IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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| In re: | ) | Chapter 11 |
| | ) | |
| EXIDE TECHNOLOGIES, INC., et al., | ) | Case No. 02-11125 (JCA) |
| | ) | |
| | ) | Jointly Administered |
| Debtors. | ) | |
| | ) | **Obj. Deadline: September 9, 2002 at 4:00 p.m.** |
| | ) | **Hearing Date: September 18, 2002 at 4:00 p.m.** |

**OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO THE MOTION OF THE STATE OF WISCONSIN INVESTMENT BOARD FOR APPOINTMENT OF AN OFFICIAL COMMITTEE OF EQUITY HOLDERS**

*(Relates to Docket No. 582)*

The Official Committee of Unsecured Creditors (the "Committee") appointed in the chapter 11 cases of Exide Technologies, Inc. and its affiliated debtors (the "Debtors"), by and through its undersigned counsel, submits this objection to the Motion of the State of Wisconsin Investment Board ("SWIB") for an Order Directing the United States Trustee to Appoint an Equity Security Holders Committee (the "Motion"). In support of its objection, the Committee states as follows:

## INTRODUCTION

1. SWIB, a state investment fund with $64.5 billion[1] in assets under management, holds approximately 19.5% of the Debtors' common stock. Without providing any credible evidence to support its hope that there is value in the equity in this case, and notwithstanding current trading prices on Exide's 10% Senior Notes that reflect a market determination that equity is hopelessly underwater, SWIB has requested that the Court override the United States Trustee's considered determination that the appointment of an equity committee is not warranted. The Committee's constituents, who already risk substantial impairment of their unsecured claims, would bear the full burden of the significant additional administrative expenses that an equity committee would engender. That burden is not warranted where the

[1] As of December 31, 2001, the most recent date for which figures are available on the SWIB web site.

Debtors appear to be hopelessly insolvent and the interests of SWIB and other shareholders can be adequately protected by individual representation, as well as by the efforts of the Debtors and the Committee to maximize the value of the Debtors' assets and operations.

## ARGUMENT

Adequate Representation

2. Equity committees are the exception rather than the rule, and the appointment of an equity committee must be "necessary to assure adequate representation" for such appointment to occur. 11 U.S.C. § 1102(a)(2). Recently, Bankruptcy Judge Lifland succinctly identified the substantial burden shareholders face when they seek to impose upon unpaid creditors the cost of that representation through the appointment of an official equity committee:

> The appointment of official equity committees should be the rare exception. Such committees should not be appointed unless equity holders establish that (i) there is a substantial likelihood that they will receive a meaningful distribution in the case under a strict application of the absolute priority rule, and (ii) they are unable to represent their interests in the bankruptcy case without an official committee. The second factor is critical because, in most cases, even those equity holders who do expect a distribution in the case can adequately represent their interests without an official committee and can seek compensation if they make a substantial contribution to the case.

In re Williams Communications Group, Inc., Case No. 02-11957 (BRL), 2002 Bankr. LEXIS 776, *18 (Bankr. S.D.N.Y. July 24, 2002) (copy attached hereto as Exhibit A).

3. "Adequate representation" as used in Section 1102(a)(2) does not mean that every subset of the Debtors' creditors and shareholders is entitled to a special interest committee. As reflected in Williams Communications, the party seeking a special interest committee must prove a present and identifiable need for representation that cannot otherwise be addressed by the individual representation of the party itself. In this case, SWIB is a huge public investment fund with tens of billions of dollars in assets under management. It owns almost a fifth of the total common stock in this case. It cannot credibly be suggested that SWIB is incapable of protecting its own interests as a shareholder without the intervention of an official committee. Moreover,

given SWIB's formidable financial resources and its huge equity stake in this debtor, SWIB has an economic incentive to protect its equity interest if it truly believes that there is value to protect. In the unlikely event that SWIB is correct and the actions of its professionals ultimately benefit the estate, SWIB can assert a substantial contribution claim to recover its professional fees. If it is not correct, though, then SWIB, and not the Debtors' unsecured creditors, will have gambled on those expenditures. In the meantime, it is in the interests of the Committee to ensure that the value of these estates is maximized. The Committee's activities toward that end will protect, for distribution in accordance with the priorities of the Bankruptcy Code, whatever value that equity holders believe may exist without the need for these estates to incur additional administrative expenses. The request for a separate, special interest equity committee should therefore be denied.

Extraordinary Nature of the Relief Requested

4. The appointment of an equity committee is considered an extraordinary remedy that must be justified by the particular circumstances of a case. Where the burden to the estate from the appointment of a separate committee exceeds the benefit to the group seeking official representation, courts have routinely denied the appointment of additional committees. In re Baldwin-United Corp., 45 Bankr. 375, 376 (Bankr. S.D. Ohio 1983) (appointment of separate committees for equity interests would result in astronomical costs to the bankruptcy estates). Appointing additional committees for shareholders whose interests are adequately protected by individual representation also subverts the well accepted bankruptcy policy of preserving the assets of the debtor's estate. In re Shaffer-Gordon Associates. Inc., 40 Bankr. at 958 (unnecessary costs to the estate); In re Saxon, Inc., 39 Bankr. 945, 947 (Bankr. S.D.N.Y. 1984).

Factors to be Considered

5. While there are no explicit factors set forth in the statute to be considered in considering the question of "adequate representation" under section 1102(a)(2) of the Bankruptcy

Code, this Court has applied a six-part test to determine the appropriateness of appointing an equity committee in a chapter 11 proceeding. The factors considered are:

a. whether the shares are widely held and publicly traded;

b. the size and complexity of the chapter 11 case;

c. the delay and additional cost that would result if the Court grants the motion;

d. the likelihood of whether the debtors are insolvent;

e. the timing of the motion relative to the status of the chapter 11 case; and

f. other factors relevant to the adequate representation issue.

In re Kalvar Microfilm, Inc., 195 B.R. 599, 600 (Bankr. D. Del. 1996); see also In re Johns-Manville Corp., 68 B.R. 155, 159 (Bankr. S.D.N.Y. 1986).

6. When these factors are applied to the SWIB Motion, it is apparent that the circumstances of this case weigh heavily against appointing an equity committee and the Motion should therefore be denied.

(a) Publicly Traded and Widely Held Nature of the Common Stock

7. While it is true that the Debtors' common stock is widely held and publicly traded, SWIB's 19.5% share ownership constitutes a substantial concentration of the Debtors' outstanding common stock. It is reasonable to assume that the holder of such a large block of the Debtors' stock can and will look out for its own interests in this case.

(b) Complexity of the Case

8. Due to the size of the Debtors' estate and the many issues that will arise throughout the course of this bankruptcy, this case is both large and complex. However, this case is no larger nor more complex than the other reorganization cases where the appointment of an equity committee was denied. See In re Williams Communications Group, Inc. 2002 Bankr. Lexis 776 (Bankr. S.D.N.Y. 2002) (appointment of equity committee denied despite the obvious complexity of the case); see also John Mansville, 68 B.R. at 164 ("adequate representation" of

shareholders can occur without appointment of a special committee despite the extreme complexity of a case). Thus, unlike the factors discussed below, the complexity of the debtor's case has not been treated by the courts as a terribly significant factor and has not, in and of itself, led to the appointment of an equity committee.

(c) Additional Cost of an Equity Committee

9. It is inevitable in a reorganization case of this size and complexity that the costs of administration will be substantial even without the appointment of an equity committee. If formed, an equity committee will hire attorneys and financial advisors, imposing still another layer of professional expenses. Perhaps not surprisingly, given that the cost of an equity committee's involvement in this case would be borne entirely by unsecured creditors, SWIB blithely discounts the concern of cost, stating that the Court's oversight of professional fees will prevent an equity committee from engaging in unreasonable activities and litigation. That observation fails to adequately address, however, the substantial administrative costs that will accrue as a result of the appointment of an equity committee in this case and the emphasis that many courts have placed on the "cost" factor. The cost factor has played a significant role in many courts' refusal to appoint an equity committee. See In re Sharon Steel Corp., 100 B.R. at 778 (separate committees impose additional administrative expenses on the debtor's estate which adversely affect the debtor's ability to reorganize); Matter of Mansfield Ferrous Castings, Inc., 96 B.R. 779 (Bankr. N.D. Ohio 1988) (guideline developed to determine whether an additional committee is necessary is whether the cost of additional committee significantly outweighs the concern for adequate representation); In re Pub. Svc. Co. of N.H., 89 B.R. 1020 (court must consider cost in determining whether to appoint a separate committee); In re Texaco, Inc., 79 B.R. at 556 (court dissolves separate committee in light of expense to estate of astronomical, duplicative fees of attorneys, accountants and investment bankers); In re Beker Indus. Corp., 55 B.R. 945 (Bankr. S.D.N.Y. 1985) (court's exercise of discretion gives rise to a concern for cost, since the appointment of additional committees is closely followed by applications to retain

attorneys and accountants); Matter of Baldwin-United Corp., 45 B.R. at 376 (appointment of separate committee denied due to astronomical cost to bankruptcy estate).

45 B.R. at 376.

10. The appointment of a second official committee would result in unnecessary administrative expenses in a case that by necessity already has substantial legitimate expenses. Such costs are a luxury that the creditors of these estates can ill afford. This factor therefore weighs decidedly against the appointment of an equity committee.

(d) Delay Arising from an Equity Committee

11. The appointment of an equity committee would not only add to the administrative costs which must be paid ahead of the claims of unsecured creditors, but would also delay, rather than facilitate, a successful reorganization. As stated by the Court in Baldwin-United Corp.:

> [W]e do not believe, and decline to rule, that a separate committee for each equity security interest will engender harmony or alleviate conflict among creditors. We believe the opposite would result, at an astronomical cost to the bankruptcy estates.

12. It is virtually certain that an equity committee will result in delay, as demonstrated by the courts' concerns in Sharon Steel, Baldwin-United, Public Service and Johns-Manville, supra. Once approved, a second committee undoubtedly will devote substantial time gathering from the Debtors information to enable that committee to formulate positions in the case, duplicating efforts already made to bring the Committee up to speed, to keep the Committee informed, and to vet creditor concerns. However, unlike the Committee, which represents a constituency with a significant economic interest, an equity committee would be duplicating the Committee's efforts on behalf of an out-of-the-money constituency. Such duplication can only serve to hinder and delay the debtors' reorganization efforts. This concern is not, as SWIB suggests, ameliorated by the reorganization timetable outlined for the Court to date, under which a plan of reorganization may be some time in the future. When the Debtors' operational restructuring has proceeded to the point that plan negotiations can reasonably be

expected to proceed, the need to negotiate with a court-sanctioned official equity committee, representing an out-of-the-money constituency, can only serve to add unnecessary burden, expense and complication. "When a debtor appears to be hopelessly insolvent, an equity committee is not generally warranted 'because neither the debtor nor the creditors should have to bear the expense of negotiating over the terms of what is in essence a gift.'" Williams Communications, 2002 Bankr. LEXIS 776, *6 (quoting In re Emons Indus., 50 B.R. 692, 694 (Bankr. S.D.N.Y. 1985).

13. Consideration of this factor weighs heavily against the appointment of an equity committee. In re Johns-Mansville Corp., 68 B.R. at 164 (appointment of second creditors committee denied where confirmation of plan of reorganization would be delayed.)

(e) Likelihood that the Debtors are Insolvent

14. In In re Wang Laboratories, Inc., 149 B.R. 1, 3 (Bank. D. Mass. 1992), the court adopted Judge Abram's assertion in Emons Industries that:

> [G]enerally no equity committee should be appointed when it appears that a debtor is hopelessly insolvent because neither the debtor nor the creditors should have to bear the expense in negotiating over the terms of what is in essence a gift.
>
> The final element of the Johns-Manville equation requires a balancing of the cost of the additional committee against the value of the representation to be provided. It is in this area that the Court must consider the assertion of the United States Trustee that no committee should be appointed since the debtor is insolvent.

In re Emons Industries, Inc., 50 B.R. 692, 694 (Bankr. S.D.N.Y. 1985). The Court need not conduct a valuation for the purposes of applying the foregoing test – it is enough that the debtor *appears* to be hopelessly insolvent. Williams Communications, 2002 Bankr. LEXIS 776.

15. In these cases, various factors indicate that the Debtors are hopelessly insolvent. First, the Debtors' chapter 11 petitions list the net-book value of assets at $2.1 billion and the net-book liabilities at $2.5 billion. Further, the Debtors' annual 10-K, which was filed with the Securities and Exchange Commission on August 19, 2002, states that the Debtors have a

negative net worth of $555,742,000 and sustained income losses of $303,586,000 for the fiscal year ending March 31, 2002. Finally, while not determinative of the valuation of the Debtors' assets and operations, the Debtors' unsecured 10% Senior Notes are currently trading at only approximately 15% of their face value. The Debtors' apparent hopeless insolvency weighs strongly against the appointment of an equity committee.

(f) Timing of the Motion

16. In deciding the instant application, the Court must inquire into the purposes of the representation, i.e. the function of the official committee in a bankruptcy reorganization case. In re Eastern Maine Electric Co-op, Inc., 121 B.R. 917, 932 (Bankr. D. Me. 1990). The purpose and functions of a committee are: (1) to investigate the debtor's assets, liabilities and financial affairs and assess the feasibility of the debtor's continuing its business; (2) to participate in negotiating a plan of reorganization; (3) to play a role in the settlement and reorganization process; (4) to participate in and initiate various proceedings such as postpetition financing; and (5) to monitor the business affairs of the debtor on an ongoing basis and meet periodically to discuss case progress and the debtor's operations. Id. See In re McLean Industries, Inc., 70 B.R. 852, 860 (Bankr. S.D.N.Y. 1987); 11 U.S.C. § 1103(c)[2].

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[2] Section 1103(c) of the Bankruptcy Code enumerates the powers and duties of a committee as follows:

> (1) consult with the trustee or debtor in possession concerning the administration of the case; (2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan; (3) participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan; (4) request the appointment of a trustee or examiner under section 1104 of this title; and (5) perform such other services as are in the interest of those represented.

17. Virtually all of the functions that an equity committee might otherwise perform in this case have already been undertaken by the Committee who, at this time, is in a better position to fulfill the statutory duties set forth in Section 1103(c) without burdening the estate with substantial additional administrative costs. The Committee serves as an appropriate and adequate overseer of the Debtors' activities to ensure that the value of the Debtors' assets and operations are maximized. While the Committee does not and will not serve the function of negotiating plan treatment for out-of-the-money equity holders, that function would in any event be inconsistent with the absolute priorities of the Bankruptcy Code in these cases, where the Debtors appear to be hopelessly insolvent. Should the Court find at some point in the future that the Debtors no longer appear to be hopelessly insolvent, and that a legitimate purpose would be served by appointing an official equity committee at that point to negotiate plan treatment, the Court of course retains jurisdiction to do so. While that circumstance would be welcomed by the Committee, as it would mean that, contrary to current expectations, unsecured creditors would receive payment in full, SWIB has presented no objective basis to believe that this is anything but a pipe dream. This factor, therefore, also weighs against the appointment of an equity committee.

(g) Other Relevant Factors

18. Seven out of the eight members of the Debtors' board of directors (the "Board") are outside directors. This strong presence of independent directors clearly indicates that the Board will discharge its duties to all of the constituents in this case, whether they are creditors or equity holders, thereby adequately representing all of the constituents' interests. The ability of a Debtors' board of directors to discharge its fiduciary duties was a significant fact relied upon by this Court in In re Sun Healthcare Group, Inc. in denying a motion for the appointment of an equity committee. In re Sun Healthcare Group, Inc., Case Nos. 99-3657 through 99-3841 (MFW) (relevant portions of the transcript of the ruling attached hereto as Exhibit A).

## CONCLUSION

The Committee respectfully requests that the Court enter an order denying the Motion and granting such other and further relief as the Court may deem just and proper.

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS

Date: September 9, 2002

By/**s/ David B. Stratton**

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## CERTIFICATE OF SERVICE

I, David B. Stratton, hereby certify that on the 9th day of September 2002, I did serve the foregoing *Objection of the Official Committee of Unsecured Creditors to Motion of State of Wisconsin Investment Board for an Order Directing the United States Trustee to Appoint an Equity Security Committee* by causing a copy thereof to be served via the manner indicated upon those parties listed on the attached service list.

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