UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	
BLITZ U.S.A. INC., *et al.*,	:	Case Number 11-13603 (PJW)
	:	
Debtors.	:	Jointly Administered
	:	
	:	**Objection Deadline: February 16, 2012 at 4:00 pm**
	:	**Extended until February 21, 2012 at 10:00 am**
	:	**for the U. S. Trustee**
	:	**Hearing Date: February 23, 2012 at 9:30 am**
	:	**Re: Docket No. 234**

UNITED STATES TRUSTEE'S OBJECTION TO THE DEBTORS' AMENDED MOTION FOR AN ORDER APPROVING (A) SALE RELATED INCENTIVE AND RETENTION PLAN FOR CERTAIN NON-INSIDER EMPLOYEES OF F3 BRANDS LLC AND (B) SALE RELATED INCENTIVE PLAN FOR CERTAIN MANAGEMENT EMPLOYEES OF F3 BRANDS LLC PURSUANT TO SECTIONS 105 (A), 363 AND 503 OF THE BANKRUPTCY CODE) (D. I. 234)

In support of the United States Trustee's Objection to the Debtors' Amended Motion for an Order Approving (A) Sale Related Incentive and Retention Plan for Certain Non-insider Employees of F3 Brands LLC and (B) Sale Related Incentive Plan for Certain Management Employees of F3 Brands LLC Pursuant to Sections 105(a), 363 and 503 of the Bankruptcy Code) (D. I. 234) (the "Motion"), Roberta A. DeAngelis, the United States Trustee for Region 3 ("U.S. Trustee"), by and through her undersigned counsel, states as follows:

Introduction

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

2. Pursuant to 28 U.S.C. § 586(a)(3), the U.S. Trustee is charged with administrative oversight of the bankruptcy system in this District. Such oversight is part of the U.S. Trustee's overarching responsibility to enforce the laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Systems, Inc. (In re Columbia Gas Systems, Inc.),* 33

F.3d 294, 295-96 (3d Cir. 1994) (noting that the U.S. Trustee has "public interest standing" under 11 U.S.C. § 307 which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U.S. Trustee as a "watchdog").

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

Statement of Facts

4. The Debtors filed voluntary chapter 11 petitions on November 9, 2011. This Court entered an order granting the Debtors' motion for joint administration of their bankruptcy cases the next day. (D. I. 31).

5. On November 21, 2011, the U.S. Trustee appointed the Official Committee of Unsecured Creditors (the "Committee").

6. Since 1966, Blitz and its predecessors have been producing portable fuel containers for consumer use. Today, with more than 150 million units currently in circulation, Blitz accounts for approximately 70% of the market share in the United States in the portable fuel containment and storage industry.

7. Blitz employs over 250 employees, achieves annual sales of approximately $80 million and has an annual adjusted EBITDA of approximately $6 million.

8. In 2009, Blitz acquired the rights to a line of organization and lawn and garden products under the brand name "2x4 Basics." In early 2011, Blitz began contemplating a spinoff of its non-gas can product lines, which included the 2x4 Basics products as well as certain other automotive maintenance products produced by Blitz. In October, 2011, Blitz formally spun off these

additional product lines into F3 Brands LLC ("F3") which is now a wholly-owned Blitz subsidiary and a subsidiary debtor in these cases.

9. The Debtors' Motion seeks Court approval of the Sale Incentive and Retention Plan ("SRIP") for nineteen non-insider F3 employees and two F3 insiders.

10. The Debtors also plan to effectuate a sale of substantially all of F3's assets. (D. I. 230).

11. Under the SRIP, the nineteen non-insider employees will split $350,236 in the aggregate if the sale of substantially all of F3's assets realizes $14,500,000 in net proceeds. The aggregate payment will increase by $75,000 for each additional $1,000,000 in net proceeds realized above $14,500,000. The nineteen non-insider employees will receive no SRIP payments if the sale of substantially all of F3 Brands' assets realizes less than $14,500,000 in net proceeds. Similarly, no payments will be made under the SRIP if the Debtors' secured lenders credit bid its claims for F3's assets. As a pre-condition to receiving payments pursuant to the Incentive and Retention Plan, the non-insider employees must release F3 Brands and the other Debtors and waive all claims against their estates.

12. Additionally, under the SRIP, the two F3 insiders will receive $116,745 in the aggregate if the sale of substantially all of F3 Brands' assets realizes $14,500,000 in net proceeds. The aggregate payment will increase by $25,000 for each additional $1,000,000 in net proceeds realized above $14,500,000. The two insiders will not receive any SRIP payments if the sale of substantially all of F3's assets realize less than $14,500,000 in net proceeds. Similarly, no payments will be made under the SRIP if the Debtors' secured lenders credit bid their claims for F3's assets. As a pre-condition to receiving payments pursuant to the Incentive and Retention Plan, the non-

insider employees must release F3 Brands and the other Debtors and waive all claims against their estates.

ANALYSIS AND ARGUMENT

13. Section 503 of the Bankruptcy Code provides for the allowance, after notice and a hearing, of administrative expenses, including "the actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A).

14. For an expense to receive administrative priority, the expense must arise from a post-petition transaction with the debtor, and the expense must benefit the operation of the debtor's business. *In re Marcal Paper Mills, Inc.*, 650 F.3d 311, 314-15 (3d Cir. 2011) (internal citations omitted). The expense must also be actual and necessary. *Id.*

15. The party asserting administrative-expense priority has the burden of demonstrating that the expense deserves such priority. *Id.* at 315.

16. Section 503(c)(1) generally prohibits transfers made to or obligations incurred for the benefit of a debtor's insiders "for the purpose of inducing such person to remain with the debtor's business . . . ." This Court has observed that, as any payment to an employee has some purpose of retention, § 503(c)(1) should be read as prohibiting payments whose *primary* purpose is retention. *See In re Nellson Nutraceutical, Inc.*, 369 B.R. 787, 801 (Bankr. D. Del. 2007) The court may authorize such "pay to stay" payments to insiders if the court "finds that the evidence establishes that the payment is 'essential' because the individual has a 'bona fide' offer from another entity at the same or greater rate of compensation, and the individual's services are 'essential' to the debtor's survival." *In re Global Home Products, LLC*, 369 B.R. 778, 785 (Bankr. D. Del. 2007).

17. Section 503(c)(3) prohibits the payment or allowance of other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition. 11 U.S.C. §503(c)(3). However, this provision pertains only to transactions occurring outside the ordinary course of business. *In re Nellson Nutraceutical, Inc.*, 369 B.R. 787, 801 (Bankr. D. Del. 2007).

18. In the reported cases to date interpreting Section 503(c)(3), the primary factor that the courts have looked to is whether the incentives are material, as noted by Judge Sontchi in *Nellson Nutraceutical, supra*. In each of the reported cases approving incentive based performance bonuses, the plans rewarded defined measurable operating results, or an increased sales price over a stated minimum. In either situation, the reward came for making the asset pool bigger. There is no reward for maintaining the *status quo*.

19. In *In re Nobex Corporation*, 2006 WL 4063024 (Bankr. D. Del. 2006), this Court approved an incentive based plan pursuant to 11 U.S.C. § 503(c)(3). The incentives were based upon the affected officers obtaining a sales price for substantially all assets of the estate higher than a stalking horse bid of $3.5 million. To obtain the bonus, the affected officers would have to produce a tangible result, a higher bid.

20. Under the facts and circumstances of this case, the Debtors have produced no evidence that a realization of $14,500,000 in net proceeds, or that the potential incremental increase in net proceeds realized above $14,500,000 is a tangible result. Moreover, there appears to be no limit to or cap upon the bonuses that could potentially be paid under the SRIP.

21. The U.S. Trustee reserves any and all of her rights, duties and obligations to, *inter alia*, conduct discovery and to modify, amend, supplement or augment this objection and take whatever other actions are deemed necessary and appropriate. The U. S. Trustee reserves any and all rights and remedies found at law, equity or otherwise.

WHEREFORE, the United States Trustee respectfully requests this Court to issue a ruling denying the Motion, and award such other relief as this Court deems appropriate under the circumstances.

ROBERTA A. DEANGELIS
UNITED STATES TRUSTEE

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