IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
EXIDE TECHNOLOGIES, INC., *et al.*,[1]	)	Case No. 02-11125 (KJC)
	)	
Debtors.	)	Jointly Administered
	)	
	)	Ref: D.I. No. 3433

LIMITED OBJECTION OF
THE PACIFIC DUNLOP HOLDINGS ENTITIES TO
THE DEBTORS' APPLICATION TO EMPLOY AND RETAIN
PATTON BOGGS LLP AS SPECIAL LITIGATION COUNSEL
NUNC PRO TUNC

The Pacific Dunlop Holdings (USA), Inc., Pacific Dunlop Holdings (Europe) Limited, P.D. International Pty Limited, Pacific Dunlop Holdings (Hong Kong) Limited and Pacific Dunlop Holdings (Singapore) PTE. Ltd. (collectively, the "Objectors" or "the "Pacific Dunlop Holdings Entities"), by their counsel, hereby submit this limited objection to the Debtor's Application for an Order Under Section 327(e) of the Bankruptcy Code Authorizing the Employment and Retention of Patton Boggs LLP as Special Counsel for the Debtors (Docket No. 3433). The Objectors do *not* oppose the retention of Patton Boggs LLP from the point at which the pending application to employ that firm was filed. The Objectors *do* oppose that firm's retention *nunc pro tunc,* as such retention is unwarranted by the circumstances and applicable law.

In support of these objections, the Objectors state as follows:

[1] The Debtors in these proceedings are: Exide Technologies, Inc., f/k/a Exide Corporation; Exide Delaware, L.L.C.; Exide Illinois, Inc.; RBD Liquidation, L.L.C.; Dixie Metals Company; and Refined Metals Corporation.

Background

1. On April 15, 2002 (the "Petition Date"), Debtor Exide Technologies, Inc., f/k/a Exide Corporation (the "Debtor" or "Exide") and certain affiliates (collectively, the "Debtors") filed their voluntary petitions for relief under Chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware.

2. The Objectors are entities that collectively sold the global GNB business to Exide and certain of its foreign, nondebtor affiliates in May and June 2000.

The Illinois Litigation

3. As a result of breaches of the sale agreements by the buyers of the GNB business, on July 17, 2001, the Objectors commenced litigation against Exide and those certain foreign nondebtor affiliates that also were parties to Sale Agreements, by filing the first of two complaints in the Illinois State Court. A second complaint was filed some months later, and that action was consolidated with the first.

4. In that state court litigation, Exide was represented by attorneys from the Illinois law firm of Schopf & Weiss.

5. After the Debtors commenced their bankruptcy case, the Debtors first sought a stay of the state court litigation as against the nondebtor Exide affiliates. The Debtors next filed for removal of the state court litigation to federal bankruptcy court in the Northern District of Illinois, and thereafter moved for transfer of the litigation to the Bankruptcy Court for the District of Delaware. Schopf & Weiss was joined in the legal representation of the Debtors by the law firm of Kirkland & Ellis, general bankruptcy counsel to the Debtors.

6. No other attorneys were involved in that litigation, on behalf of the Debtors. The Affidavit of attorney Benjamin Chew submitted with the Application to employ Patton Boggs acknowledges that Patton Boggs did not represent Exide at any time prepetition.

7. On February 4, 2003, the Bankruptcy Court for the Northern District of Illinois granted the Debtors' Transfer Motion, sending the litigation to this Delaware Bankruptcy Court.

The Ordinary Course Professionals Motion

8. Early in this bankruptcy case, the Debtors filed a "Motion for Order Authorizing Debtors to Employ and Compensate Certain Professionals Utilized in the Ordinary Course of Debtors' Business" (D.I. No. 16) (hereafter, the "Ordinary Course Professionals Motion").

9. In the Ordinary Course Professionals Motion as originally submitted, the Debtors asserted that they retained approximately 27 firms and individual consultants in the ordinary course of operating their business, as set forth on an attached schedule, and they sought authority to continue to retain and pay these so-called Ordinary Course Professionals up to a maximum of $50,000 per month per professional and $550,000 for all these professionals.[2]

10. The law firm of Schopf & Weiss, the litigation counsel that had been involved prepetition with the Objectors' litigation, was among the Ordinary Course Professionals listed on the schedule attached to the original motion. Patton Boggs was not.

11. The Ordinary Course Professionals Motion was granted by an Order of this Court dated May 10, 2002 (D.I. No. 224). The Order allowed, among other things, that the Debtors

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[2] Later, on November 8, 2002, the Debtors filed an Amended Ordinary Course Professionals Motion (D.I. No. 1007), pursuant to which the Debtors averred that they were at that retaining over 60 "ordinary course professionals", and they sought to increase the caps to $60,000 per month per professional and $1,200,000 per month for all ordinary course professionals collectively. That Amended Motion was granted by this Court by Order dated November 27, 2002 (D.I. No. 1176).

were permitted to supplement their list of Ordinary Course Professionals by filing a supplement with the Court.

12. Thereafter, the Debtors filed many amended, supplemental lists of Ordinary Course Professionals (*see, e.g.*, D.I. Nos. 410, 529, 578, 792, 1005, 2050).

13. Eventually, in one such amended, supplemental list of Ordinary Course Professionals filed on September 17, 2002 (D.I. No. 792), Patton Boggs LLP appeared. **However, Patton Boggs was not retained as an ordinary course professional for any litigation purposes**.

14. The Amended Schedule set forth in the filing docketed as No. 792 includes the following entry:

Professional	Nature of Services	Monthly Expenses
Patton Boggs LLP Attn: Laurence E. Harris 2550 M. Street, NW Washington, DE [stet] 20037	Counsel regarding legislative and policy matters and related corporate matters	$40,000

15. Since Patton Boggs was allegedly an "ordinary course" professional, there is no bankruptcy court filing that provides an accounting of what if any legislative and policy counseling that Laurence Harris of Patton Boggs actually furnished to the Debtors, or what he and his firm were paid for those services, over what period of time.[3]

16. But in any event, the Patton Boggs firm was not retained for litigation purposes.

17. As recently as July 14, 2003, the Debtors were continuing to add to their schedule of "Ordinary Course Professionals", but in each schedule since Patton Boggs was first mentioned,

[3] A First Quarterly Report setting forth the totals paid to the Debtors' various Ordinary Course Professionals was filed on November 1, 2002 (D.I. No. 967), but it covered the period between April and July 2002. It may be that the Debtors filed subsequent such reports, although the Objectors did not locate them in their review of the docket. Regardless, the first Quarterly Report provides no information about actual services rendered, but merely restates the Nature of Services listed in the schedule pursuant to which such professionals were retained.

the nature of the services being rendered by that firm in the "ordinary course" has remained, without change, legislative and policy counseling and other corporate matters.

The Pending Application to Employ Patton Boggs as Special Litigation Counsel

18. The Debtors' Application attaches two engagement letters that purport to have been sent by Patton Boggs to Exide on July 28, 2003, for the representation of the Debtors in the *defense* of, respectively, the Objectors' first action in Illinois state court and the Objectors' second action in Illinois state court (although both actions had, prepetition, been consolidated).[4]

19. Considering that a) the Illinois actions against Exide were stayed as a result of the automatic stay; b) the entire litigation had already been transferred to Delaware bankruptcy court in February 2003; c) Schopf & Weiss had been the litigation counsel prepetition, and d) insofar as bankruptcy issues were presented, the Debtor already had bankruptcy counsel in Kirkland & Ellis and Pachulski, Stang, Ziehl, Young, Jones & Weintraub, P.C., the purpose of retaining Patton Boggs in July 2003, to defend the Illinois actions is altogether unclear.

20. Despite the fact that Exide signed one of those two engagement letters at some point (the Debtors' motion avers that it was also July 28, 2003), no motion to retain Patton Boggs as special counsel was filed at that time.

21. On October 3, 2003, the Pacific Dunlop Holdings Entities filed in this bankruptcy case their Motion to Remand or for Stay Relief (D.I. No. 2507).

22. In response to the Objectors' Motion, on October 27, 2003, the Debtors filed a 40-page memorandum in opposition.

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[4] According to the Application, the Debtor may later seek to employ Patton Boggs on a contingency fee basis in connection with unidentified potential counterclaims that Exide apparently is considering. However, the Application makes clear that such representation and such contingency fee arrangement is not part of the present Application.

23. The Debtors' responding memorandum was signed exclusively by the Debtors' Delaware bankruptcy counsel, Pachulski, Stang, Ziehl, Young, Jones & Weintraub, P.C. There was no other counsel for the Debtors shown on that pleading, whether as co-counsel, "of counsel," or otherwise.

24. In other words, the participation of the Patton Boggs firm in the preparation of that lengthy pleading was kept undisclosed.

25. Five days before the hearing on the Objectors' Motion to Remand or for Stay Relief, counsel for the Objectors received a fax from Patton Boggs regarding that hearing, and thereby was first made aware to a limited degree of that firm's involvement in the matter. At the hearing, a Patton Boggs attorney argued on behalf of the Debtors.

The *Nunc Pro Tunc* Component of the Application

26. The Third Circuit has made it clear that approval of a professional's application for employment *nunc pro tunc* requires extraordinary circumstances. Indeed, both cases referred to by the Debtors in paragraph 30 of the Application cite the two-part test of disinterestedness[5] and "extraordinary circumstances" established in *In re Arkansas Company, Inc.*, 798 F.2d 645 (3rd Cir. 1986), that must be met in order to justify retroactive approval of a professional's employment.[6]

27. In *In re Arkansas Co.*, the Third Circuit recognized that by requiring "extraordinary circumstances" before granting *nunc pro tunc* approval of professionals' employment applications, it was creating "a harsh rule." *Id.* at 650. However, the Court stated that "[i]f

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5 The Objectors have no reason to believe that the first part of the test, disinterestedness, has not been met.

6 *In re Arkansas* was followed more recently in *In re United Companies Financial Corp.*, 241 B.R. 521 (Bankr. D. Del. 1999). In *United Companies*, Judge Walrath found no extraordinary circumstances justifying the *nunc pro tunc* employment of Ernst & Young LLP, "a sophisticated bankruptcy professional . . . ." *Id.* at 527. Indeed, the court found that "[n]either E & Y nor the Debtors have offered any acceptable explanation for why the Application to retain E & Y could not be filed before work was commenced on June 1, 1999." *Id.*

retroactive approval were freely granted, it would subvert the prophylactic purpose underlying the statutory requirement of prior approval. . . .We thus hold that *nunc pro tunc* approval should be limited to cases where extraordinary circumstances are present. Otherwise the bankruptcy court may be overly inclined to grant such approval influenced by claims of hardship due to work already performed." *Id.* at 649.

28. As to the second component of *In re Arkansas Co*'s. two-part test, the Debtors have set forth no "extraordinary circumstances."

29. Notably, the Debtors' Application could, but does not, disclose in detail what services were already rendered by Patton Boggs before the Application was filed, or what amount of fees and expenses the firm has already generated without court authority for doing so, over how much time.

30. The Debtors' Application states (at ¶ 28) that Patton Boggs "was originally retained as an ordinary course professional pursuant to the Order Authorizing Debtors to Employ and Compensate Certain Professionals Utilized in the Ordinary Course of Business (Docket No. 224) (the 'OCP Retention')."

31. But the Application fails to disclose that the firm was retained in so-called ordinary course for an entirely different purpose, and *not* for the Pacific Dunlop litigation.

32. The Debtors have offered no other justification, much less "extraordinary circumstances," for their failure to file a proper application to employ Patton Boggs for litigation purposes after the July 28, 2003 engagement letters were sent (and one of them was executed).

33. Insofar as the services rendered by attorneys on behalf of the Debtors in connection with the Pacific Dunlop Holdings Entities' motion in this Court was a bankruptcy matter for which the Debtors' general bankruptcy counsel were amply qualified, no explanation has been

supplied for why "special counsel" would have been needed – *nunc pro tunc* - to handle such bankruptcy issues.

WHEREFORE, the Objectors respectfully do not oppose the retention of the Patton Boggs firm from the date of the filing of the Application. The Objectors do, however, oppose the retention of Patton Boggs *nunc pro tunc,* as there has been no demonstration of any "extraordinary circumstances" as required by the Third Circuit, justifying such relief.

Respectfully submitted,

Dated: January 16, 2004

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