IN THE UNITED STATES BANKRUPTCY COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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IN RE: - BANKRUPTCY

EXIDE TECHNOLOGIES - CASE NO. 02-11125

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Philadelphia, Pennsylvania

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE KEVIN J. CAREY

UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For The Debtor	James O'Neal, Esquire
	Matthew Kleiman, Esquire
	Kathleen DePhillips
For the Creditors Committee	Fred Hodara, Esquire
	Larry Masella, Esquire
	David Zensky, Esquire
For the Bank of New York	Glenn Seigel

For Official Committee of Equity Holders

Mark Metz, Esquire

William Hazeltine, Esquire

For Prepetition Lenders Justin Hewitt, Esquire

Mark Foster, Esquire

For Smith Management Lisa McIntyre, Esquire

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1 P R O C E E D I N G S

2 THE CLERK: Is everyone still here?

3 MR. O'NEAL: Yes. This is James O'Neal on behalf

4 of Exide, and I'm here with

5 Kathleen DePhillips.

6 MR. KLEIMAN: Matthew Kleiman -- K L E I M A N --

7 also on behalf of the debtors.

8 MR. HODARA: Fred Hodara -- H O D A R A -- from

9 Aiken & Gump. I'm in transit, but back in the office is

10 Larry Masella -- M A S E L L A -- and David Zensky --

11 Z E N S K Y.

12 MR. SEIGEL: This is Glenn Seigel. We are

13 representing the Bank of New York.

14 MR. METZ: Mark Metz -- M E T Z -- representing

15 the Official Committee of Equity Security Holders.

16 MR. HAZELTINE: William Hazeltine --

17 H A Z E L T I N E, with Potter, Anderson & Karoon (ph),

18 also representing the Official Committee of Equity Holders.

19 MR. HEWITT: Justin Hewitt -- H E W I T T -- from

20 Sherman & Sterling (ph), representing the Prepetition

21 Lenders.

22 MR. FOSTER: Mark Foster, (inaudible),

23 representing the Prepetition Lenders.

24 MS. McINTYRE: Lisa McIntyre from Arent Fox as

25 counsel to Smith Management. The last name spelling is

1 M C I N T Y R E.

2 THE CLERK: Okay. I'll let the judge know that

3 you're on the line. Hold on, please.

4 THE COURT REPORTER: Court is now in session.

5 THE COURT: Good afternoon, everyone.

6 ATTORNEYS: Good afternoon, Your Honor.

7 THE COURT: I have the sign-up sheet in front of

8 me. I have also received various emails from the debtor,

9 and two from Mr. Seigel. Does that constitute all of the

10 filings?

11 MR. KLEIMAN: Yes, it does, Your Honor. This is

12 Matthew Kleiman at Kirkland & Ellis on behalf of the

13 debtors.

14 The only open issues that we need to ask Your

15 Honor's involvement with today are the issues addressing

16 those filings with the Bank of New York.

17 If perhaps I could give a brief description of

18 the events that have taken place since the Disclosure

19 Statement hearing, Your Honor, it might put all of this in

20 context.

21 THE COURT: Go ahead.

22 MR. KLEIMAN: Pursuant to Your Honor's direction

23 at the August 25th Disclosure Statement hearing, all of the

24 parties who were permitted to provide inserts to the Plan

25 and Disclosure Statement, exchanged proposed inserts on

1 Wednesday of last week, and in all instances, and in some
2 cases with some further discussion and negotiation amongst
3 the parties, those inserts, in some cases with some
4 proposed modifications, were included in a revised version
5 of the Plan and Disclosure Statement that was circulated to
6 all of the affected parties, both clean and black-lined
7 versions on Friday of last week.
8 Also on Friday of last week, the parties who were
9 permitted to prepare letters or reports to be included with
10 the solicitation materials exchanged the form of those
11 letters; specifically, the Creditors Committee, the Equity
12 Committee, the debtors, and the Bank of New York shared
13 with the other parties their proposed letters.
14 The debtor's letter and the Equity Committee's
15 letter, no one raised any issues with respect to them, and
16 they are now considered final.
17 The Creditors Committee letter, the debtor did
18 have some concerns with, but I'm pleased to report to the
19 Court that we had a productive call amongst counsel this
20 morning, and therefore there are no issues between the
21 debtors and the Creditors Committee with respect to their
22 letter.
23 Indeed, Your Honor, I think we're at the point
24 now where we have reached agreement with all of the parties
25 other than Bank of New York with respect to the Disclosure

1 Statement and the materials to be sent out with the
2 solicitation package.
3 I think that then, Your Honor, takes us to the
4 Bank of New York issues, and I think they can be framed
5 pretty distinctly as two separate questions.
6 I know that Your Honor received a letter from
7 Mr. Seigel, dated today's date, that includes a copy of the
8 report that the Bank of New York wishes to send and a copy
9 of some Plan and Disclosure Statement inserts.
10 If we could turn first to the Plan and Disclosure
11 Statement inserts, I think it's important to highlight, and
12 I think Mr. Seigel, counsel to the Bank of New York, will
13 confirm this; we have, in fact, included each of the
14 inserts to the Plan and to the Disclosure Statement
15 verbatim as proposed by counsel to Bank of New York, with
16 one exception; and that is, in the Plan, for the definition
17 of the 10 percent senior note, indentured trustee fees, the
18 debtors have proposed that those fees would be subject to
19 Court approval, and the Bank of New York has objected to
20 that provision, just that one clause, subject to Court
21 approval.
22 The second issue, Your Honor, just to frame the
23 two issues that are before the Court, does relate to the
24 form of report that the Bank of New York wishes to send.
25 As Your Honor may have noted from the certification that

1 the debtors filed, the debtors wish to strike two
2 paragraphs from the report which the debtors considered
3 advocacy which went beyond what we felt was appropriate.
4 The Bank of New York wishes to include those provisions.
5 I think, Your Honor, those are the only two
6 issues that are before the Court today.
7 THE COURT: Okay. First, let me say that I have
8 nothing -- the only thing I received from anyone concerned
9 only the solicitation letter or notice issue. I've
10 received nothing in connection with any discussion about
11 Disclosure Statement inserts that have been addressed
12 between the debtor and the Bank of New York except the
13 reference in the emails which talk both about the notice
14 and about the attorneys' fee issue, but I haven't seen any
15 separate inserts.
16 MR. KLEIMAN: I think, Your Honor, that won't
17 preclude you from addressing the issues because, as I said,
18 the debtors had no issues, and in fact took verbatim the
19 Bank of New York's inserts with the one modification that
20 we propose to make the indentured trustee's fees subject to
21 Court approval, and the Bank of New York has opposed that
22 change.
23 THE COURT: Well, the debtors propose to do that
24 by the addition of a plan provision?
25 MR. KLEIMAN: Yes, Your Honor. The indentured

1 trustee gave us a definition for their fees, and we put
2 that definition in the plan verbatim, except we added a
3 clause at the very end that said, "subject to Court
4 approval."
5 THE COURT: Okay. And I guess my first question
6 is, why is that a Disclosure Statement issue?
7 MR. SEIGEL: Your Honor, if you remember -- this
8 is Glenn Seigel -- what happened was, when we filed our
9 objections to the Disclosure Statement included within
10 those objections was an objection which was a confirmation
11 issue in that we suggested that the plan as written
12 attempted to eviscerate the trustee's lien rights.
13 After a colloquy in the Court, there was an
14 agreement that we would put provisions in the plan which
15 are typical of these plans, making sure that the trustee's
16 rights under the indenture, whatever they are, were
17 preserved, and that was what these various provisions
18 attempt to deal with.
19 What happened was in connection with making those
20 changes, our debtor's counsel added a provision saying that
21 in connection with the exercise of our lien right, the
22 Court would rule upon the reasonableness of our fees.
23 What we have said to the debtor in connection
24 with this, and you may have seen an email, is that this is
25 not an estate issue. This is an issue between the trustee

1 and the bond holders.

2 We are very pleased that the debtor is not

3 attempting to effect the rights that exist between the bond

4 holders and the trustee, but all we are saying is our

5 rights are what our rights are, that this is not a

6 bankruptcy issue.

7 What this is is an issue with respect to the

8 contract between the bond holders and the trustee, and we

9 do not understand why this is an appropriate subject for

10 the Court to deal with in the context of this plan.

11 It's that simple. I mean, bond holders may wish

12 to do something and do whatever they choose to do, but this

13 is not a debtor issue.

14 THE COURT: Mr. Kleiman.

15 MR. KLEIMAN: Well, Your Honor, I agree with at

16 least two things that Mr. Seigel said.

17 First off, there was never any attempt to

18 eviscerate rights, and when Mr. Seigel provided us with the

19 inserts we were happy to include them.

20 Number two, I would also concur that in many

21 respects this is not an estate issue because the indentured

22 trustee's fees are paid from the distributions that go to

23 the bond holders.

24 They are not charged against the estate. The

25 indentured trustee is not a 327(a) professional, and I

1 acknowledge that.

2 But that does not mean that the debtors, in their

3 capacity as fiduciaries for all creditors, including the

4 bond holders, can simply wash their hands of an issue

5 simply because it does not directly affect their bottom

6 line, and the debtor simply expressed the concern and by

7 asking that the trustee's fees be made subject to Court

8 approval, we're simply expressing the concern that the

9 trustee's fees will be an offset, a deduct, against the

10 distributions that are otherwise going to certain creditors

11 of this estate, and we felt it was appropriate to ask the

12 indentured trustee to put in place a court review, a

13 reasonableness check, so that those bond holders could have

14 an opportunity if they wish to review the fees and make

15 whatever objections, if any, that they wanted to make.

16 So even though I agree this does not affect the

17 estate, it does not affect the debtors, nor would there

18 ever be any payment coming from the debtors, we simply

19 felt, Your Honor, that as a matter of fairness to the bond

20 holders, this requirement, you know, could and should be

21 added, and that it was no harm to the indentured trustee

22 because we are, of course, sure that their fees are going

23 to be reasonable and that no one would have any objection

24 to it.

25 THE COURT: Well, it seems to me that given this

1 agreement, although there's a lot of agreement on some of
2 the sub-issues of this issue, what the debtor might say is,
3 to the extent that the debtor has the right to request that
4 the Court rule on the reasonableness of the indentured
5 trustee's fees, it may do so, and to put a companion
6 provision in the Disclosure Statement, but absent agreement
7 of the indentured trustee, I'm not going to require -- put
8 it this way -- over the indentured trustee's agreement,
9 over his objection, it doesn't seem to me to be appropriate
10 to put the plan provision in as it's being described to me.
11 As I said, I don't have it in front of me, and I
12 think that's all I have to say on that.
13 MR. SEIGEL: Your Honor, that is perfectly fine
14 with us. Essentially, you're saying if debtor wishes to
15 raise this at some later point in time, at that point in
16 time, we can have a discussion before the Court about the
17 appropriateness of it.
18 MR. KLEIMAN: And for the benefit of the parties
19 on the call, I'll simply advise everyone that the debtor's
20 intention, since it's not our issue to object, we would
21 simply include a provision in the Disclosure Statement that
22 notes that the trustee's fees are not subject to Court
23 review and that parties, you know, need to exercise
24 whatever rights they have under applicable non-bankruptcy
25 law if they wish, including requesting the Court to review

1 them, because I agree with Mr. Seigel, this is not the
2 debtor's issue ultimately, and, Your Honor, I feel like
3 I've discharged my duty by raising it with the Court
4 today.
5 MR. SEIGEL: And subject to our review of
6 whatever that language is, that this was resolved the
7 issue.
8 THE COURT: Okay. Now, before we go on to the
9 next issue, let's talk about timing. When might the final
10 versions of the Plan and Disclosure Statement be filed and
11 a form of disclosure -- letter approving the Disclosure
12 Statement be submitted?
13 MR. KLEIMAN: Your Honor, to take up the second
14 part of your question first, we do have the form of order
15 ready to go. We filled in the dates.
16 There was one change that was agreed to on the
17 record, and we've made that and circulated that, and nobody
18 has commented on it, so I assume it is final, and we can
19 provide that to Your Honor at any time.
20 I think, Your Honor, our goal is to finalize the
21 Plan and Disclosure Statement by the end of today with all
22 outside parties to give it one final review for internal
23 consistency and cross-references, such that by tomorrow
24 afternoon we would be in a position to file the final
25 versions of the documents that would be ready to go to the

1 printer's and ultimately distributed to creditors.
2 I think at the same time, Your Honor, the
3 Creditors Committee is making some last changes to their
4 recommendation letter, and I'm sure they'll want to get an
5 original signed copy, so we can photocopy that.
6 But this timing, Your Honor, I think is by
7 tomorrow afternoon. We expect to be final with
8 everything.
9 THE COURT: What is the date by which the order
10 must be signed so that the time frames that are set forth
11 are not disturbed?
12 MR. KLEIMAN: Well, Your Honor, we actually have
13 a little bit of flexibility in that regard because we
14 agreed at the outset to not insist on the minimum timing
15 but, in fact, already built in additional time.
16 We are not bucking up against any code or rule
17 deadlines for distributions of material in order to hold to
18 our October 21 confirmation hearing.
19 THE COURT: Okay.
20 As you know, this is my only day in the office
21 this week. If I don't sign the order, assuming everything
22 else gets finished, if I don't sign the order until next
23 Monday that would be okay?
24 MR. KLEIMAN: Yes, Your Honor. I think that
25 would be sufficient.

1 THE COURT: Okay. Let's turn, then, to the next
2 issue, and that is, I think, frankly, Mr. Seigel in his
3 email has correctly framed the issue, and that is whether
4 the notice in the form in which the indentured trustee
5 would like it, should be included in the debtor's
6 mailing.
7 I've reviewed the mark-up that's included in the
8 certification that was submitted by the debtor, and I guess
9 when I look at I guess the applicable law on this topic,
10 the creditor has the right to solicit rejections once the
11 disclosure statement has been approved, pretty much freely,
12 I guess subject to -- well, I'll stop there.
13 But it doesn't have the right necessarily to have
14 anything included in the package that it wishes to have,
15 and I guess there lies the rub.
16 I'll hear briefly, Mr. Seigel, from you, in
17 support of form of notice that you would like.
18 MR. SEIGEL: Your Honor, the trustee thought that
19 it made sense to have this included in the package together
20 with everything else that the various -- well, particularly
21 the bond holders will receive for the convenience of the
22 bond holders.
23 We don't think there's anything in that doesn't
24 reflect the position that the indentured trustee has
25 already taken in the case, and we think that, you know,

1 administratively, the burden on the debtor is minimal.
2 If the Court determines that either the burden is
3 not minimal or that it's inappropriate to include it, the
4 trustee will send this notice out directly to its holders.
5 This was really more of a convenience and cost issue. We
6 don't think there's anything in that notice that differs
7 materially from anything that's gone on before the Court
8 or -- well, anything that's gone on before the Court.
9 That's our view.
10 We do not necessarily feel strongly that this
11 needs to be included within the package, but we do think
12 that it's sensible that it be included in the package.
13 THE COURT: Mr. Kleiman.
14 MR. KLEIMAN: Your Honor, the debtor's concern
15 with is one of fundamental fairness. The Creditors
16 Committee has been permitted and has prepared a very
17 lengthy, approximately four-page letter, to be included
18 that in quite colorful detail lays out the reasons why the
19 Creditors Committee opposes the plan and urges unsecured
20 creditors to reject the plan.
21 The debtors are including one letter; that is our
22 explanation of why we believe creditors should support the
23 plan, and we think there is a balance in that.
24 The Debtors and the Creditors Committee are the
25 natural parties to be including materials in the

1 solicitation package.

2 But to allow the Bank of New York to include a
3 notice which clearly contains advocacy at the expense of
4 the estates, we felt violated principals of fundamental
5 fairness, because not only is the Bank of New York on the
6 Creditors Committee and therefore their views are already
7 represented in the Committee's letter, but as Mr. Seigel
8 notes, all of the comments that the Bank of New York makes
9 in their letter are duplicative of what's already in the
10 Creditors Committee letter.

11 Your Honor, to allow there to be two pieces
12 against and one piece for, we just felt was unfair,
13 particularly when this notice is supposed to go only to
14 bond holders, would go only to bond holders. To put it in
15 the solicitation materials means that all creditors bear
16 the cost, however minimal or not minimal may be associated
17 with including it.

18 We think a more fair proposition, Your Honor, is
19 either ask the Bank of New York to strike these provisions,
20 in which case, we would be comfortable including the form
21 of notice, or, as is their choice, if they wish to send out
22 whatever form of notice they wish at their own cost to the
23 bond holders, they're free to do so, and I think Mr. Seigel
24 will acknowledge that in his comments.

25 MR. SEIGEL: Your Honor, I would only make one

1 point in response to what Mr. Kleiman has said.
2 Not all of the issues raised in our -- are raised
3 by the Committee, because as Your Honor may remember we do
4 have a couple of discreet issues which affect the bond
5 holders directly but not the holders. Other than that, we
6 will, of course, abide by whatever the Court's ruling is.
7 THE COURT: I guess my feeling is, in light of
8 the fact that there are other advocacy letters largely
9 raising the issues that the indentured trustee has raised,
10 I'm inclined not to require that the debtor send the notice
11 in the form that the Bank of New York has presented it.
12 If, however, indentured trustee would like a form
13 of notice marked up as the debtor has suggested in its
14 certification but perhaps indicating that there will be
15 separate communications and that bond holders should look
16 for that, I don't think that would be inappropriate
17 provided that the indentured trustee is going to separately
18 communicate with the bond holders.
19 I wouldn't want to say that unless the Bank of
20 New York was actually going to do that.
21 MR. SEIGEL: Your Honor, we will be sending out a
22 separate notice, and we think that your suggestion is a
23 good one, and we would err to include within a package a
24 notice that references the fact that holders will be sent a
25 separate notice.

1 THE COURT: Okay. Without describing the
2 character of the contents.
3 MR. SEIGEL: That's correct, Your Honor. Put
4 them on notice that they should look for it.
5 THE COURT: All right.
6 I ask that the notice be revised accordingly, and
7 I'm assuming counsel will be able to agree on the
8 appropriate language.
9 If we're finished with that, I do have one sort
10 of housekeeping item to bring up with the debtor for
11 discussion with Enersys (ph).
12 Since the disclosure hearing, I have had a chance
13 to review my October calendar, and, Mr. Kleiman, given the
14 fact that I have now set aside in October two days for
15 confirmation, and October is a tight month for me, I would
16 like to move the Enersys hearing to November, and I know
17 the debtor has been anxious to resolves this and that there
18 have been a couple of disputes along the way about just how
19 quickly we can get the final hearing, but in view of my
20 calendar, and I hadn't had a chance really to fully review
21 it at the time I picked the dates for confirmation, I
22 really would like to free up those two dates for me.
23 I have dates in November to suggest to you,
24 Mr. Kleiman, to discuss with Enersys' counsel. They are
25 November 19th and 20th and November 24th and 25th.

1 MR. KLEIMAN: Understood, Your Honor.
2 THE COURT: All right.
3 And I'm sorry for the about another month or so
4 delay, but I do need to recapture that time. So if you
5 would just get back to -- why don't you get back to my
6 courtroom deputy in Philadelphia, Ms. Blalock, with what
7 you and Enersys' counsel have decided.
8 If it turns out that neither of those two sets of
9 dates are workable for you and for your witnesses, let me
10 know and we'll try to work around that somehow.
11 MR. KLEIMAN: Understood, Your Honor. I would
12 note, although Your Honor may not have seen it, on Friday
13 of last week the debtors did file a motion for summary
14 judgment in that contested matter.
15 THE COURT: Oh.
16 MR. KLEIMAN: I don't know that that will
17 necessarily change the timing vis-a-vis the evidentiary
18 trial we've just been assessing, but I did want to mention
19 that to the Court.
20 THE COURT: No, I hadn't seen it, and I'm glad
21 you did. Thank you.
22 All right. Anything further, counsel?
23 MR. ZENSKY: Your Honor, David Zensky at Aiken,
24 Gump, the Creditors Committee.
25 THE COURT: Yes.

1 MR. ZENSKY: May I bring up one very minor
2 housekeeping matter?
3 The Committee has started discovery process,
4 looking towards the confirmation hearing. Mr. Kleiman and
5 I have traded calls but have not been able to speak about
6 an accelerated discovery schedule and other issues
7 affecting discovery related to the confirmation hearing.
8
9 I would ask Your Honor whether it makes sense to
10 possibly decide, if you have the time, a half-hour time
11 slot, the early part or middle of next week so that if the
12 parties are unable to resolve any issue that does come up
13 that we can get it squared away in short order, and so that
14 it will not delay the discovery process related to the
15 confirmation hearing.
16 THE COURT: I'll put aside a half an hour or hour
17 on Tuesday, September 9th, at 9:30 -- half an hour, let's
18 say, at 9:30, to have a conference call on scheduling.
19 In fact, I guess what I'd like -- I'll leave it
20 to the parties ultimately, but maybe even if there's no
21 dispute it would be good to have a scheduling order with
22 respect to discovery.
23 I'm assuming counsel have also considered the
24 issue of what discovery and the adversary can be used in
25 confirmation. To the extent there are disputes, we can

1 resolve them on Tuesday the 9th.

2 Is that satisfactory?

3 MR. ZENSKY: Yes, that's great, Your Honor.

4 Thank you.

5 MR. KLEIMAN: That's fine with the debtors,

6 Your Honor.

7 THE COURT: All right. Thank you very much.

8 MR. KLEIMAN: Thank you, Judge.

9 MR. SEIGEL: Thank you, Judge.

10 THE COURT: The hearing is concluded.

11 (Whereupon, the hearing was concluded.)

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1 CERTIFICATION

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3 I certify that the foregoing is a correct transcript

4 from the electronic sound recording of the proceedings in

5 the above-entitled matter.

6

7 O Jean Papach 9/8/03

8 O. Jean Papach Date

9 Signature of Transcriber

10

11