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), et seq. (Jointly Administered)
Debtors.	:	**Objections due by: August 19, 2003 at 4:00 p.m.** **Hearing Date: August 25, 2003 at 10:00 a.m.**

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO APPROVAL OF THE DEBTORS' DISCLOSURE STATEMENT FOR DEBTORS' FIRST AMENDED JOINT PLAN OF REORGANIZATION UNDER CHAPTER 11 OF THE BANKRUPTCY CODE

(relates to Pleading Nos. 2097, 2106)

The Official Committee of Unsecured Creditors (the "Committee") of Exide Technologies ("Exide") and its related debtors and debtors-in-possession in the above captioned cases (collectively, the "Debtors"), by and through its undersigned counsel, hereby files its objection to approval of the Disclosure Statement For Debtors' First Amended Joint Plan Of Reorganization Under Chapter 11 Of The Bankruptcy Code (the "Disclosure Statement") (Docket No. 2096), and in support hereof states as follows:

BACKGROUND

1. On April 15, 2002, Exide Technologies, 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 Title 11 of the United States Code. On November 21, 2002, Dixie Metals Company and Refined Metals Corporation, each an affiliate of the Original Debtors (the "Additional Debtors"), filed voluntary petitions for relief under Chapter 11 of the Bankruptcy

[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.

Code. An order consolidating the cases of the Original Debtors and the Additional Debtors was entered by the Court on November 29, 2002.

2. 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. No trustee or examiner has been appointed in these Chapter 11 cases.

3. On April 29, 2002, the Office of the United States Trustee appointed the Committee. The Committee selected Akin Gump Strauss Hauer & Feld LLP and Pepper Hamilton LLP as its counsel.

SUMMARY OF OBJECTION

4. Exide has filed a First Amended Joint Plan of Reorganization (the "Plan") that proposes to give all the value of the Debtors' worldwide business to its management team and the current holders of the prepetition bank debt. The general unsecured creditors – whose claims exceed $1 billion in the aggregate -- are getting $4.4 million (or less) to share, resulting in a distribution of potentially less than a penny on the dollar, and the holders of the Debtors' 10% Senior Notes will receive less than .8% of the Debtors' New Common Stock, subject to dilution. The holders of the Debtors' 2.9% Convertible Notes (which are also general unsecured claims) and the general unsecured creditors of Exide's subsidiaries get absolutely nothing under the Plan. One of the noteworthy features of the Plan is that it purports to settle the adversary proceeding brought by the Committee and R2 Investments, LDC against the prepetition lenders (the "Adversary Proceeding").

5. The Disclosure Statement cannot be approved for a variety of reasons. First and foremost, it is impenetrable. It obfuscates rather than elucidates the workings of the Plan, claims against the Debtors, management bonuses and a variety of other topics. It also

contains a number of specific defects with respect to the adequacy of disclosure with respect to Plan terms. Moreover, the Plan is unconfirmable on its face and, as a result, the Disclosure Statement should not be approved.

6. As discussed in more detail below, and of particular concern, is the lack of adequate information about the Adversary Proceeding. A central feature of the Plan is the settlement of the Adversary Proceeding. The outcome of that litigation will have a material affect on the distributions to ***all*** creditors in these cases. In order to provide creditors with adequate information about the litigation, there would have had to have been a complete evaluation of the litigation and the likely outcome. However, no such evaluation has been done or is even possible because the litigation is in its early stages and the defendants have consistently opposed and forestalled meaningful discovery.

GROUNDS FOR OBJECTION

7. The Debtors filed the Disclosure Statement on July 25, 2003, shortly after the filing of their Debtors' First Amended Joint Plan Of Reorganization Under Chapter 11 Of The Bankruptcy Code (the "Plan"). Together, the Disclosure Statement and Plan represent over 300 pages of text, not including the 65 pages of the Motion For The Entry Of An Order (A) Approving The Debtors' Disclosure Statement; (B) Scheduling A Hearing To Confirm The Debtors' Plan; (C) Establishing A Deadline For Objecting To The Debtors' Plan; (D) Approving Form Of Ballots, Voting Deadline And Solicitation Procedures; And (E) Approving Form And Manner Of Notices (the "Motion To Approve Disclosure Statement") filed on July 30, 2003 (Docket No. 2106).

8. On August 1, 2003, the Committee filed a Motion 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 (Docket No. 2116). The Court has ruled that the hearing on that motion will be held on August 22, prior to the hearing on the Disclosure Statement. This objection is not intended to prejudice the Committee's position as stated in that motion. The Committee firmly believes that the best course of action is to stay consideration of the Disclosure Statement and other Plan related pleadings until, among other things, the estates obtain a resolution of the Adversary Proceeding and the Debtors engage in serious discussions with the Committee about the Plan.

A. THE DISCLOSURE STATEMENT LACKS ADEQUATE INFORMATION ABOUT WHAT CREDITORS CAN EXPECT TO RECEIVE UNDER THE PLAN.

9. Approval of a disclosure statement is governed by § 1125(b) of the Bankruptcy Code, which requires that a disclosure statement contain "adequate information." Adequate information is a term of art under the Bankruptcy Code:

> (1) "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan; and
>
> (2) "investor typical of holders of claims or interests of the relevant class" means investor having—
>
> (A) a claim or interest of the relevant class;
>
> (B) such a relationship with the debtor as the holders of other claims or interests of such class generally have; and
>
> (C) such ability to obtain such information from sources other than the disclosure required by this section as holders of claims or interests in such class generally have.

10. Although there is no fixed formula for determining the adequacy of information set forth in a disclosure statement, courts over the years have required a minimum

threshold of detail expressed as a laundry list of factors, such as those set forth in In re Metrocraft Publishing Servs., Inc., 39 B.R. 567 (Bankr. N.D.Ga. 1984):

(1) the events which led to the filing of a bankruptcy petition;

(2) a description of the available assets and their value;

(3) the anticipated future of the company;

(4) the source of information stated in the disclosure statement;

(5) a disclaimer;

(6) the present condition of the debtor while in Chapter 11;

(7) the scheduled claims;

(8) the estimated return to creditors under a Chapter 7 liquidation;

(9) the accounting method utilized to produce financial information and the name of the accountants responsible for such information;

(10) the future management of the debtor;

(11) the Chapter 11 plan or a summary thereof;

(12) the estimated administrative expenses, including attorneys' and accountants' fees;

(13) the collectability of accounts receivable;

(14) financial information, data, valuations or projections relevant to the creditors' decision to accept or reject the Chapter 11 plan;

(15) information relevant to the risks posed to creditors under the plan;

(16) the actual or projected realizable value from recovery of preferential or otherwise voidable transfers;

(17) litigation likely to arise in a nonbankruptcy context;

(18) tax attributes of the debtor; and

(19) the relationship of the debtor with affiliates.

Id. at 568.

11. On many occasions, the Third Circuit has underscored the importance of providing adequate information to creditors. For instance, in Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414 (3rd Cir. 1988), the Third Circuit stated:

> The importance of full disclosure is underlaid by the reliance placed upon the disclosure statement by the creditors and the court. Given this reliance, we cannot overemphasize the debtor's obligation to provide sufficient data to satisfy the Code standard of adequate information.

Id. at 417. In considering whether a disclosure statement contains adequate information, this Court has reminded us that it is also important to "keep in mind the audience." In re Zenith Elecs. Corp., 241 B.R. 92, 99 (Bankr. D.Del. 1999).

12. Exide's business and the history of these cases suggest, at first blush, that creditors should expect to receive a substantial dividend under any plan. Although the Debtors are acting as debtors in possession with a fiduciary duty to the creditors of their respective estates, they have proposed a plan which seeks to make only a nominal distribution to more than $1 billion of claims held by the Debtors' diverse unsecured creditors. While the Committee reserves the right to contest confirmation on this and other grounds, the Disclosure Statement is hopelessly inadequate to inform creditors about their treatment under the Plan and why they will get next to nothing or, in some cases, nothing.

13. The Disclosure Statement contains little more than a verbatim restatement of the governing Plan provisions, using multiple layers of defined terms and numerous cross-references to the Plan itself and other parts of the Disclosure Statement. It is impossible to conclude that a typical unsecured creditor will be able to understand how the Plan works and how to vote on the Plan by reading the Disclosure Statement. Even those creditors who are sophisticated enough to comprehend the text of the Disclosure Statement are unlikely to spend

the time necessary to understand its nuances. In short, the Disclosure Statement falls far short of the standard for adequate information required by 11 U.S.C. § 1125.

14. An example that illustrates the problem with the Disclosure Statement is the proposed treatment of Class P4-A Non-Noteholder General Unsecured Claims. To begin with, an ordinary trade creditor would not be able to tell if it is the holder of a "Class P4-A Non-Noteholder General Unsecured Claim" without reading the Plan. Even if a creditor were to ascertain that it falls within that class, it must then decipher this explanation of its treatment:

> Holders of Allowed Class P4-A Non-Noteholder General Unsecured Claims will receive, in full and final satisfaction of their Class P4-A Claims, (A) a Pro Rata distribution of the Class P4-A Cash Pool, plus (B) if the Class P4 Cash Pool Excess is greater than zero, a Pro Rata distribution of the Class P4 Cash Pool Excess, as determined based on the aggregate of all Allowed Class P4 Claims.

Disclosure Statement, p.3.

15. This description contains no fewer than seven defined terms. Because none of these terms are defined in the Disclosure Statement, a creditor must look to the Plan to decipher this description. The description of the treatment of Class P4-A claims also requires an understanding of the definition of "Class P4-A Cash Pool" in the Plan:

> "Class P4-A Cash Pool" means Cash in the amount of $4,400,000.00; provided, however, that such amount shall be decreased in the event the aggregate amount of Allowed Class P4-A Non-Noteholder General Unsecured Claims, after final determination by the Bankruptcy Court, is less than the estimate of Allowed Class P4-A Non-Noteholder General Unsecured Claims as set forth in the section of the Disclosure Statement entitled "SUMMARY – Treatment of Claims and Equity Interests" such that the Pro Rata percentage recovery by Holders of Class P4-A Non-Noteholder General Unsecured Claims is equivalent to the Pro Rata percentage recovery by Holders of Class P4-B 10% Senior Note Claims.

Plan, Art. I, ¶ B.29. This convoluted definition of *part* of what unsecured creditors should expect to receive under the Plan is distorted enough to confound a sophisticated reader, much

less "enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class . . . . to understand the Plan."

16. But we are not done yet. Even if the average creditor manages to decipher the definition of Class P4-A Cash Pool, there is another half of the description of the treatment of Class P4-A Non-Noteholder General Unsecured Claims. Subsection (B) requires an understanding of the clause, "Class P4 Cash Pool Excess" to understand the Plan:

> "Class P4 Cash Pool Excess" means that amount of Cash, if any, that the Class P4 Cash Pool is decreased so that the Pro Rata percentage recovery by holders of Holders of Class P4-A Non-Noteholder General Unsecured Claims is equivalent to the Pro Rata percentage recovery by Holders of Class P4-B 10% Senior Note Claims."

Plan, Art. I, ¶ B.30.

17. If the creditor manages to grasp this elusive concept, then the additional amount the creditor can expect to receive is "a Pro Rata distribution of the Class P4 Cash Pool Excess, as determined based on the aggregate of all Allowed Class P4 Claims." Disclosure Statement, p.3. That is, "if the Class P4 Cash Pool Excess is greater than zero." Id. And, although further analysis in this objection would not add significantly to this discussion, the creditor must also understand the mechanism established for the "recovery by Holders of Class P4-B 10% Senior Note Claims," because the treatment of Class P4-A creditors is tied to the treatment of Class P4-B creditors.

18. The foregoing discussions protracted for a reason: it illustrates the most fundamental problem with the Disclosure Statement: it is incomprehensible. And that is true not just for the treatment of general unsecured claims, it is also true of the treatment of Prepetition Credit Facility Claims and Class P4-B 10% Senior note claims.

19. Creditors must also understand what the *other* creditors and parties in interest are projected to receive under the Plan in order to make an informed judgment about the Plan. The Debtors are projecting that under the Plan, holders of claims under the prepetition credit facility are expected to receive a distribution of between 70.2% and 72% of the amount of their claims. Despite the fact that the Debtors anticipate distributing the lions' share of consideration under the Plan to this single class of creditors, the Debtors' description of their obligations under the prepetition credit facility and the treatment of those claims is limited to a half page of generic categorizations and *in haec verba* recitation of the Plan treatment of this class of creditors.

20. Because creditors will not know what to expect to receive if the Court approves the Disclosure Statement in its present form, approval of the Disclosure Statement should be denied.

B. THE DISCLOSURE STATEMENT LACKS ADEQUATE INFORMATION ABOUT THE FORFEITURE OF ONE OF THE ESTATES' MORE VALUABLE ASSETS.

21. In a single sentence, deep in the Disclosure Statement, the Debtors inform creditors that

> [p]ursuant to Bankruptcy Rule 9019 and in consideration for the classification, distribution, releases and other benefits provided under the Plan including . . . the distributions to be made to Holders of General Unsecured Claims . . . the provisions of the Plan shall constitute a good faith settlement of all Claims . . . including but not limited to . . . the Creditors Committee/R2 Adversary Proceeding . . . .

A creditor who wants to know what the Committee/R2 Adversary Proceeding means would have to look to the Plan – not elsewhere in the Disclosure Statement – for an explanation. However, neither the Disclosure Statement nor the Plan explain what is at stake in the litigation and what positive results could flow to unsecured creditors if the litigation is resolved in favor of the

plaintiffs. The Disclosure Statement also fails to discuss how the so-called settlement was negotiated, why or how it can be characterized as a "good faith" settlement, who negotiated the settlement, what investigation of the claims asserted in the Committee/R2 Adversary Proceeding the Debtors did before agreeing to the settlement or that the Committee opposes the settlement. The Disclosure Statement also fails to disclose that no meaningful evaluation of the merits of the litigation has been or even could be done because the litigation is in its early stages and the defendants have consistently opposed meaningful discovery. All this information must be included if creditors are to understand the significance of the unilateral "settlement" of the litigation by the Committee against the Pre-Petition Lenders.

22. The Disclosure Statement's inadequate description of the Adversary Proceeding and the proposed settlement should be treated as the failure to describe an asset potentially available for distribution. Creditors cannot make an informed decision on whether the Debtors have made an accurate assessment of the value of this claim or whether this claim is being sacrificed for a plan that provides substantial benefits to the prepetition lenders and the Debtors' management at the expense of creditors.

23. For instance, the Debtors have not adequately disclosed the following:

a. the estimated value of the Adversary Proceeding to the estates,

b. the current status of the Adversary Proceeding,

c. the basic facts of the Adversary Proceeding, other than that the Committee is "alleging impropriety with respect to the Prepetition Credit Facility";

d. that the Debtors voluntarily waived their right to bring this action but the right to bring this action was reserved for the Committee; and

e. that the Committee continues to believe that the estates should pursue the litigation;

f. the potential affect of the litigation on distributions to creditors; and

g. the limited amount of discovery that has been provided in the Adversary Proceeding.

24. It is also improper for the Debtors to fail to disclose the possible effect of a successful outcome in the adversary proceeding on the Liquidation Analysis. Given the fact that a substantial amount of secured debt could be subordinated or become unsecured, the effect on a Chapter 7 liquidation (or an orderly liquidation under Chapter 11) is potentially enormous. See Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. GMC (In re Krystal Cadillac-Oldsmobile GMC Truck, Inc.), 2003 U.S. App. LEXIS 14965, at *16 (3rd Cir.) ("Debtors must therefore identify and disclose all 'property of the estate' including all of the debtor's 'legal and equitable' property interests. This includes such contingent assets as any cause of action [the debtor] may have. . . .").

25. The Adversary Proceeding may represent one of the most valuable assets owned by the Debtors' estates, but in the Disclosure Statement the Debtors have made every attempt to obscure the significance of the litigation and downplay its importance in this case. It goes without saying that hypothetical reasonable creditors would want to know that the Committee, charged with representing the interests of unsecured creditors, believes that prosecution of the Adversary Proceeding is more likely to result in a recovery to creditors than confirmation of the Plan. The Disclosure Statement, which fails to make creditors aware of this, should not be approved.

C. THE DISCLOSURE STATEMENT LACKS ADEQUATE INFORMATION ABOUT THE BENEFITS TO BE CONFERRED ON THE DEBTORS' MANAGEMENT IN CONNECTION WITH THE PLAN.

26. Under the Plan, it appears (but it is not clear) that 92% of the Debtors' equity (on an undiluted basis) is being distributed to the holders of prepetition credit facility claims and that 10% senior notes will receive .8% of the Debtors' equity. It appears (but once again is not clear) that the other 7-10% of the Debtors' equity has been set aside for the Debtors' management team. However, the disclosures made in connection with the Company Incentive Plan in the text of the Disclosure Statement are not specific, do not name the individuals entitled to receive bonuses, and do not offer any factual justification to award as much as 10% of the fully-diluted New Exide Common Stock to management. Because it is the Debtors' management, allied with the prepetition lenders, who are sponsoring the Plan, and because the incentive compensation alluded to in the Disclosure Statement and Plan creates at least the appearance of a conflict of interest, the details of the incentive compensation should be included in the Disclosure Statement.

D. THE DISCLOSURE STATEMENT SHOULD NOT BE APPROVED BECAUSE CERTAIN SPECIFIC DISCLOSURES ARE INADEQUATE.

27. Certain aspects of the Plan are not properly disclosed, and approval of the Disclosure Statement should, therefore, be denied. The following are examples of the inadequate disclosures.

28. The artificially low valuation of the Debtor's enterprise value is the key to the Plan which leaves nothing for general unsecured creditors. The discussion of the valuation of Exide's business as it appears at pages 20 through 22 of the Disclosure Statement is deficient and flawed. The Committee has serious concerns with respect to the methodology used in arriving at the valuations set forth in the Disclosure Statement. Just as importantly, the extraordinarily low

enterprise value arrived at by the Debtors is misleading to unsecured creditors who are being asked to vote on the Plan. At a minimum, creditors should be told that the Committee believes that there is significant value in the Debtors that is not accounted for, which value should go to unsecured creditors.

29. The Plan provides for broad releases of claims the Debtors or third parties hold against the Releasees.[2] However, there is no discussion whatsoever concerning whether the Debtors have knowledge of any actual or threatened claims against insiders or other released parties that might be affected by the Plan, the consideration being given for the releases or what other exceptional circumstances exist to support the releases. In fact, given the scope of the proposed released parties, it is likely that many of the parties to be released would not even be known to the average hypothetical creditor in advance.

30. The Disclosure Statement also fails to provide adequate information with respect to the following issues:

a. Under the Plan the holders of the Debtors' 2.9% Convertible Notes get no distribution, notwithstanding the fact that the notes are general unsecured claims against Exide. The Disclosure Statement must be modified to include a discussion of this issue.

b. Class S4 General Unsecured Claims, the holders of claims against the Exide subsidiaries, get nothing under the Plan. The Disclosure Statement offers not one word of discussion to support or explain this treatment.

c. According to Exide, one of the primary factors that led it to file the Plan when it did was the fact that the Standstill Agreement expires on December 18, 2003.

[2] The Committee notes that it does not appear that the term "Releasees" is defined in the Disclosure Statement, even though this defined term describes the parties to be released.

However, the Disclosure Statement does not discuss what efforts the Debtors have undertaken to negotiate an extension of the Standstill Agreement and what alternatives may be available to protect the Debtor's operations outside the United States if the Standstill Agreement expires before a Plan is confirmed.

d. There is no discussion or valuation of avoidance actions in the Disclosure Statement. These actions could be used to enhance recoveries for unsecured creditors. The Disclosure Statement must be revised to describe what avoidance claims there are, their value and estimated net recoveries on these claims.

e. The Disclosure Statement states only that there are $322,162,758 in general unsecured claims. No effort is made to provide any detail as to what claims are included in this amount. In particular, there is no indication of what portion, if any, of this amount represents PITWD claims or claims for environmental clean up and similar causes of action, even though the Debtors have reserved $78.3 million for environmental, safety and health claims. Moreover, it is also not clear what effect rejection damage claims have on this estimate and it is possible that the pool of unsecured claims will be bloated tremendously as a result of the rejection of executory contracts. The Debtors should be required to clarify the components of the general unsecured claims class.

f. The process proposed in an attachment to the Plan for resolving PITWD claims is unclear.

31. Finally, the Committee opposes the Plan and has published a term sheet for a competing Plan that would reinstate the prepetition bank debt and give the reorganized Debtors' equity to its unsecured creditors. In order to insure that unsecured creditors have

"adequate information," the Disclosure Statement must be modified to prominently disclose the Committee's opposition to the Plan and the terms of the committee's proposed plan.

E. THE DISCLOSURE STATEMENT SHOULD NOT BE APPROVED BECAUSE THE PLAN IS UNCONFIRMABLE.

32. The Plan also contains numerous objectionable provisions which will prevent its confirmation. These objections should be considered by the Court before the Debtors spend hundreds of thousands of dollars soliciting acceptance of a plan the confirmation of which must ultimately be denied as a matter of law. In re Beyond.com Corp., 289 B.R. 138 (Bankr. N.D.Cal. 2003) (the court will deny approval of a disclosure statement if the plan could not possibly be confirmed); In re United States Brass Corp., 194 B.R. 420, 422 (Bankr. E.D.Tex. 1996). In this case, the Plan is unconfirmable and, therefore, the Disclosure Statement should not be approved. See In re Curtis Ctr. Ltd. Partnership, 195 B.R. 631, 638 (Bankr. E.D.Pa 1996) (citing In re Eastern Maine Elec. Co-Op, Inc., 125 B.R. 329, 333 (Bankr. D.Me. 1991)); In re 226 Washington Assoc., 141 B.R. 275, 288 (Bankr. E.D.N.Y.), aff'd, 147 B.R.(E.D.N.Y. 1992); In re Bjolmes Realty Trust, 134 B.R. 1000, 1002 (Bankr. D.Mass. 1991); In re Atlanta West V.I., 91 B.R. 620 (Bankr. N.D.Ga 1988); In re Monroe Well Serv., Inc., 80 B.R.324, 333 (Bankr. E.D.Pa 1987); In re Pecht, 57 B.R. 137, 139 (Bankr. E.D.Va 1996). Even if the Court does not consider these objections before the Debtors' solicitation of acceptances, there should be adequate disclosure of the risk that the Plan may be unconfirmable unless such provisions are removed.

33. The first objection to confirmation that would effectively render the Disclosure Statement moot is the Debtors' proposal to approve and effectuate a compromise of the Adversary Proceeding under the Plan. At the inception of these cases, the Debtors expressly waived their right to pursue all actions against their prepetition lenders, leaving such actions to

the Committee and other parties in interest to pursue. Thus, it is the Committee, not the Debtors, that has been authorized to, and has, prosecuted the Adversary Proceeding. The Debtors should not be permitted to "settle" litigation to which they are not even a party and until that litigation is either settled or concluded the Debtors should not allocate the value of their business to any constituency.

34. The next dispositive objection to confirmation is the improper treatment of certain classes as impaired. Holders of administrative claims, DIP facility claims, priority claims, and "other secured claims" are scheduled in the Plan as unimpaired. To the extent each holder of claims in any of these categories "is entitled to receive a distribution of property in connection with the Plan," such party shall be deemed to have unconditionally agreed to the expansive releases described in Article X of the Plan. A class of claims or interests is impaired unless the plan "leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest." 11 U.S.C. § 1124(1). Even if such claimants are entitled to be paid the allowed amount of their claims in full, the deemed release provisions may affect other rights arising from their claims, and their claims are therefore impaired under the Plan. This matter could be resolved at confirmation, except that the Debtors are proposing in their motion for approval of the Disclosure Statement that solicitation packages and ballots *not* be sent to parties that they deem to have accepted the Plan. Therefore, the Disclosure Statement should not be approved for distribution.

35. Third, the Plan provides for improper releases and exculpatory provisions in many respects:

(a) The Plan contemplates that upon the Effective Date, the Debtors will be deemed to have released any claims[3] against the "Releasees." To the extent such claims exist, they must be disclosed, and the Debtors should be required to demonstrate what consideration the Debtors' estates are receiving in exchange for the releases. This includes both claims under the Adversary Proceeding and other claims. Otherwise, creditors are without adequate information to determine the extent to which confirmation may deprive them of a better result through liquidation;

(b) The Plan requires that parties who "accept" the Plan or who become "entitled to receive a distribution of property in connection with the Plan shall be deemed to have unconditionally" released any claims against the Releasees.[4] To the extent a party does not vote to accept the Plan and agree to the release, a release cannot be imposed upon such party without adequate financial consideration grounded upon "sufficient evidentiary and legal basis." See Gillman v. Continental Airlines (In re Continental Airlines), 203 F.3d 203, 214 (3rd Cir. 2000); and

(c) The scope of releases and exculpatory language under the Plan is similarly improper. Such releases are absolute in nature and do not carve out claims relating to inappropriate conduct. To the extent the Plan contains releases and exculpation, the Plan is not confirmable to the extent such releases apply to claims for willful misconduct or gross negligence. See In re PWS Holding Corp., 228 F.3d 224, 246 (3rd Cir. 2000).

36. Obscured among the Plan and Disclosure Statement provisions describing executory contracts is a provision deeming and treating virtually all indemnification obligations of the Debtors to be executory contracts "that are assumed by the Reorganized Debtors pursuant hereto and pursuant to section 365 of the Bankruptcy Code as of the Effective Date." Plan Art.

[3] The breadth of the releases in Article X is much more encompassing than merely covering claims. For brevity's sake, the Committee is not reproducing the entire laundry list of rights being released.

[4] The Committee does not believe that this provision is per se improper, to the extent a party has expressly accepted the Plan. See, e.g., In re Continental Airlines, 203 F.3d 203, 214 n. 11 (3rd Cir. 2000) (citing In re Zenith Electronics, 241 B.R. 92, 111 (Bankr. D.Del. 1999). To the extent that a party's acceptance of the Plan is "deemed acceptance" without an express indication by the claimant, however, the Committee believes such release is improper.

VI, ¶ D; Disclosure Statement Art. III, ¶ I. These provisions include "obligations of the Debtors to indemnify any Person serving at any time after the Initial Petition Date as one of their directors, officers or employees . . . ." Id. Although obligations under an indemnification agreement may, in certain cases, be "executory contracts" as that term is used in § 365 of the Bankruptcy Code, this provision is overly broad, factually unsupported, and contextually suspicious. To the extent any indemnification obligations meeting the criteria of these provisions exist, the Debtors should disclose them, analyze whether each is in fact executory, disclose such facts as are necessary to establish a record to justify their assumption as executory contracts.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, the Committee respectfully requests that this Court enter an order denying approval of the Disclosure Statement, and grant such other and further relief as this Court deems just and proper.

Dated: August _____, 2003
Wilmington, Delaware

Respectfully submitted,

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