IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	
	)	Chapter 11
EXIDE TECHNOLOGIES, et al.,[1]	)	
	)	Case No. 02-11125 (KJC)
Debtors.	)	(Jointly Administered)
	)	
	)	**Hearing Date: August 22, 2003 at 10:00 a.m.**
	)	**Objection Deadline: August 12, 2003**

DEBTORS' OBJECTION TO MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR AN ORDER STAYING PROCEEDINGS ON THE DEBTORS' PLAN OF REORGANIZATION AND DISCLOSURE STATEMENT OR, ALTERNATIVELY, TERMINATING THE DEBTORS' EXCLUSIVE PERIODS TO FILE AND SOLICIT ACCEPTANCES OF A PLAN (RE DOCKET NO. 2118)

Exide Technologies and certain of its domestic subsidiaries, as debtors and debtors in possession in the above captioned cases (collectively, the "Debtors"), by and through their undersigned counsel, submit this objection (the "Objection") to the Motion of the Official Committee of Unsecured Creditors for an Order Staying Proceedings on the Debtors' Plan of Reorganization and Disclosure Statement or, Alternatively, Terminating the Debtors' Exclusive Periods to File and Solicit Acceptances of a Plan (the "Motion"); and for their Objection, the Debtors respectfully state as follows:

Introduction

1. During the over 15 months since the commencement of these chapter 11 cases, the Debtors have engaged in a systematic and thorough restructuring of their business operations and their financial obligations. They have reduced costs and implemented new plans to increase revenue. The Debtors have shed under-performing business lines, sold unnecessary

[1] The Debtors in these proceedings are: Exide Technologies, 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.

assets and rejected burdensome contracts. Most importantly, the Debtors have filed—within their exclusivity period—a plan of reorganization and are proceeding in good faith toward confirmation. And while their restructuring is not complete, there are no more tools available in bankruptcy to further the Debtors' business reorganization. As a result, now is the appropriate time for the Debtors to emerge from chapter 11.

2. The Debtors' prompt exit from chapter 11 is not a question of convenience or haste. To stay, or otherwise delay, the confirmation process at this time would directly undermine all of the progress the Debtors have made since the start of this long restructuring process and would result in material harm to the Debtors and every constituancy affected by these cases. As described herein, the Standstill Agreement between the Debtors, their non-debtor affiliates and their secured lenders, terminates on December 18, 2003. The Debtors debtor in possession financing expires 30 days earlier, on November 18, 2003. A default under either of these facilities would leave the Debtors with insufficient capital to operate their businesses as a going concern and, as a result, would likely result in a global liquidation of the company.

3. However, the Debtors' need to exit chapter 11 is not merely based on the expiration of its financing arrangements. Operating in bankruptcy has put Exide at a competitive disadvantage with its customers and suppliers. From the outset of these cases, the Debtors have struggled to assuage fears of their demise, and in an effort to maintain business operations at the current level and to attract new customers, the Debtors have resolved publicly to their customers, suppliers and employees that they will emerge from bankruptcy by the end of this year. If the confirmation process is stayed, or otherwise delayed, and the Debtors fail to exit bankruptcy within that timeframe, such failure would be seen as a signal of peril for the businesses, prompting essential customers and employees to move to the Debtors' competitors. Moreover,

the chapter 11 process itself is taxing to the resources of the company, both in terms of cost and time. Prolonging the Debtors' stay in bankruptcy at this point serves only to deplete the value otherwise ready for distribution to creditors. Therefore, it is in the best interests of the Debtors, their estates and creditors for the plan process to proceed toward confirmation without delay.

Background

4. On April 15, 2002 (the "Petition Date"), Exide Technologies, f/k/a Exide Corporation, Exide Delaware, L.L.C., Exide Illinois and RBD Liquidation, L.L.C. (the "Original Debtors") filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code (the "Chapter 11 Cases"). On November 21, 2002, Dixie Metals Company and Refined Metals Corporation (the "Additional Debtors") also filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. An order consolidating the cases for the Original Debtors and the Additional Debtors (collectively, the "Chapter 11 Cases") was entered by the Court on November 29, 2002. The Debtors continue in possession of their properties and are operating and managing their businesses as debtors and debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

5. Prior to the Petition Date, an unofficial committee of bondholders was formed (the "Bondholders Committee"). The Bondholders Committee, which was the precursor to the official committee of unsecured creditors (the "Committee"), which was appointed by the United States Trustee on April 29, 2002, retained Akin Gump Strauss Hauer & Feld LLP ("Akin Gump") as its counsel.

6. On the Petition Date, the Debtors and their debtor in possession lenders (the "DIP Lenders") entered into the Secured Super Priority Debtor in Possession Credit Agreement (the "DIP" or "DIP Agreement"). Under the terms of the DIP Agreement, the

Debtors will default under the loan if they do not exit chapter 11 by November 18, 2003, without securing a parallel extension to the Standstill Agreement.

7. Also on the Petition Date, the Debtors, their foreign non-debtor affiliates and their prepetition secured lenders (the "Secured Lenders") executed the Standstill Agreement and Fifth Amendment to the Credit Agreement (the "Standstill Agreement"), wherein the Secured Lenders agreed to forbear from exercising any of their rights or remedies relating to defaults under the prepetition credit agreement against the Debtors' non-debtor affiliates until no later than December 18, 2003. The Standstill Agreement contains a cross-default provision, which provides that a default under the DIP Agreement also constitutes a default under the Standstill Agreement.

8. On April 17, 2002, the Court approved the DIP Agreement on an interim basis, and on May 9, 2002, the DIP Agreement was approved on a final basis. The Bondholders Committee and the Committee supported the interim and final DIP orders, respectively.

9. Over the course of the Chapter 11 Cases, the Debtors filed several motions seeking to (a) implement the Employee Bonus Programs, including the Corporate Bonus Plan, the Income Protection Plan and the key employee retention plan (the "KERP"); (b) retain professionals, including JA&A Services LLC ("Alix") as restructuring consultants and the Blackstone Group L.P. ("Blackstone") as financial advisors; and (c) assume Craig Muhlhauser's, the Debtors' chief executive officer, employment agreement. Each of these pleadings were extensively negotiated between the parties in interest, including the Committee, and entered by the Court on a consensual basis.

10. On January 16, 2003, the Committee and R^2 Investments, LDC (collectively, the "Plaintiffs") filed a derivative adversary proceeding against certain of the Secured Lenders challenging the amount, status and nature of the Secured Lenders' claims (the

"Adversary Proceeding"). The claims alleged by the Plaintiffs belong to the Debtors and were brought on behalf of the Debtors' estates.

11. Under section 1121(c) of the Bankruptcy Code, the original exclusive period for filing a plan of reorganization was to expire on August 13, 2002 and the exclusive period to solicit acceptances was to expire on October 15, 2002. However, these dates have been extended by this Court on three occasions, the last time being on April 22, 2003, wherein the exclusive period for filing a plan of reorganization was extended to August 7, 2003 and the exclusive period for soliciting acceptances to a plan was extended to October 7, 2003. The Committee supported each such extension.

12. On July 10, 2003, while within their exclusive period to file a plan, the Debtors filed the Debtors' Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code. On July 24, 2003, also within their exclusive period, the Debtors filed the Disclosure Statement for Debtors' First Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (the "Disclosure Statement") and Debtors' First Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (the "Plan"). One provision of the Plan proposes to settle the Adversary Proceeding for the amounts to be distributed to general unsecured creditors. The hearing to determine the adequacy of the Disclosure Statement is set for August 25, 2003. In accordance with the Federal Rules of Bankruptcy Procedure and the Delaware Bankruptcy Local Rules, the Debtors have served notice of the Disclosure Statement hearing on all creditors and equity holders.

13. It is clear that the Debtors have accomplished everything they could, and progressed as far as they could with the restructuring of their businesses, in bankruptcy. There is nothing more that can be done to reorganize the company within chapter 11, other than confirm a

plan. As a result, the Debtors believe that this is the appropriate time to emerge from chapter 11 and continue restructuring without court supervision.

14. However, on August 1, 2003, after the Debtors' filed the Disclosure Statement and the Plan and after notice of the hearing on the Disclosure Statement was served, the Committee filed the Motion requesting that the Court (a) stay the proceedings on the Disclosure Statement and Plan or re-schedule the hearing on the Disclosure Statement to a date no sooner than December 31, 2003 or the completion of the Adversary Proceeding, or (b) in the alternative, terminate the Debtors' exclusive periods to file a plan and solicit acceptances thereto. The Motion should be denied for the reasons stated below.

Argument

15. The Chapter 11 Cases have been pending for over 15 months. During such time, the Debtors have successfully implemented a restructuring of their operations and their financial obligations by, among other things:

- closing two plastic plants in Jackson and Vicksburg, Mississippi;
- closing the Florence transportation plant;
- downsizing the Kankakee, Illinois facility and consolidating it into the Fort Smith, Arkansas facility;
- moving GEL production from the Manchester, Iowa plant to the Columbus, Georgia plant;
- consolidating three facilities in the Chicago, Illinois area to one office/distribution center;
- combining two corporate facilities in Atlanta, Georgia into one North American transportation headquarter;
- closing the City of Industry, California transportation plant;
- closing the Columbus, Georgia distribution center;

- combining the motive and network operations into one industrial North American business unit;
- reducing the motive power service center footprint by closing four locations (which is approximately 45%);
- downsizing the transportation branch network by nine locations (which is approximately 12%);
- reducing the North American headcount by over 550 employees;
- rejecting approximately 120 unexpired leases and executory contracts that are either no longer necessary to business operations or whose obligations are not cost effective;
- assuming certain agreements and entering into new leases and contracts that are consistent with the new business plan;
- establishing two separate bar dates for contaminant-related claims and all other unsecured claims against the Debtors, respectively;
- implementing internal protocols for handling claims filed against the estates and establishing external procedures for resolving personal injury tort and wrongful death claims;
- analyzing all of their claims against third parties and initiating litigation actions relating to those claims that were economically justified and would support their new business strategy; and
- selling numerous de minimis assets that are not necessary to the on-going operations of the Company.

Although the Debtors' restructuring efforts are not complete, principally in their (non-debtor) European businesses, there is nothing further that they can accomplish in bankruptcy other than confirmation of a reorganization plan. Therefore, the Debtors believe that now is the appropriate time to emerge from chapter 11.

16. The relief requested by the Committee—i.e., delaying confirmation and asking that the Debtors remain in bankruptcy for an indefinite time—is tantamount to a death sentence for the Debtors. First, and foremost, if the Debtors do not confirm the Plan before November 18, 2003, they will be in default under the DIP Agreement and the Standstill

Agreement, allowing the DIP Lenders and the Secured Lenders to foreclose against both the Debtors and their foreign non-debtor entities. In that event, the Debtors would not have sufficient capital to pay the amounts due under either the DIP Agreement or the prepetition credit agreement and the company as a whole, including domestic and foreign operations, could be forced to liquidate, erasing all restructuring progress achieved over the last 15 months and substantially reducing the expected recoveries of all of the Debtors' creditor constituencies.

17. Even if the Debtors could convince the DIP Lenders to extend the DIP Agreement, which is not likely, and the Secured Lenders agreed to continue the Standstill Agreement, which cannot be assumed since it would require a 100% vote of the approximately 60 separate lender institutions, continuing to operate within chapter 11 for an artificially extended period of time would prove detrimental, and potentially catastrophic, to the Debtors and their businesses. Although the Debtors have made great progress toward a successful reorganization of their operations during the Chapter 11 Cases, the Debtors, like all chapter 11 debtors, have experienced real difficulty maintaining customers, suppliers and employees, let alone attracting new ones, while in bankruptcy. These parties—each of whom is absolutely essential to a successful turn-around—have been genuinely and understandably concerned about Exide's prospects if the company were to become embroiled in a protracted bankruptcy.

18. To assuage these natural concerns, the Debtors have publicly announced since the commencement of these cases that they intend to emerge from chapter 11 by the end of 2003. On the basis of this commitment, significant customers and suppliers have agreed to continue to do business with the Debtors, and key employees have continued their vital service to the Debtors. However, if this Court were to grant the Motion and delay confirmation of the Plan, it is certain that such a setback would be interpreted as a material blow to the prospects and viability of the company. As a result, the Debtors could lose significant customers, employees

and vendors, without which the Debtors could not survive. Moreover, such losses would be equally felt by the Debtors' creditors, whose distributions would evaporate with the diminished value of the enterprise. Therefore, it is in the best interests of the Debtors, their estates and creditors to proceed toward confirmation without delay.

19. For these reasons and others discussed below, the plan process should not be stayed, or otherwise delayed, nor should the Debtors' exclusivity period for soliciting acceptances to the Plan be terminated.

I. The Plan Process Should Not Be Stayed.

A. Delaying Confirmation Is In Direct Conflict with the Purpose of Chapter 11.

20. The process of confirming the Plan should not be stayed because delaying the administration of the estates and the Debtors' emergence from bankruptcy is contrary to the core purpose of chapter 11. It has been universally held that one of the primary purposes of chapter 11 and bankruptcy law in general is "to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period." Katchen v. Landy, 382 U.S. 323, 328 (1966); see also Chemetron Corp. v. Jones, 72 F.3d 341, 346 (3d Cir. 1995) (stating that one of the principal purposes of bankruptcy law is to secure, within a limited period of time, the prompt and effectual administration and settlement of the debtor's estate); Beaty v. Selinger (In re Beaty), 306 F.3d 914, 922 (9th Cir. 2002); Strickland v. Roberts (In re Roberts), 460 F. Supp. 88, 93 (N.D. Ga. 1978); In re Hinchey, 349 F. Supp. 116, 118 (D. Or. 1972); In re Transatlantic and Pacific Corp., 216 F. Supp. 546, 553 (S.D.N.Y. 1963); St. Vincent's Hospital v. Norrell (In re Norrell), 198 B.R. 987, 996 (Bankr. N.D. Ala. 1996); In re Houbigant, Inc., 188 B.R. 347, 352 (Bankr. S.D.N.Y. 1995); In re Best Products Co., 140 B.R. 353, 356 (Bankr. S.D.N.Y. 1992); Zimmerman v. Continental Airlines, Inc. (In re Ludwig Honold Manufacturing Co.), 22 B.R.

436, 438 (E.D. Pa 1982) (holding that one of the goals of the Bankruptcy Reform Act is the prompt administration of the bankruptcy proceedings).

21. Under this guiding principle, courts have routinely issued rulings supporting a debtor's right to exit chapter 11 cases as promptly as possible, even if certain creditors' rights must be forfeited or abridged. See Katchen, 382 U.S. at 340 (holding that in order to implement congress' intent to effectuate a prompt administration of a debtor's estate within a limited period of time, the bankruptcy court did have the power to order the surrender of a preference); Chemetron, 72 F.3d at 348 (holding that under the principal of prompt administration of the estate, publication notice of a bar date was sufficient to satisfy the requirements of due process); Beaty, 306 F.3d at 922-23 (holding that laches is available as a defense in an action under section 523(a)(3)(B) of the Bankruptcy Code because it is consistent with the chief purpose of bankruptcy law to effectuate the prompt administration of the bankruptcy cases); Hinchey, 349 F. Supp. at 119 (disallowing a right to a jury trial on the issue of dischargeability in order to provide for the prompt administration of the bankruptcy cases); Houbigant, 188 B.R. at 352-53 (dismissing certain claims that a creditor did not timely file in the bankruptcy because a bar date order serves an important purpose in the prompt administration of the bankruptcy proceedings); Ludwig, 22 B.R. at 438 (holding that forcing the debtor to submit to arbitration would frustrate the goal of bankruptcy law to provide for the prompt administration of the bankruptcy proceedings).

22. As a result, because this is the appropriate time to exit bankruptcy, the Debtors cannot be indefinitely held in limbo while the Committee pursues the Adversary Proceeding. See Transatlantic, 216 F. Supp. at 553 (the court disapproved of an agreement entered into by the trustee in bankruptcy because payment to the estates under such agreement was contingent upon a pending law suit, which would have delayed administration of the

estates). Tellingly, the Committee does not cite any authority for its request. This is because the Committee is well aware that delaying confirmation to finish the Adversary Proceeding is in direct conflict with the intent and purpose of chapter 11—the "prompt and effectual administration and settlement of the estate." The Debtors in their Plan have proposed a fair and appropriate solution to the timing issues caused by the Adversary Proceeding; the Committee in its Motion has proposed only obstructions and problems for the estates.

23. The Debtors cannot help but conclude that in a reckless attempt to secure a greater distribution for unsecured creditors, the Committee seems willing to gamble with the recoveries of more senior creditors by unfairly exposing them to the risk of irreparably harming or even destroying the Debtors' businesses. To grant the Committee's Motion would not only force a default under the DIP Agreement and the Standstill Agreement, but would result in the loss of essential customers, suppliers and employees. These indisputable facts are sufficient grounds alone to deny the Motion as inconsistent with the policies and proposes of chapter 11.

B. The Plan's Proposed Settlement of the Adversary Proceeding Is Permissible, Therefore, the Plan Confirmation Process Should Not Be Delayed.

24. The Plan's proposed settlement of the Adversary Proceeding is permissible under bankruptcy law and, therefore, is not grounds for staying or otherwise delaying the plan confirmation process. By its Motion, the Committee seems to ask this Court to decide now that the proposed settlement of the Adversary Proceeding is unfair, and therefore that the Debtors should be enjoined from seeking approval of the Plan and the settlement embodied therein. The cart cannot be put before the horse: the proper time to debate the fairness of the Plan's proposed settlement is at confirmation.

i. **The Debtors' Proposal of a Settlement of the Adversary Proceeding under Section 1123(b) of the Bankruptcy Code Is Legitimate Because the Claims Belong to the Debtors' Estates.**

25. The Plan's proposal of a settlement of the Adversary Proceeding is appropriate because the claims reflected in the Adversary Proceeding belong to the estates. Section 1123(b)(3)(A) of the Bankruptcy Code provides that a plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate . . . ." A debtor's legal causes of action fall within the definition of a "claim or interest" belonging the estate. See In re Ozark Restaurant Equipment Co., 816 F.2d 1222, 1225 (8th Cir. 1987) ("[I]t is clear that causes of action belonging to the debtor at the commencement of the case are included within the definition of property of the estate").

26. The Adversary Proceeding clearly constitutes a "claim or interest" belonging to the Debtors' estates. Indeed, the Plaintiffs do not ask for direct relief against the Secured Lenders (monetary or otherwise), but rather ask that the estates be allowed to avoid certain transfers, that certain fees and expenses be disgorged to the estates, and that the claims of the lenders against the estates be subordinated to general unsecured claims.

27. Further, the Plaintiffs themselves acknowledge that the claims raised in the Adversary Proceeding are actually claims of the Debtors. In paragraph 22 of the Adversary Proceeding complaint, the Plaintiffs state:

> The Committee and R^2 have joint and individual standing to bring these claims *belonging to the Debtors, on behalf of the Debtors' estates*, as authorized by the Final DIP Order at ¶ 17 and subsequent Stipulations and Orders including, but not limited to, the Stipulation and Consent Order Extending Deadline To Commence Actions To Challenge Pre-Petition Obligations and Resolving Related Matters dated November 27, 2002, at ¶ 1. The Committee and R^2 have standing as well under the strong-arm powers inhering in the debtor-in-possession. (emphasis added).

Therefore, by the Committee's own admission, the Adversary Proceeding can clearly be classified as a "claim or interest belonging to a debtor" within the meaning of section 1123(b) of the Bankruptcy Code.

ii. The Adversary Proceeding May Be Settled Without the Consent of the Plaintiffs and Without a Full Trial on the Merits, Therefore, There Are No Grounds to Delay Confirmation.

a. Claims Belonging to a Debtor May Be Settled Under A Plan of Reorganization Regardless of Who Is Prosecuting the Claim or Who Is Sponsoring the Plan.

28. The Debtors are authorized to settle the Adversary Proceeding through the Plan, regardless of an objection to such settlement by the plaintiffs. Case law demonstrates that a claim belonging to a debtor can be settled under a plan notwithstanding the objection of the party prosecuting such claim. In re Cellular Information Systems, Inc., 171 B.R. 926, 947 (Bankr. S.D.N.Y. 1994) (bank allowed to file and confirm plan of reorganization which involuntarily settled lender liability suit brought by debtor); In re Matter of Texas Extrusion Corp., 844 F. 2d 1142, 1148 (5th Cir. 1988) (secured creditor allowed to file and confirm plan dismissing debtors' actions against it, over debtors' objections); In re BBL Group, Inc., 205 B.R. 625 (Bankr. N.D. Ala. 1996) (creditor proposed and confirmed a plan that resolved debtor's fraud and fraudulent transfer claims against it, notwithstanding debtor's objections). The Cellular Information case is particularly instructive on this issue. In that case, the debtor was prosecuting a $100 million lawsuit against its prepetition lenders. Cellular Information, 171 B.R. at 929. Following a termination of exclusivity, the lenders/defendants filed a plan of reorganization that included a settlement of the debtor's litigation in exchange for the lenders' voluntarily reducing the amount of their claims by approximately 15%. Id. The debtor objected, contending that the bankruptcy court could not approve the settlement because it was not the result of arms-length negotiations and that the debtor/plaintiff did not consent to the settlement. However, the bankruptcy court

concluded that section 1123 is not limited to "traditional" consensual settlements. Id. at 947. On this point, the court remarked that "[t]he Debtors correctly note that the [settlement] is not the product of arms-length negotiations between the Plaintiffs and the Banks. This, however, in no way bars consideration of the proposed settlement." Id. The court then concluded that the proposed settlement was reasonable, and confirmed the lenders' plan.

29. The present case is indistinguishable from Cellular Information. As in Cellular Information, therefore, the Debtors are authorized to propose a settlement of the Adversary Proceeding under the Plan, even over the Committee's objection. This is not to suggest that the Committee will not have the opportunity to object to the settlement itself. As described below, settlements under section 1123 are evaluated under the same standard as settlements under Bankruptcy Rule 9019, and any party in interest, including the Committee, will have the opportunity to advise the Court of their position. The salient point, however, is that the pendency of the Adversary Proceeding does not give the Committee a pocket veto over the Debtors' right to propose and confirm a plan.

b. The Fairness of the Proposed Settlement Can Be Resolved on the Debtors' Current Confirmation Timeline Without the Need for Extensive Additional Discovery or Delay.

30. In its Motion, the Committee suggests that a delay of confirmation is warranted because the merits of the proposed settlement of the Adversary Proceeding cannot possibly be evaluated within the normal timeline for approval of the Plan. In the Committee's view, this Court should be precluded from considering the settlement until, at the earliest, the conclusion of full-blown discovery and after the completion of a formal trial. However, the Committee provides no case law support for this proposition, and, indeed, the many courts that have considered these issues completely disagree.

31. In fact, the procedures and standards for evaluating a settlement under section 1123 are essentially the same as those used in evaluating settlements under Bankruptcy Rule 9019—namely, whether the settlement "falls below the lowest point in the range of reasonableness" when considering potential litigation outcomes. Cellular Information, 171 B.R. at 948. Under Rule 9019, the decision whether to accept or reject a compromise lies within the sound discretion of the Bankruptcy Court. In re Neshaminy Office Bldg. Assocs., 62 B.R. 798, 803 (E.D. Pa. 1986). Approval of a compromise settlement is appropriate if it is in the "best interests of the estate." Id. In determining whether a compromise settlement is in the best interests of a debtor's estate, courts have considered the following factors: (a) the probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and (d) the paramount interest of the creditors. Neshaminy Office, 62 B.R. at 803; see also In re Pennsylvania Truck Lines, Inc., 150 B.R. 595, 598 (E.D. Pa. 1992), aff'd, 8 F.3d 812 (3d Cir. 1993); In re Grant Broadcasting of Philadelphia, Inc., 71 B.R. 390, 395 (Bankr. E.D. Pa. 1987).

32. Moreover, it is not necessary for the court to conduct a "mini trial" of the facts or the merits underlying the dispute. See In re Drexel Burnham Lambert Group Inc., 138 B.R. 723, 759 (Bankr. S.D.N.Y. 1992) ("Approval of a settlement [under 1123(b)] does not require a 'mini-trial' on the merits . . . ." Rather than being forced to decide all questions of law and fact that are settled, a Court need only "canvass the issues [to] see whether the settlement 'falls below the lowest point in the range of reasonableness.'") (citations omitted); In re A & C Properties, 784 F.2d 1377, 1384 (9th Cir.), cert. denied, 479 U.S. 854 (1986). Rather, the court need only consider those facts that are necessary to enable it to evaluate the settlement and to make an informed and independent judgment about the settlement. In re Penn Central

Transportation Co., 596 F.2d 1102, 1114 (3rd Cir. 1979); In re Energy Cooperative, Inc., 886 F.2d 921, 924-25 (7th Cir. 1989).

33. Furthermore, the Committee's contention that insufficient discovery has taken place to adjudge the merits of the settlement is belied by their statement in the Motion that they have already "conducted an *in-depth* investigation of the Pre-Petition Banks' actions, purported claims and liens." Motion at ¶ 24 (emphasis added). Even though the Committee is not entitled to full-scale discovery under the Rule 9019 standard, the Debtors nevertheless note that the Debtors and the Debtors' advisors have produced significant discovery to date, including, but not limited to:

- documents evidencing the Debtors' foreign subsidiaries' status as borrowers or guarantors under the prepetition credit agreement or DIP Agreement;
- documents evidencing receipt by, or repayment of, any proceeds under the prepetition credit agreement or DIP Agreement by the Debtors and their foreign non-debtor subsidiaries;
- documents evidencing any pledges, collateral or guarantees to the Secured Lenders;
- documents relating to the non-debtor foreign subsidiaries' decision to participate in the Standstill Agreement;
- documents related to the prepetition credit agreement;
- documents evidencing intercompany transactions, loans, agreements and promissory notes;
- internal financial audits, reports and accounting materials;
- documents relating to the Debtors' and their foreign non-debtor subsidiaries' cash management systems;
- appraisals, evaluations and schedules of all of the foreign non-debtors subsidiaries' assets and liabilities;
- documents evidencing foreign non-debtor subsidiaries' payment of expenses and liabilities;

- the outstanding balances owed to each Secured Lender under each tranche of the prepetition credit agreement;
- an overview of the foreign non-debtor subsidiaries' senior management and board of directors;
- balance sheets, operating statements and audited and unaudited financial statements for the Debtors and their foreign non-debtor subsidiaries;
- documents relating to the capital structure of the Debtors and their foreign non-debtor subsidiaries;
- certificates of incorporation, by-laws, and other relevant organizational material and board minutes;
- the Debtors' tax returns;
- a schedule of letters of credit;
- a schedule of inventory by country;
- accounts receivable aging and securitization reports; and
- a preliminary valuation presentation.

On top of the foregoing, the Debtors note that the Committee will have at least eight weeks from now to continue its discovery efforts in preparation for the confirmation hearing (which the Debtors' have proposed will occur in early October), during which time it can address any open issues it believes still exist. This, coupled with the fact that the Debtors have voluntarily stipulated to lift the document and written discovery stay in the Adversary Proceeding, clearly demonstrate that the Committee will have a reasonable and fair opportunity to evaluate the proposed settlement within the confirmation timeline proposed by the Debtors.

c. The Fairness of the Debtors' Settlement Is an Issue to Be Addressed at Confirmation.

34. Although the Motion clearly (and predictably) conveys that the Committee does not presently support the proposed settlement of the Adversary Proceeding, that is not a basis to derail the confirmation process at the current juncture. The proper forum to dispute the

Plan's proposed settlement of the Adversary Proceeding is at confirmation, and the Committee will have the opportunity to object to the Plan and its proposed settlement at that time. However, the fact that a party objects to a provision in a plan is not grounds to stay that plan or be permitted to propose a competing plan.

II. The Exclusive Period to Solicit the Plan Should Not Be Terminated.

A. The Committee Has Failed to Carry Its Heavy Burden of Demonstrating Cause to Terminate Exclusivity.

35. The Committee has not demonstrated cause to terminate the Debtors' exclusivity period for solicitation of votes on its Plan. The exclusivity periods to file and solicit a plan under section 1121 of the Bankruptcy Code are important and integral protections given to a debtor upon the filing of a chapter 11 petition. See In re Texaco Inc., 81 B.R. 806, 809 (Bankr. S.D.N.Y. 1988) ("It was intended that at the outset of a chapter 11 case a debtor should be given the unqualified opportunity to negotiate a settlement and propose a plan of reorganization without interference from creditors and other interests," citing to H.R. Rep. No. 595, 95th Cong., 2d Sess. 221-222 (1978)). Given the number of divergent interests involved in any chapter 11 case, Congress recognized that it was important to provide an organized process by which those interests could be addressed and, thus, conferred upon the debtor the exclusive right to respond to those interests in a plan. Accordingly (contrary to the erroneous standard proposed by the Committee) when moving to shorten a debtor's exclusivity period, a movant faces a heavy burden.[2] See In re Standard Mill Limited Partnership, 1996 WL 521190, *1 (Bankr. D. Minn.

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[2] In the Motion, the Committee cites language from several cases to suggest a more liberal standard exists for terminating exclusivity. However, each of the cases cited by the Committee are inapplicable to these cases. The cases cited by the Committee—In re Lake in the Woods, 10 B.R. 338 (E.D. Mich. 1981), In re Kun, 15 B.R. 852 (Bankr. D. Ariz. 1981), In re Pine Run Trust, Inc., 67 B.R. 432 (Bankr. E.D. Pa. 1986), In re All Seasons Industries, Inc., 121 B.R. 1002 (Bankr. N.D. Ind. 1990) and In re Sharon Steel Corp., 78 B.R. 762 (Bankr. W.D. Pa. 1987)—all involved motions by the debtor to extend the exclusivity periods. None of them was confronted with the issue of terminating a then-existing exclusivity period, as is the case here, and which, as noted above and below, carries a (Continued...)

1996) (a party requesting a reduction of the exclusivity period under section 1121(d) bears a heavy burden); In re Geriatrics Nursing Home, Inc., 187 B.R. 128, 132 (Bankr. D.N.J. 1995) (a party in interest which seeks to terminate the exclusivity period bears a heavy burden); In the Matter of Interco Inc., 137 B.R. 999 (Bankr. E.D. Mo. 1992) (denying creditors' motion to modify exclusivity period to file a competing plan, stating "[A] party requesting an immediate termination of the exclusivity period as originally authorized by the statute or as it may have been extended by the Court, bears a heavy burden.").

36. As the case law clearly establishes, terminating or modifying exclusivity is an extraordinary remedy that courts "neither routinely nor cavalierly" grant. See In re Lehigh Valley Professional Sports Club, Inc., 2000 WL 290187, *3 (Bankr. E.D. Pa. 2000). Indeed, as noted by a recent bankruptcy court decision, "[i]n the 22 years since the exclusivity provision was promulgated in the Bankruptcy Reform Act of 1978, there have been only two reported cases that permitted shortening the exclusivity period."[3] Lehigh, 2000 WL 290187, *4.

37. Under section 1121(d) of the Bankruptcy Code, a debtor's exclusivity periods may only be reduced upon the showing of "cause." Courts have provided very limited grounds under which "cause" has been found to shorten a debtor's exclusivity period, including (a) gross mismanagement of the debtors' operations, (b) acrimonious feuding between the

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much more stringent burden. Similarly, In re Timbers of Inwood Forest Associates, Ltd., 808 F.2d 363 (5th Cir. 1987), also cited by the Committee, is equally unapplicable. The issue in that case revolved around adequate protection for undersecured creditors and only mentioned section 1121(d) in passing. The only case cited by the Committee actually relating to the termination of an existing exclusivity period is In re Crescent Beach Inn, Inc., 22 B.R. 155 (Banrk. D. Me. 1982), and the holding of that case supports the Debtors' position that a "heavy burden" applies.

3 The two cases referred to in Lehigh are Crescent Beach, 22 B.R. at 160-61 (Bankr. D. Me. 1982) (exclusivity terminated because there was acrimonious feuding between the debtor's principals) and Pickens Industries, Inc. v. Palmer, Palmer & Coffee (In re Texas Extrusion Corp.), 68 B.R. 712, 725 (N.D. Tex. 1986), aff'd, 844 F.2d 1142 (5th Cir. 1988) (exclusivity terminated for same reason). As noted below, the facts supporting the termination of exclusivity in Crescent Beach and Texas Extrusion are not present here.

debtor's principals, (c) the debtor's use of the exclusivity period to force creditors to accept a patently unconfirmable plan, and (d) the debtor's delay in filing a plan. See Crescent Beach, 22 B.R. at 160-161; Texas Extrusion, 68 B.R. at 725; Geriatrics, 187 B.R. at 132; In re Eagle-Picher Industries, Inc., 176 B.R. 143, 147 (Bankr. S.D. Ohio 1994); In re Texaco Inc., 81 B.R. 806, 812 (Bankr. S.D.N.Y. 1988).

38. The Committee does not, nor could it, allege that any of these factors exist in the Chapter 11 Cases. The Debtors have timely filed their Plan, and have at all times acted in good faith as they proceed toward reorganization. There are no allegations of mismanagement of the Debtors' operations and there has been no acrimonious feuding between the Debtors' officers and/or directors, as is evidenced by the fact that a Plan and Disclosure Statement have been filed. Additionally, it is undisputed that the Debtors are not pressuring creditors into acceding to a plan and there can be no question that the Plan is legally confirmable. Indeed, the very reason the Committee filed the Motion and seeks to file a competing plan is its fear that the Plan will be confirmed. Finally, there have been no allegations that the Debtors have delayed filing a plan. To the contrary, it is the Committee that is attempting to delay confirmation.

39. Notably, the mere fact that a creditor or group of creditors does not like the results of a plan is not a recognized ground to terminate exclusivity. To the extent the Committee does not support the Plan, their remedy under the Bankruptcy Code is to oppose confirmation, not to seek leave to file their own competing plan. See Interco, 137 B.R. at 1001 (denying motion to shorten exclusivity based on purported plan deficiencies, noting "[n]ot all of the terms of this proposed plan, as the plan is now structured, are acceptable to all parties," but rejecting such arguments stating "[t]his is not a hearing on confirmation of a plan").

40. Failing to allege "cause," the Committee only offers two justifications for terminating exclusivity: (a) it would like the opportunity to present an alternative plan of

reorganization, and (b) no meaningful negotiation has occurred with the Committee.[4] Both of these reasons have been held to be insufficient to satisfy the heavy burden standard required to shorten the exclusive periods under section 1121(d) of the Bankruptcy Code. Geriatrics, 187 B.R. at 134 (holding that sufficient cause is not demonstrated when creditors were prepared to offer a more favorable plan); Eagle-Picher, 176 B.R. at 147 (holding that cause was not shown where the only grounds for terminating exclusivity were that movant wanted to file an alternative plan and it had been excluded from negotiations).

41. The Committee further contends that when "plan negotiations have failed to render a consensus, it is appropriate to terminate exclusivity to rebalance the negotiation process." Motion at ¶ 32. In support of this misguided proposition, the Committee cites All Seasons Industries and Sharon Steel. However, the Committee's reliance on these cases is, once again, misplaced. Both the All Seasons and Sharon Steel cases involved a motion by the debtor to extend exclusivity, not a shortening of existing exclusivity, which, as noted above, carries a much higher burden. All Seasons, 121 B.R. at 1003; Sharon Steel, 78 B.R. at 763. Further, courts acknowledge that not all creditors will agree with their distribution under a proposed plan. Interco, 137 B.R. at 1001 ("Frequently, . . . a consensual plan cannot be obtained prior to submission of the plan to creditors"). However, these and similar issues are properly addressed during the confirmation process. They are not grounds to terminate exclusivity in order to submit an alternative plan. If they were, creditors would be able to terminate exclusivity and file

[4] For the record, the Debtors unconditionally deny any inference made by the Committee that the Committee is being excluded from the plan process. To the contrary, the Debtors have engaged in extensive discussions with the Committee and its advisors on all aspects of these cases, including the business plan, the exit financing alternatives, the valuation of the Debtors on a going-concern basis, and the terms of the Plan. However, in light of the confines of Federal Rule of Evidence 408, the Debtors are not permitted to further elaborate on the current status of ongoing plan negotiations.

a competing plan every time they did not fully support the terms of a debtor's proposed plan. Indeed, the purpose of the exclusivity period is to allow a debtor to address the divergent interests of its estate, and propose a solution in the best interests of all interested parties. Therefore, a mere dissatisfaction with the proposed treatment under a plan is not, and could not be, sufficient cause to terminate exclusivity.

42. Moreover, the Debtors note that there is sufficient time between now and confirmation for the parties to continue, and perhaps successfully complete, negotiations for a consensual plan. The Debtors are still hopeful that a consensual confirmation will occur, as it would facilitate a smooth and efficient transition out of the chapter 11 process. However, it is imprudent to delay the confirmation process or to terminate exclusivity simply because the Debtors have filed a Plan that does not presently have the support of the Committee. As stated above, the Debtors have accomplished all they can in bankruptcy. In order to conclude the restructuring process, continue operating and improve revenue, the Debtors must proceed toward confirmation. If the plan process is delayed or the exclusivity periods terminated, the Debtors will suffer a significant loss in value, resulting in a reduction in the distribution to creditors.

B. <u>The Committee's Proposed Term Sheet Is Not Feasible.</u>

43. Although the Committee has failed to establish cause to terminate exclusivity and file a competing plan, it should also be noted that the term sheet attached to the Motion, upon which the Committee claims it would base its alternative plan, is not feasible. The Committee's proposed plan requires an exit facility loan in the amount of $420 million <u>and</u> reinstates the Secured Lenders' old secured debt in the amount of $775.9 million. It is implausible to believe that any lender would loan the Debtors $420 million if the old secured debt is not expunged. Consequently, the Committee's term sheet is a "straw man"—even if the

Committee was allowed to file a competing plan, its plan would not be feasible and, as a result, would further simply complicate and delay the Debtors' exit from chapter 11.

C. Terminating Exclusivity and Filing a Competing Plan Would Not Be Beneficial to the Estates.

44. The filing of a competing plan of reorganization at this stage of the Chapter 11 Cases would not be beneficial to the Debtors' estates. At best, the Debtors believe that the filing of a competing plan during the critical solicitation process would be confusing and inject uncertainty into the overall reorganization process. The Plan represents a fair and prompt distribution to all parties with an economic interest in the estates, as will be demonstrated at confirmation. Allowing the Committee to file a plan now would unfairly and artificially bolster its negotiating posture by increasing the possibility for additional delay, and, one supposes, in generating additional negotiating leverage in the weeks before the confirmation hearing. This is evident by the fact that the Chapter 11 Cases have been pending for over 15 months and only now—after the Debtors filed the Plan and the cases are approaching confirmation—does the Committee, for the first time, propose a "term sheet" for a competing plan. The statutory exclusivity periods are designed to protect debtors from precisely this type of gamesmanship.

D. The Committee Consented to the Deadlines in the DIP Agreement and the Standstill Agreement, therefore, it Cannot Now Object to Their Effect.

45. The Committee, not so subtlety, suggests that the Debtors are trying to "steamroll" confirmation through before year end so that management's bonuses and the Debtors' professionals' restructuring and performance fees will be earned. This could not be farther from the truth. As noted above, if the Debtors do not confirm a plan before November 18, 2003, they will default under both the DIP Agreement and Standstill Agreement, effectively sounding a death knell for the company. Further, even if the DIP Lenders and the Secured Lenders agreed to extend the DIP Agreement and the Standstill Agreement,

respectively, which appears unlikely given the unanimity requirement among the approximately 60 lenders, the Debtors have legitimate business concerns that any delay would threaten their ability to sustain the positive trends they have achieved up to this point.

46. Further, the Committee exaggerates the significance of the December 18 deadline on employee bonuses and professionals' success fees. First, the actual deadline to avoid a default under the Debtors' lending facilities is November 18, not December 18. If the Debtors do not confirm a plan prior to November 18 they will default under the DIP Agreement and the Standstill Agreement, likely resulting in the liquidation of the company and conversion to chapter 7, rendering any proposed employee bonuses and professionals' performance fees moot.

47. Second, the Committee, which actively participated in the negotiation of each bonus plan and professional retention described in their Motion, knows that a majority of the employee bonuses and professionals' performance fees are merit-based and only portions of such bonus payments and fees are triggered by the confirmation date. For instance, the KERP is paid in four (4) equal installments, only the last of which is paid if a plan is confirmed by December 18. With regard to Mr. Muhlhauser specifically, only half of his proposed bonus under the KERP is paid if a plan is confirmed by December 18, not $1,000,000 as claimed by the Committee in the Motion. Additionally, none of Mr. Muhlhauser's benefits under his amended employment agreement are triggered by a date certain for confirmation of a plan. Similarly, neither the Income Protection Plan nor the Corporate Bonus Plan have any ties to the December 18 date. With regard to the performance fee contemplated under the Alix Application, only a portion of the maximum amount of the compensation is triggered by confirming a plan before December 18, and such payment must be approved upon application to the Court. A substantial portion of Alix's performance fee is merit-based, without reference to confirmation of a plan, and is earned only if the Debtors achieve various EBITDAR targets. Under the

Blackstone Application, Blackstone will receive a restructuring fee even if a plan is confirmed after December 18, 2003, and in any event any restructuring fee it earns must be approved by the Court.

48. The Committee feigns shock and surprise that the Debtors and its advisors are motivated to achieve a prompt exit from chapter 11. However, the Debtors have been consistently open and vocal, both in and out of this Court, about their intention to complete their restructuring as quickly as possible in order to promote and preserve the business. Moreover, the Committee not only participated in the negotiations with respect to all of the bonuses and deadlines described above, but consented to them as well. Finally, the Committee was fully aware of the deadlines under the DIP Agreement and the Standstill Agreement and consented to such dates by supporting approval the interim and final DIP orders.

Conclusion

49. In conclusion, the plan confirmation process should not be stayed, or otherwise delayed, because to do so would directly conflict with one of the primary purposes of chapter 11, which is to exit bankruptcy as promptly and efficiently as possible. Further, despite the Committee's present objection, the proposed settlement of the Adversary Proceeding in the Plan is legally permissible. In any event, this is an issue that should be addressed at confirmation, and it is not grounds to delay the plan process. Finally, the Committee has failed to present any evidence, let alone sufficient evidence under the heightened burden applicable here, to demonstrate cause to terminate the exclusive period for solicitation of the Plan. The Committee is free, if it chooses, to oppose confirmation of the Plan. It has no right, however, to obtain the unprecedented and dangerous relief requested in the Motion.

Notice

50. Notice of this Objection has been given to (a) the Office of the United States Trustee, (b) counsel for the prepetition agent to the prepetition secured lenders, (c) counsel for the postpetition lenders, (d) counsel for the Committee, (e) counsel to the Equity Committee, and (f) those persons who have requested notice pursuant to Federal Rule of Bankruptcy Procedure 2002. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

WHEREFORE, the Debtors respectfully request that the Court enter an order denying the Motion and granting the Debtors such other and further relief as is proper and just.

Dated: August 12, 2003

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