

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

In re : Chapter 11  
:   
BLITZ U.S.A., INC., *et al.*, : Case No. 11-13603 (PJW)  
:   
Debtors. : Jointly Administered  
:

**Related to Docket No. 230  
Hearing Date: March 28, 2012, at 10:00 a.m.  
Objection Deadline: March 23, 2012,  
by 12:00 Noon**

**LIMITED OBJECTION AND RESERVATION OF RIGHTS OF  
LIBERTY SURPLUS INSURANCE CORPORATION TO DEBTORS'  
MOTION PURSUANT TO 11 U.S.C. §§ 105(a), 363, AND 365 AND  
BANKRUPTCY RULES 2002, 6004, AND 6006 FOR (I) ENTRY OF AN  
ORDER (A) ESTABLISHING BIDDING AND AUCTION PROCEDURES  
RELATED TO THE SALE OF CERTAIN OF THE DEBTORS' ASSETS;  
(B) ESTABLISHING PROCEDURES FOR APPROVAL OF RELATED BID  
PROTECTIONS; (C) SCHEDULING AN AUCTION AND SALE HEARING;  
(D) ESTABLISHING NOTICE PROCEDURES FOR DETERMINING CURE  
AMOUNTS FOR EXECUTORY CONTRACTS AND LEASES TO BE ASSIGNED;  
(E) GRANTING RELATED RELIEF; AND (II) ENTRY OF AN ORDER  
(A) APPROVING THE SALE OF CERTAIN OF THE DEBTORS' ASSETS FREE  
AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES AND INTERESTS;  
(B) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF  
CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

Liberty Surplus Insurance Corporation, and possibly other related insurance companies (collectively, "Liberty"), by their attorneys, sets forth its limited objection and reservation of rights to *Debtors' Motion Pursuant To 11 U.S.C. §§ 105(a), 363 And 365, And Bankruptcy Rules 2002, 6004, And 6006 For (I) Entry Of An Order (A) Establishing Bidding And Auction Procedures Related To The Sale Of Certain Of The Debtors' Assets;* *(B) Establishing Procedures For Approval Of Related Bid Protections; (C) Scheduling An Auction And Sale Hearing; (D) Establishing Notice Procedures For Determining Cure Amounts For Executory Contracts And Leases To Be Assigned, (E) Granting Related Relief; And*



*(II) Entry Of An Order, (A) Approving The Sale Of Certain The Debtors' Assets Free And Clear Of All Liens; Claims, Encumbrances And Interests; And (B) Authorizing The Assumption And Assignment Of Certain Executory Contracts And Unexpired Leases* (the "Sale Motion"), and respectfully states as follows:

### **Background**<sup>1</sup>

1. Without concession as to such matters, and fully reserving its rights and defenses, Liberty issued certain insurance policies for various policy periods (collectively, the "Policies") that may provide insurance coverage in connection with claims with respect to the Debtors. Liberty may also be a party to certain other agreements relating to the Policies (together with the Policies, collectively, the "Liberty Agreements"). The Liberty Agreements are executory contracts within the meaning of section 365 of the Bankruptcy Code.

2. The Liberty Agreements contain provisions that prohibit assignment without the express consent of Liberty. Moreover, applicable non-bankruptcy law precludes the assignment of insurance policies without the consent of the insurer. As a result, the Liberty Agreements cannot be assigned without Liberty's consent.<sup>2</sup>

3. On November 9, 2011 (the "Filing Date"), Debtors filed their voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code.

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<sup>1</sup> Terms not otherwise defined refer to the terms as defined in the Sale Motion and Asset Purchase Agreement.

<sup>2</sup> See 11 U.S.C. § 365(c)(1)(A)(debtor can not assume or assign an executory contract if applicable law excuses non-debtor from accepting performance from entity other than debtor); *Allied Corp. v. Frola*, 1992 WL 281114 (D.N.J. 1992)(Wolin, J.)(finding that policies were not unilaterally assignable either as executory contracts or as non-executory contracts and discussing authority); *Touchet v. Guidry*, 550 So. 2d 308, 313 (La. App.3d Cir. 1989) ("[S]ince insurance is a personal contract between the insurer and the named insured and on behalf of others specifically provided for, coverage terminates when contract is assigned or transferred without the consent, permission, and approval of both contracting parties." (citations omitted)).

4. On February 7, 2012, Debtor filed the Sale Motion, seeking entry of an Order approving, *inter alia*: (i) certain bidding and auction procedures; and (ii) sale of substantially all of Debtor's F3 Brands LLC business division assets free and clear of liens, claims, encumbrances and other interests pursuant to that certain Asset Purchase Agreement by and between certain Debtors and Scepter Holdings, Inc. (the "Purchaser") subject to higher and better offers (the "Asset Purchase Agreement").

#### **Limited Objection And Reservation Of Rights**

5. Notwithstanding the anti-assignment provisions expressly set forth in the Liberty Agreements, the Sale Motion and Asset Purchase Agreement indicate that the Liberty Agreements, and/or proceeds from such agreements, may be assigned to the Purchaser without Liberty's consent. Liberty submits this Limited Objection to clarify Debtors' intentions with respect to the Liberty Agreements and, to the extent that Debtors intend to assign such agreements without Liberty's consent, to outline Liberty's objections to the assignment.

6. As an initial matter, there are a number of ambiguous provisions in the Asset Purchase Agreement that warrant clarification as it relates to the treatment of Debtors' insurance policies.

7. First, section 2.2(a)(xiii) of the Asset Purchase Agreement provides that all rights and causes of action which Debtors may have against third parties related to the Business or Purchased Assets will be transferred to the Purchaser. Asset Purchase Agreement, § 2.1(a)(xiii).

8. As such, absent clarification, this section may be interpreted as an assignment of claims or causes of action held by the Debtors, as insureds, against their insurers, to the Purchaser.

9. Moreover, section 2.1(a)(iv) provides that all rights to insurance proceeds primarily related to the Purchased Assets will be transferred in the sale. Section 2.1(a)(v) states that all rights to insurance proceeds related to the Purchased Real Property will also be assigned. Asset Purchase Agreement, §§ 2.1(a)(iv); 2.1(a)(v).

10. Notwithstanding these representations, section 2.2(h) of the Asset Purchase Agreement indicates that all insurance policies, and all rights to proceeds thereof, primarily related to any of the Excluded Assets, are excluded from the sale.

11. In short, it is difficult to reconcile intent of the provisions of section 2.2(h) with those of section 2.1(a)(iv) and 2.1(a)(v) and, in light of those patent ambiguities, determine what, if any policies and/or proceeds Debtors are purporting to assign to the Purchaser. Stated another way, it is difficult to discern which insurance proceeds, if any, relate to Purchased Assets; and which insurance proceeds relate to Excluded Assets. Moreover, it is equally difficult to determine which insurance policies relate to the Excluded Assets and therefore are deemed Excluded Assets within the meaning of section 2.2.<sup>3</sup>

12. Lastly, the Asset Purchase Agreement states that contracts that are identified on Schedule 1.1(e) will be assigned. However, the Asset Purchase Agreement affords the Purchaser to add and subtract contracts to that Schedule of its discretion until the Closing Date. Accordingly, Liberty is unable to conclusively determine whether the Liberty Agreements will ultimately be added to the Schedule prior to the sale.

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<sup>3</sup> Furthermore, an issue arises as to whether, by implication or otherwise, insurance policies that relate to the Purchased Assets are to be assigned as part of the sale. In other words, if insurance policies that relate to Excluded Assets are excluded from the sale under section 2.2(h), at issue is whether the Asset Purchase Agreement will be interpreted to provide that the insurance policies that relate to Purchased Assets are to be included in the sale.

13. To the extent that the Asset Purchase Agreement contemplates the assignment of the Liberty Agreements, or any proceeds thereof, any transfer of the Liberty Agreements would violate the terms of the Liberty Agreements, which prohibit assignment without Liberty's consent and would deprive Liberty of adequate protection of its interests in the Liberty Agreements as required under section 363(e) of the Bankruptcy Code.

14. Accordingly, Liberty submits this Limited Objection in order to obtain adequate protection of its interests in the Liberty Agreements, as well as formal assurances that:

(i) neither the Liberty Agreements nor any rights thereunder are being assumed, assigned or otherwise transferred in connection with this proposed transaction; (ii) the relief requested in the Sale Motion will not violate Liberty's contractual rights and/or release Debtors from any ongoing reciprocal contractual obligations under the Liberty Agreements; and (iii) the effect of this transaction will not prejudice Liberty's rights under the Liberty Agreements or otherwise by forcing it to assume different, greater, additional and/or competing risks than it originally bargained for or for which it was paid a negotiated premium.

15. In the event that any of the Liberty Agreements or any rights thereunder will be assigned, transferred or otherwise affected in connection with this proposed sale transaction, Liberty objects and reserves all rights to consent to any such assignment or transfer as well as to insist on Debtors' or any asset purchaser's full compliance with the requirements of sections 365(b) and 365(f) of the Bankruptcy Code and/or all terms of Liberty Agreements.

16. Moreover, in the event that the Liberty Agreements are identified as executory contracts that will be assumed and assigned in connection with this proposed sale transaction or in connection with any plan, Liberty reserves its rights to assert claims for any presently unliquidated amounts for any obligations due and owing under the Liberty Agreements, including the right to receive adequate assurance of future performance, whether or not such obligations may be considered as cure costs. Provided that Liberty expressly consents in the first instance, any and all obligations of Debtors, as the insureds under the Liberty Agreements, must be expressly assumed by any asset purchaser in connection with any assumption, assignment and/or transfer of the Liberty Agreements.

17. Liberty expressly reserves, and does not waive, any and all of its rights, claims, defenses, limitations and/or exclusions in connection with its contractual rights, and Debtors' contractual obligations, under the Liberty Agreements, applicable law or otherwise. Liberty further reserves all rights to assert any and all such rights, claims, defenses, limitations and/or exclusions in any appropriate manner or forum whatsoever (including, without limitation, any of its rights to have any non-core matter relating to the interpretation of its contractual rights and Debtors' contractual obligations adjudicated by the United States District Court). Nothing contained in this Limited Objection shall be deemed to expand any coverage that may otherwise be available under any insurance policies or any rights to payment under any settlements.

18. Liberty further reserves all of its rights to raise any issues contained in this Limited Objection and any other related issues in any procedurally-appropriate contested matter and/or adversary proceeding including, without limitation, (i) objections to confirmation of any plan; (ii) a separate adversary proceeding requesting any appropriate declaratory and/or injunctive relief; (iii) or an objection to any subsequent motion seeking approval of an asset sale

to any prospective asset purchaser with respect to any contractual rights that may be adversely affected by the Sale Motion or the confirmation of any plan.

19. Liberty further reserves all of its rights to object to any claim for coverage under any of the Liberty Agreements and/or any claim for payment and/or to seek declaratory and/or injunctive relief to the extent that treatment of its contractual rights, and Debtors' contractual obligations, under the Liberty Agreements violates any terms or conditions of any of the Liberty Agreements or gives rise to any claims and/or defenses on behalf of Liberty.

20. Nothing in this Limited Objection shall be construed as an acknowledgment that any of the Liberty Agreements cover or otherwise apply to any claims, losses or damages on account of any claims or otherwise, or that any such claims or causes of action are eligible for payment. Liberty reserves the right to seek an adjudication that Debtors, or any administrator or trustee appointed pursuant to a plan, or any asset purchaser, have waived or forfeited any available coverage under the Liberty Agreements.

WHEREFORE, Liberty respectfully requests that, in the event the Liberty Agreements or any rights thereunder are sought to be assumed, assigned or otherwise transferred by Debtors in connection with this proposed sale transaction or otherwise, this Court (i) condition any such assumption, assignment and/or transfer of the Liberty Agreements or any rights thereunder on first receiving Liberty's express consent thereto, on Liberty being provided with adequate protection of its interests in the Liberty Agreements, and on Debtors' or any asset purchaser's full compliance with the requirements of sections 365(b) and 365(f) of the Bankruptcy Code, especially with respect to any presently unliquidated obligations due and owing under the Liberty Agreements; and (ii) grant Liberty such other and further relief as may be just.

Dated: March 23, 2012

STEVENS & LEE, P.C.

By: /s/ John D. Demmy

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## **CERTIFICATE OF SERVICE**

John D. Demmy hereby certifies that, in addition to the notice and service provided through the Court's CM/ECF system, true and correct copies of the foregoing *Limited Objection And Reservation Of Rights Of Liberty Surplus Insurance Corporation To Debtors' Motion Pursuant To 11 U.S.C. §§ 105(A), 363, And 365 And Bankruptcy Rules 2002, 6004, And 6006 For (I) Entry Of An Order (A) Establishing Bidding And Auction Procedures Related To The Sale Of Certain Of The Debtors' Assets; (B) Establishing Procedures For Approval Of Related Bid Protections; (C) Scheduling An Auction And Sale Hearing; (D) Establishing Notice Procedures For Determining Cure Amounts For Executory Contracts And Leases To Be Assigned; (E) Granting Related Relief; And (Ii) Entry Of An Order (A) Approving The Sale Of Certain Of The Debtors' Assets Free And Clear Of All Liens, Claims, Encumbrances And Interests; (B) Authorizing The Assumption And Assignment Of Certain Executory Contracts And Unexpired Leases*, were served on March 23, 2012, upon the parties listed below in the manner indicated and on the parties identified on the attached service list all via U.S. first class mail, postage prepaid.

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/s/John Demmy

John D. Demmy