UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	
EXIDE TECHNOLOGIES, *et al.*,	:	Case Number 02-11125 (KJC)
	:	
Debtors.	:	**Hearing Date: 9/23/03 at 9:30 a.m.**
	:	**Objections Due: 9/18/03 at 4:00 p.m.**

UNITED STATES TRUSTEE'S OBJECTION TO DEBTORS' MOTION TO FILE EXIT FINANCING FACILITY FEE LETTER UNDER SEAL(D.I. 2362)

In support of her Objection to the Debtors' Motion to File an Exit Facility Fee Letter Under Seal (the "Seal Motion"), Roberta A. DeAngelis, the Acting United States Trustee for Region 3 ("UST"), by and through her counsel, avers:

1. This Court has jurisdiction to hear and determine this Objection.

2. Pursuant to 28 U.S.C. § 586(a)(3), the UST is charged with administrative oversight of the bankruptcy system in this District. Such oversight is part of the UST's overarching responsibility to enforce the laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Systems, Inc. (In re Columbia Gas Systems, Inc.),* 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that UST has "public interest standing" under 11 U.S.C. § 307 which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the UST as a "watchdog").

3. Pursuant to 11 U.S.C. § 307, the UST has standing to be heard on the issues raised by this Objection.

4. On September 12, 2003, the Debtors filed a Motion for Entry of An Order Authorizing the Debtors to Enter Agreements for Their Exit Financing Facility and to Pay Fees and Expenses in Connection Therewith Pursuant to 11 U.S.C. §§ 105 and 363(b) (the "Financing

Motion"), Docket Index No. 2361. The Financing Motion refers to a "Fee Letter" which is the subject of the Seal Motion. Pending a ruling on the Seal Motion, the Fee Letter has not been attached to the Financing Motion; accordingly, the Financing Motion presents an incomplete and seriously misleading description of the proposed exit financing facility.

5. The Seal Motion asserts that the fee letter contains "detailed proprietary information that is

> generally considered by DB [Deutsche Bank AG, Cayman Islands Branch and Deutsche Bank Securities, Inc.], *as well as the investment banking and finance lending industry as a whole*, to be highly valuable and confidential information that is not generally disclosed to the public by financial institutions, or otherwise made accessible to competing financial institutions.

(Emphasis added).

6. The Seal Motion recites that public disclosure of the "proprietary fee information" contained in the Fee Letter would cause significant competitive harm to DB by providing sensitive pricing information to DB's customers. The Seal Motion accordingly seeks to prevent disclosure of DB's fees pursuant to 11 U.S.C. § 107(b)[1/] and FED.R.BANKR.P. 9018.[2/]

[1/]11 U.S.C. § 107(b) provides:

> On request of a party in interest, the bankruptcy court shall, and on the court's own motion, the bankruptcy court may –
>
> (1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or
>
> (2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.

[2/]Fed.R.Bankr.P. 9018 provides:

> On motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of

7. The Supreme Court stated in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 591 (1978): "It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." Unanimity in the case law demonstrates that there is a common law right of access to judicial proceedings and to inspect judicial records in civil matters. In *Orion Pictures Corp. v. Video Software Dealers Assoc.,* 21 F.3d 24 (Cir. 2 1994), the Court stated the general rule as: "...a strong presumption of public access to court records.... This preference for public access is rooted in the public's first amendment right to know about the administration of justice. It helps safeguard the 'integrity, quality, and respect in our judicial system." (21 F. 3d 24, 26 (citations omitted)). *See also In re Continental Airlines,* 150 B.R. 334 (D. De. 1993), where the court noted "...the strong presumption in favor of public access to judicial records and papers...." Accord, *In re Foundation for New Era Philanthropy,* 1995 WL 478841 (E.D. Pa. 1995); *In re Barney's Inc.,* 201 B.R. 703 (Bankr. S.D.N.Y. 1996).

8. In the bankruptcy context, the right of public access is prescribed by the Bankruptcy Code: "Except as provided in subsection (b) of this section, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge." 11 U.S.C. § 107(a). Limited exceptions to the general rule of full public access are contained in Section 107(b) and FED.R.BANKR.P. 9018. *See*

> a trade secret or other confidential research, development, or commercial information, (2) to protect any entity against scandalous or defamatory matter contained in any paper filed in a case under the Code, or (3) to protect governmental matters that are made confidential by statute or regulation. If an order is entered under this rule without notice, any entity affected thereby may move to vacate or modify the order, and after a hearing on notice the court shall determine the motion.

notes 1 and 2, *supra*. However, the burden is on the moving party to show that a request to place documents under seal falls within the parameters set forth in Section 107(b) and FED.R.BANKR.P. 9018 by demonstrating "that the interest in secrecy outweighs the presumption in favor of access." *See In re Continental Airlines,* 150 B.R. 334 (D. De. 1993).

9. In *In re Foundation for New Era Philanthropy,* 1995 WL 478841 (Bankr. E.D. Pa.), the Court examined a request to place under seal the creditor lists required to be filed pursuant to FED.R.BANKR.P. 1007. The debtor claimed that it needed to keep its list of donors anonymous. The court rejected the request, stating:

> The provision [Section 107(b)] was not intended to save the debtor or its creditors from embarrassment, or to protect their privacy in light of countervailing statutory, constitutional and policy concerns...Full disclosure of bankruptcy records may help insure that the bankruptcy statute is applied effectively in this case...Thus, there are significant public concerns which favor full public access to all documents filed in this case.

1995 WL 478841, 4-5.

10. In *Orion*, *supra*, the court defined commercial information as: "information which would cause an 'unfair advantage to competitors by providing them information as to the commercial operations of the debtor." 21 F. 3d 24, 27 (citations omitted). In *Orion*, the Court found a request by a dealer association for a promotional agreement between the debtor and McDonald's to be subject to Section 107(b) because the information sought to be obtained could adversely impact the debtor's ability to negotiate future promotion agreements, giving competitors an unfair advantage.

11. The Seal Motion does not contain sufficient information to demonstrate that the Fee Letter which the Debtors seek to place under seal meets the definition of commercial

information. The Seal Motion also fails to provide any information to demonstrate that the fee structure set forth in the Fee Letter is considered confidential by the investment banking and lending finance industry as a whole. Instead, the Debtors rely on the logical fallacy of *ipse dixit*: "it is so because we say it is, and no proof is needed."

12. At best, the Seal Motion asserts (but does not prove) only that DB, in this particular instance, does not want its fee information disclosed for fear of legitimate price competition. It does not demonstrate that other lenders, credit arrangers, lending agents, investment bankers or others in the investment banking and lending industry obtain or even demand secrecy regarding their fees or fee structures.

(a) In fact, various types of financing – whether debtor-in-possession financing of exit financing – are routinely brought before bankruptcy courts, and the fees payable in connection with such financing are routinely disclosed publicly.

(b) The Court may take judicial notice of the hotly contested first-day motion for debtor-in-possession financing in this case, where an *ad hoc* committee of bondholders asserted that the interest rates and fees of the Debtors' proposed lenders were excessive and that less costly financing was available. The *ad hoc* committee's actions induced the post-petition lender to reduce the estates' financing costs. Those savings would not have been possible if the interest rates and fees of the proposed debtor-in-possession lender were held under seal because the lender wished to prevent competition.

13. The fees for which the Debtors seek approval are payable in connection with exit financing; that financing is itself incident (indeed, critical) to the Debtors' proposed plan of reorganization. As such, those fees require approval by the Court under 11 U.S.C. § 1129(a)(4).

Because those fees are subject to approval under Section 1129(a)(4), all parties in interest are entitled under Section 1109(b) to be heard on the issue; the right to notice and an opportunity to be heard is not reserved to a chosen few.

14. The Seal Motion seeks to create a Kafka-esque environment in which parties in interest have a right to comment, but are not permitted to know on what they are commenting. This is a mockery of due process.

15. The UST leaves the Debtors to their burden on the merits and reserves her discovery rights.

WHEREFORE the UST requests that this Court issue an order denying the Seal Motion and/or granting such other relief that this Court deems appropriate.

Respectfully submitted,

ROBERTA A. DeANGELIS
ACTING UNITED STATES TRUSTEE, REGION 3

Dated: September 18, 2003

BY: /s/ Mark S. Kenney

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