders require that $1.5 million of the DIP Financing Facility must be used to fund a cash reserve. This minimum cash balance must be reduced or removed entirely.
- Considering that the DIP Financing Facility will only provide the Debtors with availability of $3.5 million, the interest rate on the DIP Financing Facility, coupled with Origination Fee totaling $75,000, yields an effective interest rate of approximately 12.6%, which is high and does not include the additional Unused Line Fee of approximately 2% and proposed LIBOR Breakage Fee.
- The Budget does not provide for the payment of all administrative claims, including administrative claims arising from the payment of Critical Vendor Claims and Bankruptcy Code § 503(b)(9) claims.
- Although the Term Sheet and DIP Motion describe the Professional Fee Cap as $500,000 on a "roll-forward monthly basis", the Budget only provides for professionals' fees during weeks eight and thirteen. The "Restructuring Fees" line items must be allocated on a monthly basis. Further, the aggregate amount of budgeted professionals' fees is patently inadequate to support the Debtors' stated strategy, which includes two separate asset marketing and sale processes and a liquidation or reorganization of the Debtors' remaining business.
- The $100,000 Restructuring Fees line item proposed for the Committee's professionals under the Budget is an inadequate, arbitrary cap designed to inhibit the Committee's participation in these Chapter 11 Cases. The inadequacy of the proposed Committee's professionals' fees carve-out is readily apparent when compared to the $900,000 earmarked for the Debtors' professionals during the same 13 week period which itself appears very low considering the Debtors' stated strategy.
- The proposed Final DIP Order and DIP Credit Agreement impose on the Committee an unrealistically low $10,000 limit on lien investigation costs. Further, the proposed Lien Challenge Period of sixty (60) day from the Committee formation date is inadequate.
- The Final DIP Order must specify that the Committee's lien challenge period applies only to challenges to the extent, validity, priority and perfection of the pre-petition liens and security interests, and <u>does</u> <u>not</u> apply to other causes of action such as lender liability, equitable subordination, recharacterization, etc., and must make clear the Committee can commence any avoidance power actions against the Pre-Petition Lenders.
- The Final DIP Order must expressly grant the Committee standing to bring challenges to the extent, validity, priority and perfection of the pre-petition liens and security interests.
- The Lenders are not entitled to payment of interest, reimbursement of costs, legal fees on account of the Pre-Petition Credit Facility as the Lenders have not yet established that their claims are over-secured. To the extent that the Court authorizes the Lenders to

receive payments of interest or reimbursement of costs and legal fees, the Committee must be authorized to seek re-characterization of such payments if the Lenders' claims ultimately prove to be under-secured.

- The Final DIP Order must clarify that post-petition interest will be paid at the contract (non-default) rate, not the default rate unless a post-petition Event of Default has occurred.
- The proposed Interim DIP Order improperly attempts to include in the DIP Lenders' Collateral all causes of action, including avoidance actions. The Final DIP Order must specify that the Lenders will have no post-petition liens, replacement liens, administrative claims or super-priority claims on Chapter 5 avoidance power actions and/or the proceeds thereof.
- The Final DIP Order must specify that the DIP Lenders' liens cannot prime any pre-existing liens and security interests that were not provided with notice of the DIP Motion.
- The Final DIP Order must clarify that any proceeds of the sale of F3, Reliance, and/or the Debtors' Excess Equipment must first be used to satisfy amounts outstanding under the DIP Financing Facility and only thereafter shall any remaining such funds become available to satisfy any amounts outstanding under the Pre-Petition Credit Facility. Further, the proceeds of any sale of the Debtors' assets shall not be paid to the Lenders on account of pre-petition loans unless and until the lien challenge period has expired without a lien challenge action having been filed, or if a lien challenge action is filed, until such action is resolved by a final non-appealable order.
- The Final DIP Order must require that all reports and/or notices to be provided by either the Debtors or the Lenders must be simultaneously provided to the Committee.
- The Final DIP Order must state that the Lenders' right to credit bid at the auction sale under Bankruptcy Code Section 363(k) is subject to the Committee's rights to challenge the Lenders' pre-petition liens and rights to credit bid.

5. As set forth in detail herein, certain of the terms of the DIP Financing Facility are inappropriate under applicable law and, if continued in the proposed Final DIP Order, will unduly prejudice the rights and interests of the Debtors' estates and unsecured creditors. The Debtors have fallen far short of meeting their burden to demonstrate that the proposed DIP Financing Facility is necessary, worth the associated costs and onerous conditions, and is in the best interest of the Debtors' estates. Accordingly, the Committee submits that the DIP Motion must be denied on a final basis. Alternatively, if the Court is inclined to approve the DIP Financing Facility, the proposed DIP Term Sheet, DIP Credit Agreement and any Final DIP

Order should be modified as set forth herein.

RELEVANT BACKGROUND

I. In General.

6. On November 9, 2011 (the "Petition Date"), the Debtors commenced their respective bankruptcy cases (the "Chapter 11 Cases") by filing voluntary petitions for relief under title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the "Bankruptcy Code").

7. 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.

8. No trustee or examiner has been appointed in the Debtors' bankruptcy cases.

9. On the Petition Date, the Debtors filed their critical vendor motion (the "Critical Vendor Motion") seeking Court authority to Debtors to pay up to $1,300,000 in unsecured, prepetition critical vendor claims (the "Critical Vendor Claims"), on an interim basis, and an additional $700,000 in Critical Vendor Claims and $520,000 in unsecured, prepetition lien claims under a proposed final order. *See* Docket No. 10. In the Critical Vendor Motion, the Debtors estimate that they owe a total of $5.5 million in prepetition unsecured trade claims, of which $545,000 accrued within twenty (20) days of the Petition Date and will therefore be entitled to administrative priority under Bankruptcy Code section 503(b)(9). *See* Critical Vendor Motion, ¶ 9.

10. On the Petition Date, the Debtors also filed the *Declaration of Rocky Flick, President and Chief Executive officer of Blitz U.S.A., Inc., in Support of Debtors' Chapter 11 Petitions and First Day Motions* (the "Flick Declaration"). *See* Docket No. 13. The Flick Declaration defines the Debtors' pre-petition secured debt obligations ("Pre-Petition Credit Facility") among the Debtors, the prepetition lenders (the "Pre-Petition Lenders") and BOKF, NA d/b/a Bank of Oklahoma as administrative agent ("BOK"). *See* Flick Declaration, ¶

22. The Pre-Petition Credit Facility is comprised of approximately $22 million outstanding under a pre-petition term loan facility and approximately $19 million outstanding under a prepetition revolver facility. *Id.* The Debtors claim that all obligations under the Pre-Petition Credit Facility are secured by a first priority security interest in substantially all of the Pre-Petition Borrowers' and Pre-Petition Guarantors' assets. *Id*.

11. Additionally, in connection with the September 12, 2007 acquisition (the "2007 Transaction") of the Debtors from previous owner Crestwood Holdings, Inc. ("Crestwood"), Debtor Blitz Acquisition Holdings, Inc. issued two unsecured subordinated promissory notes (the "Subordinated Promissory Notes") to Crestwood each in the initial principal amount of $11,103,340.49, for an aggregate total of $22,206,680.98, all of which was allegedly outstanding as of the Petition Date. The Debtors further assert that the Subordinated Promissory Notes were amended and restated in connection with the negotiation of the Prepetition Credit Facility. *See* Flick Declaration, ¶ 23. Finally, the Debtors estimate that they owe approximately $3.5 million to various legal counsel for defense costs associated with certain prepetition litigation. *Id*.

II. The DIP Motion.

12. On the Petition Date, the Debtors filed the DIP Motion seeking court approval of a $5 million senior secured super-priority debtor-in-possession financing facility (the "DIP Financing Facility") between the Debtors and BOKF, NA d/b/a Bank of Oklahoma (the "DIP Agent"), as agent, and BOKF NA d/b/a Bank of Oklahoma, The F&M Bank & Trust Company, and Citizens Security Bank and Trust Company (collectively, the "DIP Lenders") (each of which are also Pre-Petition Lenders under the Prepetition Credit Facility) and to permit the Debtors' use of Cash Collateral during the pendency of these Chapter 11 Cases. *See* DIP Motion, ¶ 9.

13. Other relevant terms of the proposed DIP Financing Facility include: (a) interest rate of LIBOR plus 8%; (b) default interest rate of an additional 2%; (c) unused line fee

of LIBOR plus 1%; (d) maturity date of June 30, 2012 (approximately seven months); and (e) origination fee of $75,000. The DIP Motion and Term Sheet also outline a series of Benchmark Requirements connected to the sale of the Debtors' businesses and the business of one of the Debtors' non-debtor affiliates including the following:

(a) Identify stalking horse bidder and enter into stalking horse asset purchase agreement for the sale of Debtor F3 Brands LLC ("F3") on or before **January 16, 2012**.

(b) File motion to approve the sale of F3 on or before **January 18, 2012**.

(c) Close sale of F3 on or before **March 16, 2012**.

(d) Engage sales broker to sell non-debtor affiliate Reliance Products Holdings, Inc. ("Reliance") on or before **December 16, 2011**.

(e) Prepare and circulate prospectus to potential buyers of Reliance on or before **January 16, 2012**.

(f) Close sale of Reliance on or before **May 3l, 2012**.

(g) Formulate and present Business Plan on or before **December 15, 2011**, which Business plan shall include (i) a plan to reverse negative cash flow and net income, (ii) milestones for resolution of the chapter 11 cases (including filing Chapter 11 Plan and outline thereof); (iii) addressing product liability concerns post-reorganization (including any insurance needs); and (iv) employee incentive compensation for accomplishing all Benchmark Requirements.

(h) Identify Excess Equipment and other assets to be sold and present a plan for such sale on or before **November 30, 2011**.

(i) Liquidate all Excess Equipment on or before **February 28, 2012**.

14. On November 10, 2011, the Court entered an order approving the DIP Motion on an interim basis (the "Interim DIP Order"). Attached as Exhibit A to the Interim DIP Order is the term sheet that sets forth the proposed terms and conditions of the DIP Financing Facility (the "DIP Term Sheet"). Attached as Exhibit B to the Interim DIP Order is a consolidated thirteen (13) week DIP financing budget (as amended and revised, the "Budget"). The Budget projects that at the end of the thirteen (13) week period, the Debtors will not have drawn down a single dollar under the DIP Financing Facility and will have approximately $1.8 million in cash on hand. *See* Budget. The Interim DIP Order authorized the Debtors to use the

Prepetition Lenders' Cash Collateral in accordance with the Budget, but did not authorize any interim borrowing. *See* Docket No. 33.

15. On November 10, 2011, the Court entered an order directing that the Debtors' chapter 11 cases be jointly administered for procedural purposes only pursuant to Rule 1015 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Rule 1015-1 of the Local Bankruptcy Rules. *See* Docket No. 31.

16. Also on November 10, 2011, the Court entered an order approving the Critical Vendor Motion on an interim basis (the "Critical Vendor Order") authorizing the Debtors to pay on an interim basis up to an aggregate of $1,300,000 in Critical Vendor Claims. *See* Docket No. 39.

17. On November 21, 2011, the Office of the United States Trustee appointed the Committee pursuant to §1102(a)(1) of the Bankruptcy Code. *See* Docket No. 63.

18. On November 23, 2011, the Debtors filed their Notice of Filing (A) Substantially Final DIP Financing Agreement, and (B) Proposed Final DIP Order. *See* Docket No. 73.

III. The DIP Financing Facility.

19. The Debtors claim that in the normal course of their businesses, they use "cash on hand and cash flow from operations to fund working capital, capital expenditures, litigation-related expenses incurred defending the product liability lawsuits against the Debtors, and for other general corporate purposes." Motion, ¶ 7. The Debtors further assert that without the immediate access to the Prepetition Lenders' cash and the ability to draw on the DIP Financing Facility in January, they expect to suffer a cash shortage that will harm their estates and creditors by inhibiting the Debtors' ability to operate their business in an orderly manner, maintain business relationships with vendors, suppliers, and customers, pay employees, and satisfy other working capital and operation needs. *Id.* The Debtors argue that all such

expenditures are necessary to preserve and maintain the Debtors' going-concern value and, ultimately, effectuate a successful reorganization.

20. The Debtors therefore requested the approval of the DIP Financing Facility to provide post-petition financing in the aggregate amount of $5 million.

21. As previously noted, pursuant to the Interim DIP Order, the Debtors were authorized to use the Prepetition Lenders' cash collateral pending the entry of an order approving the DIP Motion on a final basis (the "Final DIP Order"). The Interim 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. The Interim DIP Order also grants replacement liens and various other forms of adequate protection including, without limitation, payment of interest and professional fees.

OBJECTIONS TO THE PROPOSED DIP FINANCING FACILITY AND FINAL ORDER

22. While approval of the proposed DIP Financing Facility remains within the Court's "informed discretion," and the Committee is not unmindful of the Debtors' financial condition and needs, the Court must balance the interests of the DIP Lenders with those of general unsecured creditors. Striking this balance requires that a debtor seeking post-petition financing on a superpriority basis demonstrate that the proposed financing comports with basic notions of fairness and equity and that it would ultimately inure to the benefit of the Debtors' estates. *See In re Aqua Associates*, 123 B.R. 192, 196 (Bankr. E.D. Pa. 1991); *In re Ames Department Stores, Inc.*, 115 B.R. 34, 37-40 (Bankr. S.D.N.Y. 1990). The Debtors, for the sake of obtaining post-petition financing promptly, cannot abrogate their fiduciary duties to their estates and creditors. *Ames Department Stores*, 115 B.R. at 38.

23. Section 364 of the Bankruptcy Code is not a "secured lenders act" allowing a creditor to undo the more level "playing field" contemplated by the Bankruptcy Code. The Court in *Ames Department Stores* stated:

> Acknowledging that Congress, in Chapter 11, delicately balanced the hope of debtors to reorganize and the expectations of creditors for payment, the courts have focused their attention on proposed terms that would tilt the conduct of the bankruptcy case; prejudice, at an early stage, the powers and rights that the Bankruptcy Code confers for the benefit of all creditors; or leverage the Chapter 11 process by preventing motions by parties-in-interest from being decided on their merits.

Ames Department Stores 115 B.R. at 37. *See also In re Tenney Village Co., Inc.*, 104 B.R. 562, 568 (Bankr. D. N.H. 1989).

24. In keeping with the principles annunciated by the Courts above, the Committee submits that DIP Credit Agreement, the Interim DIP Order and the proposed Final DIP Order are unduly prejudicial to the rights of unsecured creditors and, therefore, the DIP Motion must be denied. Alternatively, if the Court is inclined to approve the DIP Motion on a final basis the proposed Final DIP Order should be significantly modified as described herein.

I. The Debtors Do Not Require Debtor in Possession Financing.

25. The Debtors have not clearly established the need for this expensive, onerous DIP Financing Facility. The Approved Budget, which contemplates no draws under the DIP Financing Facility, indicates that at the end of the 13-week period, the Debtors will have a cash balance of over $1.9 million. The proposed DIP Financing Facility is an illusion designed by the Lenders in an attempt to gain complete control of these Chapter 11 Cases. Rather than operate on cash collateral, the Debtors have agreed to a financing proposal that requires them to pay exorbitant fees and interest, and abide by unrealistic, burdensome Benchmark Requirements in exchange for illusory consideration.

26. Approval of the DIP Financing Facility as currently proposed will only serve two purposes. First, the Debtors will be forced to pay dearly for additional financing that they do not really need. While the DIP Lenders will be the beneficiaries of the exorbitant interest and fees charged under the seven (7) month DIP Financing Facility, the Debtors' other creditors, administrative, priority and unsecured, will be saddled with the hardship of paying for this unnecessary luxury. Second, by virtue of the Benchmark Requirements and the related

threat of default under the DIP Financing Facility, the DIP Lenders will wrest control of these Chapter 11 Cases away from the Debtors, their creditors and other stakeholders. This will allow the DIP Lenders to proceed with their proposed "quick sale" of arguably the Debtors' most valuable assets with the sole objective of repaying the DIP Financing Facility and Pre-Petition Credit Facility, regardless of whether such strategy would be of any benefit to the Debtors and their creditors.

27. The DIP Motion should be denied because the DIP Financing Facility is not in the best interests of the Debtors, their estates and creditors as it would be nothing more than a wasteful, unnecessary burden to the estates.

II. The Proposed DIP Financing Facility Is Premature.

28. As the Court is aware, Wal-Mart has filed a motion for stay relief seeking, *inter alia*, to set-off pre-petition payables due to the Debtors against alleged pre-petition indemnification obligations arising from certain tort litigation. The Debtors and Lenders have stated in informal discussions with the Committee that approval of the DIP Financing Facility is necessary due to the ongoing dispute with Wal-Mart. The Debtors assert that if Wal-Mart is authorized to exercise the set-off rights sought in its motion for stay relief, or, if Wal-Mart otherwise determines to discontinue doing business with the Debtors, draws on the DIP Financing Facility will be necessary before the end of December. As of the date hereof, it is unclear whether Wal-Mart will continue to order goods from the Debtors and on what specific terms.

29. While the Debtors claim that they may need the DIP Financing Facility to cover any revenue shortfall attributable to the loss of Wal-Mart's business, the Debtors have not produced a budget reflecting this scenario, and under the present Budget no such draws would be authorized. Further, considering that sales to Wal-Mart allegedly comprise approximately twenty-five percent (25%) of the Debtors' revenue, it appears that a disruption in the Wal-Mart business would likely render the proposed DIP Financing Facility grossly inadequate to

accomplish and fulfill all of the requirements mandated by the DIP Credit Agreement including two distinct and separate asset marketing and sale processes, and the liquidation or reorganization of the Debtor's remaining business.

30. The DIP Motion should not even be considered by this Court unless and until such time as the Debtors propose a revised budget detailing additional expenditures and modified projections resulting from the Wal-Mart dispute that will allow the Court, the Committee and other stakeholders to accurately analyze the necessity and viability of the DIP Financing Facility.

III. If the Court Is Inclined to Approve Debtor in Possession Financing, the Proposed Terms Should Be Modified.

31. In the event the Court is inclined to approve the DIP Financing Facility, the Committee submits that many of the terms proposed in the DIP Credit Agreement, DIP Term Sheet and Final DIP Order are inappropriate, unacceptable and must be changed. Further, the current proposed Budget is woefully inadequate and raises serious questions.

A. The Waiver Of The Estates' Rights Under 11 U.S.C. §§ 506(c) and 552(b) Is Unfair And Prejudicial To Unsecured Creditors.

32. The DIP Motion provides for a waiver of the Debtors' rights under §§ 506(c) and 552(b) of the Bankruptcy Code to surcharge the collateral securing the claims of the DIP Lenders and the Pre-Petition Lenders for any costs and expenses of administration in these cases. *See* Interim DIP Order, ¶¶ 18 and 32. Section 506(c) of the Bankruptcy Code permits a debtor to surcharge a lender's collateral for the costs of preserving the collateral. While it is not unusual for a debtor to waive the right to surcharge under section 506(c) when the lender funds a budget designed to cover all of the anticipated expenses of chapter 11, the Debtors have neither provided a budget that provides for payment of all administrative expenses, nor demonstrated that such expenses are otherwise adequately provided for.

33. In light of the Supreme Court's decision in *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000), the Lenders' attempt to compel a

waiver of any potential surcharge rights under section 506(c) of the Bankruptcy Code and the outright prohibition of any such a surcharge upon the entry of a final order approving the DIP Financing Facility is objectionable because it denies the estates the right to seek to surcharge the collateral if appropriate. This provision is particularly overreaching here because the Budget does not appear to include all anticipated administrative expenses in these cases, including an estimated $545,000 million in section 503(b)(9) claims. Under these circumstances, the section 506(c) waiver and prohibition against surcharging the collateral are prejudicial to creditors and must be denied.

34. The Committee submits that in light of the fact that the Lenders appear to be the sole beneficiaries of the mandated sale processes required by the DIP Financing Facility, the Lenders should be charged with 100% of the administrative expense claims in these cases or, at a minimum, that the section 506(c) waiver be stricken. Indeed, a § 506(c) waiver is especially inappropriate in a case being administered for the sole benefit of a secured creditor. *See generally In re Guterl Special Steel*, 316 B.R. 843, 854-55 (Bankr. W.D. Pa. 2004) (property was surcharged with fees incurred by chapter 7 trustee in unsuccessful effort to convince government agency to clean up environmental contamination on property that secured a creditor's claim).

35. Accordingly, the section 506(c) waiver must be removed so that interested parties may at least make the argument that the cost should be borne by the Lenders when the results of the sale process are known (and whether those results benefit anyone other than the Lenders). *See generally Precision Steel Shearing v. Fremont Finance Corp.*, 57 F.3d 321, 325 (3d Cir. 1995) ("[Section] 506(c) is designed to prevent a windfall to the secured creditor . . . The rule understandably shifts to the secured party . . . the costs of preserving or disposing of the secured party's collateral, which might otherwise be paid from the unencumbered assets of the bankruptcy estate.") (citations omitted). Assuming the Court approves of the DIP Motion, a provision must be included in the proposed Final DIP Order expressly stating that the Debtors' estates retain their rights under section 506(c) of the

Bankruptcy Code.

36. As noted in the Interim DIP Order, the Debtors also seek a waiver of the "equities of the case" exception contained in section 552(b) of the Bankruptcy Code, which allows the Debtors, the Committee or other parties in interest to assert that equitable considerations justify the exclusion of post-petition proceeds from the pre-petition Collateral. Here, it is unclear whether the proposed sale of certain of the Debtors' assets will generate sufficient proceeds to fund a reorganization and/or provide any meaningful recovery to unsecured creditors. Accordingly, the Committee submits that any finding of fact that prospectively waives the "equities of the case" exception set forth in § 552(b), is inappropriate at this time. *See In re Metaldyne Corporation, et al.*, 2009 WL 2883045, at *6 (holding that in the context of a proposed section 552(b) waiver, "the waiver of an equitable rule is not a finding of fact … and the Court, in its discretion, declines to waive prospectively an argument that other parties in interest may make. If, in the event, the Committee or any other party in interest argues that the equities of the case exception should apply to curtail a particular lenders' rights, the Court will consider it.").

37. Thus, the waiver of the Debtors' rights under §§ 506(c) and 552(b) respectively is inappropriate and must be stricken from the Final DIP Order.

B. The Asset Sale Milestones Are Needlessly Short.

38. The proposed Required Benchmarks included in the DIP Term Sheet, DIP Motion and the Events of Default in the Interim DIP Order are much too compressed and aggressive to allow for a fulsome sale process, especially considering that the Debtors currently have no investment banker in place, no marketing process underway and no stalking horse bid. Notably, one of the Required Benchmarks has already passed (November 30, 2011) and another is less than two weeks away (December 15, 2011).

39. The DIP Term Sheet and Interim DIP Order contain a number of milestones related to the asset sale processes that the Debtors are required to satisfy in order to

avoid default under the proposed DIP Financing Facility

40. The Committee submits that there is no rational justification to impose such short deadlines on the Debtors -- including at least one Required Benchmark that has already passed -- unless the only purpose of these Chapter 11 Cases is to engineer a quick sale to pay off the Lenders, "stiff" all holders of unpaid administrative expense claims and then let the cases convert to chapter 7. These milestones will do nothing to further a fulsome asset sale process. Rather, these carefully engineered hurdles appear to be designed solely to provide the DIP Lenders with repeated opportunities to declare the Debtors in default with respect to the DIP Financing Facility. In essence, the DIP Lenders are setting the Debtors up for failure rather than success.

41. In mandating such unrealistic and unattainable sale-related Required Benchmarks, the DIP Lenders have again demonstrated the over-reaching and undue influence they are attempting to exert over the Debtors. Accordingly, the DIP Motion must be denied unless and until the DIP Lenders agree to more reasonable asset sale milestones.

C. The $5.0 Million DIP Financing Is Illusory and the Interest Rate and Fees Are Unreasonably High.

42. Although the Debtors and the DIP Lenders advertise the DIP Financing Facility as providing $5.0 million of working capital to the Debtors' estates, the required cash reserve balance of $1.5 million effectively diminishes the actual cash availability to $3.5 million. *See* DIP Motion, p. 7. Strikingly, there is no analogous reduction in the interest charged to account for this limitation on thirty percent (30%) of the funds available under the DIP Financing Facility, rather, the Debtors (and all stakeholders) will be forced to pay interest on $5.0 million, while enjoying the benefits of only $3.5 million.

43. The DIP Financing Facility calls for post-petition interest to be paid to the DIP Lenders at a rate equal to LIBOR plus 8% per annum.[3] *See* DIP Motion, p. 7. This interest

[3] Upon information and belief, the current 1-month LIBOR rate is approximately 0.27%. Accordingly, the interest rate will be approximately 8% + 0.27% = 8.27 %.

rate against $5.0 million -- when coupled with the Origination Fee totaling $75,000 -- yields an effective annual interest rate of approximately 12.6% for use of $3.5 million. Further, this effective rate does not include the unused line fee of LIBOR plus 1% and the LIBOR Breakage Fees required in the DIP Credit Agreement. *See* DIP Credit Agreement, ¶ 2.14(D).

44. While charging such an exorbitant rate of interest is inappropriate under almost any circumstances, it is particularly inequitable here, where the term of the loan is only approximately seven (7) months, maturing no later than June 30, 2012. *See* DIP Motion, p. 8 .

45. Thus, the post-petition interest rate must be reduced to a reasonable, market rate of interest and the requirement of a cash reserve must be reduced significantly or removed entirely.

D. The Budget does not make adequate provision for the payment of administrative claims.

46. Even in today's troubled economy, a chapter 11 case should not be administered, and DIP financing procured, 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) ("[C]redit should not be approved when it is sought for the primary benefit of a party other than the debtor."); *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) (debtor-in-possession financing terms must not "pervert the reorganizational process from one designed to accommodate all classes of creditors and equity interests to one specially crafted for the benefit "of the secured creditor").

47. It is particularly 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 using 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 when debtor admitted that it would convert the case to chapter 7 following the sale). *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 hereunder is unlikely).

48. Bankruptcy courts in this District have come to a similar conclusion stating 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"),[4] p. 78:18-20. Further, in particular regard to § 503(b)(9) claims, Judge Sontchi has stated:

> [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.

49. Moreover, the Budget only provides for a carve-out of $1.0 million for the estate's professionals, a mere $100,000 of which is allocated to the Committee's professionals, despite the fact that the Debtors intend to conduct two separate asset marketing and sale processes and reorganize or liquidate the remaining Debtors. In addition, the Debtors' Critical Vendor Motion seeks authority to pay up to $2.5 million in Critical Vendor Claims, which

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

include $545,000 in 503(b)(9) administrative claims.[5] Generally, section 503(b)(9) claims are treated just like any other administrative claim. *See, generally, In re Plastech Engineering*, 394 B.R. 147 (Bankr. E.D. Mich. 2008) (rejecting application of 502(d) to 503(b)(9) claims, the Court holding that 503(b)(9) claims should be treated like any other administrative claim). Obviously, such claims must be paid at confirmation. *See* 11 U.S.C. § 1129(a)(9). However, nothing in the DIP Motion or the Approved Budget appears to adequately provide for the payment of these significant claims, which undoubtedly will be significantly higher - in required professionals' fees alone -- if the Debtors and Lenders pursue the strategy they have set forth in the DIP Motion. In addition, as of the date of this Objection, no proposed sale agreement or stalking horse bid has been filed. Accordingly, there is nothing in the record to indicate that the proceeds of the proposed partial asset sales will be anywhere near sufficient to pay the claims of the DIP Lenders, the Prepetition Lenders and all administrative claims, including section 503(b)(9) claims.

E. The Court Should Not Approve (i) a Patently Insufficient Professionals' Fees Carve-out; (ii) Excessive Limitations on the Committee's Rights to Investigate and Challenge the Prepetition Lenders' Liens and Claims; and (iii) the Inclusion of Unrelated Causes of Action Under the Lien Challenge Period.

50. In order for the Committee to properly and adequately meet its fiduciary duty to investigate matters relating to the Debtors' prepetition secured creditor relationships and otherwise diligently carry out its statutory duties, various provisions of the proposed Approved Budget and Final DIP Order require modification.

51. The Committee's fiduciary role is of paramount importance in the chapter 11 reorganization process, and it is essential that the Committee professionals are not artificially

[5] By virtue of Interim Critical Vendor Order approved by this Court, the Debtors have authority to pay up to $1.3 million in Critical Vendor Claims on an interim basis and are seeking authority to pay an additional $700,000 in Critical Vendor Claims and $520,000 in Lien Claims under a proposed final order. However, it is unclear how the Debtors will pay any critical vendor claims as the Debtors' budget does not provide for payments in an amount close to $2.52 million with or without the DIP Financing Facility proceeds.

restrained from aiding the Committee in fulfilling that role. *See In re Channel Master Holdings, Inc.*, 2004 Bankr. LEXIS 576, at *8-9 (Bankr. D. Del. Apr. 26, 2004) (holding that a $75,000 cap on committee's professional fees under a DIP facility was unreasonable relative to the larger budgets for other professionals in the case, and determining that the cap on the committee's fees provided for inadequate compensation).

52. First, the budgeted amount the Debtors have allocated to pay the Committee's professionals' fees in these cases is inadequate and inappropriate. The Debtors' current Approved Budget provides for a carve-out of $1.0 million for the payment of "Restructuring Fees-Debtor" and "Restructuring Fees-Committee." Of this aggregate total, the Debtors have represented that $100,000, or 10%, is allocated to payment of fees of the Committee's professionals consisting of bankruptcy counsel and financial advisors. The Lenders and Debtors have obviously designated this unreasonably low limit on payment of Committee professionals' fees in an attempt to correspondingly limit the performance of the Committee Professionals. The Committee respectfully submits that the aggregate budget total for restructuring professionals' fees should be increased and that the Committee carve-out should be $175,000 per month, at a minimum.

53. Second, in a transparent attempt by the DIP Lenders to limit the Committee's ability to investigate the validity and extent of the Pre-Petition Lenders' prepetition liens, the Final DIP Order proposes to limit the fees and expenses of the Committee's professionals on such matters to a total of $10,000. There should be no limitation on the Committee's ability to investigate the priority, extent and validity of the Pre-Petition Lenders' prepetition liens beyond the limitations on the professionals' fees included in the Debtors' Budget. If, however, the Court is inclined to agree to an "investigation cap", the amount should not be less than $75,000 for the Committee to be able to properly investigate these matters for the benefit of the Debtors' estates. Further, the Final DIP Order must specify that the Committee's lien challenge period applies only to challenges to the extent, validity, priority and

perfection of the pre-petition liens and security interests, and does not apply to other causes of action such as lender liability, equitable subordination, recharacterization, etc.

54. Third, the Interim DIP Order provides a period of sixty (60) days from the appointment of the Committee, for the Committee to assert challenges against the Pre-Petition Lenders' prepetition liens and claims. Upon the expiration of this "challenge period," such liens and claims are allowed, with any further challenges deemed released and waived. While the Committee acknowledges that a sixty (60) day challenge period is customary and consistent with the local rules in this jurisdiction, due to the complex corporate structure involved here, including the fact that F3 Brands was recently spun off from Blitz and the fact that Reliance is a Canadian entity, the Committee requests a minimum of 90 days, subject to extension on consent or as ordered by the Court.

55. In addition, under the present circumstances, expanding the lien challenge deadline to include challenges beyond the extent, validity, priority and perfection of the Pre-Petition Lenders' prepetition liens is inequitable and inappropriate at this time. Accordingly, the Final DIP Order must clearly specify that the lien challenge period applies only to challenges to the extent, validity, priority and perfection of the pre-petition liens and security interests, and does not apply to any other causes of action including, without limitation, lender liability, equitable subordination and recharacterization. The Final DIP Order must also expressly grant the Committee standing to bring challenges to the extent, validity, priority and perfection of the pre-petition liens and security interests.

56. Fourth, the Interim DIP Order currently provides for a $550,000 carve-out (the "Post-Default Carve-Out") for the payment of Case Professionals (the Debtors', the Committee's and the Agent's) for fees incurred after the occurrence of an Event of Default as defined in the Term Sheet, Final DIP Order or DIP Credit Agreement. *See* Interim DIP Order, ¶ 17. The Committee--and the Court--have insufficient information to determine whether the proposed Post-Default Carve-Out amount for professional fees will be sufficient to enable the

Debtors and the Committee to appropriately respond to an Event of Default and/or wind down the estates' operations and conclude these cases subsequent to an Event of Default. The $500,000 Post-Default Carve-Out appears to be patently insufficient for cases of this size and complexity. Accordingly, the Committee submits that the Post-Default Carve-Out must be increased to $750,000.

F. The Pre-Petition Lenders Are Not Entitled to Payment of Interest, Reimbursement of Costs, Fees and Expenses.

57. A prepetition secured lender is entitled to payment of post-petition interest and reimbursement of legal fees and expenses only if and to the extent that it was oversecured pre-petition. *See* Section 506(b) of the Bankruptcy Code. In the DIP Motion, the Debtors seek authorization to pay interest, fees, costs, expenses, and indemnities to the Pre-Petition Lenders in connection with the Pre-Petition Credit Facility. The Pre-Petition Lenders are not entitled to any such payments unless (and only to the extent that) they were oversecured prepetition, and the Committee submits that the Court should refuse to authorize these impermissible payments. To the extent the Court is inclined to permit the Debtors to pay interest, fees (including attorneys' fees), and expenses to the Lenders, any Final DIP Order must reserve the Committee's right to seek recharacterization of such payments as repayments of principal in the event the facts so warrant.

58. Undersecured secured creditors are not entitled to post-petition interest on their prepetition claims, and cannot circumvent this prohibition simply by attempting to characterize interest payments as adequate protection. *See United Savings Assoc. of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 372 (1988). The *Timbers of Inwood* Court observed that allowing post-petition interest to undersecured secured creditors under the guise of adequate protection would render section 506(b) totally meaningless:

> If the Code had meant to give the undersecured creditor, who is thus denied interest on his claim, interest on the value of his collateral, surely this is where that disposition would have been set forth, and not obscured within the "adequate protection" provision of § 362(d)(1). Instead of the intricate phraseology set forth above,

> § 506(b) would simply have said that the secured creditor is entitled to interest "on his allowed claim, or on the value of the property securing his allowed claim, whichever is lesser." Petitioner's interpretation of § 362(d)(1) must be regarded as contradicting the carefully drawn disposition of § 506(b).

Id.; *see also Baybank-Middlesex v. Ralar Distributions, Inc. et al.*, 63 F.3d 1200, 1203 (1st Cir. 1995) ("We need not determine whether there was a failure of adequate protection because . . . an undersecured creditor[] is not entitled to postpetition interest and fees under § 506(b) . . . .").

59. The DIP Lenders bear the burden of establishing that the prepetition loans of the Pre-Petition Lenders are oversecured, *see* 11 U.S.C. § 363(p)(2), but have not done so. Moreover, the Pre-Petition Lenders have not demonstrated that payment of their fees, expenses and interest, are required to protect the Pre-Petition Lenders against the diminution in the value of their pre-petition collateral post-petition. Accordingly, the members of the Pre-Petition Lenders are not entitled to payment of interest and reimbursement of fees and costs in connection with the Pre-Petition Credit Facility. Any Final DIP Order must reflect this reality.

G. Certain Other Provisions of the Interim DIP Order Must Be Modified to Protect the Interests of Unsecured Creditors.

60. Certain provisions included in the Interim DIP Order will adversely affect all unsecured creditors if approved in the Final DIP Order without modification. Such provisions include the following.

(a) First, the Final DIP Order must clarify that post-petition interest will be paid at the contract (non-default) rate, <u>not</u> the default rate in the absence of the occurrence of an Event of Default.

(b) Second, the DIP Motion improperly attempts to include in the DIP Lenders' Collateral all causes of action, including avoidance actions. *See* DIP Motion, p. 10. The Final DIP Order must specify that the Lenders will have no post-petition liens, replacement liens or other claims of any kind on chapter 5 avoidance power recoveries and the proceeds thereof, and will not be entitled to

payment of their super-priority claims from such chapter 5 avoidance action recoveries and proceeds.

(c) Third, the Interim DIP Order makes no provision for permitted encumbrances such as purchase money security interests on certain of the Debtors' collateral. The Final DIP Order must specify that the DIP Lenders' liens cannot prime any pre-existing validly perfected liens and security interests that were not provided with notice of the DIP Motion.

(d) Fourth, the Final DIP Order must clarify that any proceeds of the sale of F3, Reliance, and/or the Debtors' Excess Equipment must first be used to satisfy amounts outstanding under the DIP Financing Facility and only thereafter shall any remaining such funds become available to satisfy any amounts outstanding under the Pre-Petition Credit Facility. Further, the proceeds of any sale of the Debtors' assets shall not be paid to the Lenders on account of pre-petition loans unless and until the lien challenge period has expired without a lien challenge action having been filed, or if a lien challenge action is filed, until such action is resolved by a final non-appealable order.

(e) Fifth, the Interim DIP Order includes certain notice requirements and circumstances under which the Debtors or the DIP Lenders must provide notices or reports to each other. The Final DIP Order must include a separate provision requiring that all reports and/or notices to be provided by either the Debtors or the DIP Lenders must be simultaneously provided to the Committee.

(f) Sixth, the Final DIP Order must include a provision expressly reserving the Committee's power to challenge any party's right to credit bid as well as the underlying liens of any such credit bidder.

H. Certain Provisions of the DIP Credit Agreement Must Be Modified to Protect the Interests of Unsecured Creditors.

62. In addition to corresponding deficiencies present in the Interim DIP Order, certain definitions and provisions included in the DIP Credit Agreement will adversely affect all unsecured creditors if approved in the Final DIP Order without modification. Such provisions include the following:

(a) First, the definition of "Commitment Termination Date" in the DIP Credit Agreement provides for termination after only thirty (30) days after the entry of the Interim DIP Order if a Final Order has not been entered. *See* DIP Credit Agreement, p. 5. This definition must provide for at least forty-five (45) days to allow adequate time for entry of a Final DIP Order without triggering an unnecessary or unwanted termination.

(b) Second, the definitions of "Permitted Existing Indebtedness", "Pre-Petition Indebtedness" and "Pre-Petition Obligations" in the DIP Credit Agreement are drafted in a manner that could allow certain Pre-Petition Indebtedness to be impermissibly paid ahead of all other indebtedness. *See* DIP Credit Agreement, p. 13; ¶¶ 2.4(B)(iv), 2.4(B)(v)(i) and 12.3(I). These definitions must be revised to clarify that no pre-petition obligations shall be satisfied unless and until the Committee's lien challenge period expires and no lien challenge action is at that time pending.

(c) Third, the definition of "Required Lenders" in the DIP Credit Agreement includes all of the DIP Lenders who are signatories to the DIP Credit Agreement. Consequently, any provisions requiring consent, agreement or other action on the part of the "Required Lenders" will, by definition, require unanimous action, rather than a simple majority, as is customary. *See* DIP Credit Agreement, p. 15; ¶¶ 3.2 and 9.1. This definition must be revised to indicate that "Required Lenders" means any combination of the Lenders holding a total of at least fifty-one percent (51%) of the outstanding commitment.

(d) Fourth, the DIP Credit Agreement includes an early return "LIBOR Breakage Fee" that would apply to funds obtained by the Lenders from LIBOR to advance to the Borrower, but returned to LIBOR prior to maturity. *See* DIP Credit Agreement, ¶ 2.14(D). However, as set forth in paragraph 2.6, all funds are made available immediately on a "same-day" basis confirming that the Lenders do not contemplate advancing LIBOR funds to the Borrower, rather, the Lenders are simply using LIBOR as a benchmark for computing interest rates. Accordingly, paragraph 2.14(D) must be stricken in its entirety.

(e) Fifth, the DIP Credit Agreement includes an extremely broad release for the Lenders and Administrative Agent that fails to "carve-out" the Debtors' estates, the Committee, and specifically the Lien Challenge Period. See DIP Credit Agreement, ¶ 2.22. This provision must be modified to expressly exclude the Debtors' Estates and the Committee from releasing the Lenders from anything, and reference the lien challenge period as modified.

(f) Sixth, the DIP Credit Agreement requires the Borrower to indemnify the Administrative Agent for certain expenses, but fails to clearly define the limits of such indemnification. The DIP Credit Agreement provides that "the Borrower's obligation to reimburse the Administrative Agent shall be subject [to] the amounts outlined in the Budget." DIP Credit Agreement, ¶ 10.7. However, no such amounts limiting the Borrower's obligation are clearly set forth in the Approved Budget.

RESERVATION OF RIGHTS

63. The Committee continues to review all of the documents related to the DIP Financing Facility and the proposed Final DIP Order. The Committee reserves the right to revise, amend or supplement this Objection at any time or at any further hearing on the DIP Motion.

CONCLUSION

64. The Committee respectfully requests that the Court (i) deny the DIP Motion on a final basis unless the concerns and objections of the Committee set forth herein are resolved as discussed above; and (ii) grant the Committee such other and further relief as the Court deems just and appropriate.

Dated: December 6, 2011

Respectfully submitted,

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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

Debtors' Motion for Order Pursuant to Sections 105 and 363 of the Bankruptcy Code Authorizing and Approving (I) the Agreement with Loughlin Meghji and Company Associates, Inc. to Provide James J. Loughlin, Jr. and Stephen Gawrylewski to Serve as Debtors' Co-Chief Restructuring Officers and the Temporary Staff, Nunc Pro Tunc to the Petition Date

Motion of the Debtors for an Order Authorizing the Debtors to Retain, Employ and Compensate Certain Professionals Utilized in the Ordinary Course of Business

Motion of the Debtors for an Order Authorizing Additional Time to File Schedules and Statements of Financial Affairs

Motion for Order Authorizing Sale of Certain Real Property of the Debtors to Grimsview Properties, LLC

Debtors' Motion for Order Under 11 U.S.C. Sections 345, 363, 364, 503(b)(1), 553 1107, and 1108 and Local Rule 2015-2 (I) Authorizing Continued Use of Existing (A) Bank Accounts, (B) Cash Management System, and (C) Business Forms and Checks; (II) Authorizing the Continuation of Intercompany Transactions Among Debtors and According Superpriority Status to All Intercompany Transactions; and (III) Waiving Investment and Deposit

Requirements of 11 U.S.C. Section 345(b)

Motion of the Debtors for Interim and Final Orders (I) Authorizing, but not Directing, the Debtors to (A) Pay Prepetition Employee Obligations, (B) Continue Employee Benefit Plans and Programs Postpetition, and (C) Honor Workers' Compensation Obligations; (II) Confirming that Debtors are Able to Pay Withholding and Payroll-Related Taxes and (III) Directing All Banks to Honor Prepetition Checks for Payment of Employee Obligations

Motion of the Debtors for an Order Establishing Procedure for Interim Compensation and Reimbursement of Expenses of Professionals

Motion of the Debtors for Entry of an Interim and Final Order Pursuant to 11 U.S.. C. Sections 105(a) and 366(I) Prohibiting Utility Providers from Discontinuing, Altering or Refusing Utility Services, (II) Deeming Utility Providers Adequately Assured of Future Performance and (III) Establishing Procedures for Determining Adequate Assurance of Payment

Motion of the Debtors for Interim and Final Orders Under 11 U.S.C. Sections 105, 363, 364, 1107, and 1108 Authorizing but not Directing (I) Payment of Prepetition Claims of Essential

Suppliers and (II) Financial Institutions to Honor and Process Related Checks and Transfers

Debtors' Motion for Interim and Final Orders Pursuant to Sections 361, 362, 363 and 364 of the Bankruptcy Code and Rule 4001 of the Federal Rules of Bankruptcy Procedure (A) Authorizing the Debtors to (I) Use Cash Collateral of the Prepetition Lenders; (II) Obtain Postpetition Financing; and (III) Provide Adequate Protection to the Prepetition Lenders, and (B) Providing Notice and Scheduling Final Hearing

Debtors' Application for an Order Pursuant to Sections 327(a) and 328(a) for the Bankruptcy Code Authorizing the Debtors to Retain and Employ Latham & Watkins LLP as Attorneys for the Debtors Nunc Pro Tunc to the Petition Date

Debtors' Motion for Entry of Order Authorizing the Debtors to (I) Reject a Certain Unexpired Lease of Nonresidential Real Property Nunc Pro Tunc to Petition Date, (II) Reject Certain Executory Contracts Nunc Pro Tunc to Petition Date and (III) Abandon Certain Expendable Property

Application of the Debtors for an Order Authorizing the Retention and Employment of Young Conaway Stargatt & Taylor, LLP as Attorneys for the Debtors, Nunc Pro Tunc to the Petition

Date

Debtors' Application Pursuant to Sections 327(a) and 328(b) of the Bankruptcy Code for an Order Authorizing the Debtors to Retain and Employ William Blair & Company, LLC as Investment Banker for the Debtors Nunc Pro Tunc to the Petition Date

Debtors' Application Pursuant to Section 327i of the Bankruptcy Code for an Order Authorizing the Retention and Employment of Fulbright & Jaworski L.L.P. as Special Counsel to the Debtors Nunc Pro Tunc to the Commencement Date

Motion of Cenveo Corporation for Entry of an Order Under 11 U.S.C. Section 105(a) and Federal Rules of Bankruptcy Procedures 2004 (I) Permitting Examination of the Debtors and Their Advisors and (II) Directing the Debtors and Their Advisors to Permit Prospective Purchasers to Participate in the Sale Process

Notice of Deposition Under Federal Rules of Civil Procedure 30(b)(6) and Request for Documents Under Federal Rules of Civil Procedure 30(b)(2)

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CHRISTOPHER P. CURTI, Loughlin Meghji & Company

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

save the company, but certainly to maximize value for all creditors, and I don't distinguish between secured creditors, unsecured creditors, administrative claimants. I'm just trying to make the pie as big as possible, and then they can all beat each other up about how to split it up. And the Bankruptcy Code has a way of splitting it up that maybe some of them don't like, and maybe they'll work it out. I've had other cases that were administratively solvent in terms of what happened from the petition date to the end of the petition date where it was not solvent on 503(b)(9) claims, but at the end of the case, we went to the 503(b)(9) claimants and we said we have this pile of money available, and we made a deal, and certainly --

THE COURT: Well, and I --

MR. ATHANAS: -- in the Bankruptcy Code, it says administrative claimants can agree to take less.

THE COURT: Right, but they haven't yet.

MR. ATHANAS: No, they haven't.

THE COURT: And you're --

MR. ATHANAS: But Your Honor, we're not deciding a plan today. We're just deciding whether our case should disappear or whether we should get financing.

THE COURT: Well, I understand you're not deciding a plan today, but you're proceeding under a course of action to sell on a going-concern basis the business, improving -- almost certainly improving the enterprise value of the estate to the

benefit of, among others, secured creditor, but at the same time, with no reasonable prospect that at least -- or no probable prospect that administrative claims will get paid in full. And if that's the case, let's go to a foreclosure. Let's convert and have a foreclosure and let the secured creditor go about its business of foreclosing on its collateral. Now, that's not in the Code. That's in Judge Sontchi's Code. It's a much weightier document.

MR. ATHANAS: And Your Honor, I'd like to talk about the Code.

THE COURT: And my point on that is, and I've had cases that went the other way. I had Goody's (ph.) I and II, and Goody's I, we had a plan of reorganization and we had evidence that what money was set aside for 503(b)(9) claims would be sufficient and it was uncontested evidence, and it was thorough. There were two witnesses on it. And six weeks later, it turns out it was woefully inadequate and the 503(b)(9) claims and other admin claims were not paid in full and became general unsecured claims of the Goody's II estate. That happens. Like I said, nobody's a guarantor. But you would -- you have to, at least, have a path forward that contemplates the probability that these claims are going to get paid. Otherwise, you know, go somewhere else.

MR. ATHANAS: Your Honor, if I may quibble with you, just a little bit.

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2011, the foregoing document was served via electronic mail and Hand Delivery/US Mail on the following parties:

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

____12/6/2011_____ __/s/ Heidi E. Sasso_____
Date Heidi E. Sasso