UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 11
	:	
EXIDE TECHNOLOGIES, *et al*.	:	Case Number 02-11125 (KJC)
	:	
	:	Jointly Administered
Debtors	:	**Hearing Date: 10/21/03 at 10:00 a.m.**
	:	**Objections Due: 10/7/03 at 4:00 p.m.**

UNITED STATES TRUSTEE'S OBJECTION TO CONFIRMATION OF DEBTORS' THIRD AMENDED JOINT PLAN OF REORGANIZATION (D.I. 2312)

In support of her Objection to Confirmation of the Debtors' Third Amended Joint Plan of Reorganization (the "Plan"), Roberta A. DeAngelis, Acting United States Trustee for Region 3 ("UST"), by undersigned counsel, avers as follows:

1. This Court has jurisdiction to hear the above-referenced Objection.

2. Pursuant to 28 U.S.C. § 586, the UST is charged with overseeing the administration of Chapter 11 cases filed in this judicial district, including, at the UST's discretion, monitoring plans filed in Chapter 11 cases and filing comments in connection with hearings on such plans pursuant to 28 U.S.C. § 586(a)(3)(B). This duty is part of the UST's overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., 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 with regard to the above-referenced Objection.

BASIS FOR RELIEF

Relevant Procedural Law

4. "After notice, the court shall hold a hearing on confirmation of a plan." 11 U.S.C. § 1128(a).

5. "A party in interest may object to confirmation of a plan." 11 U.S.C. § 1128(b).

6. An objection to confirmation is governed by Rule 9014 and "shall be filed and served on the debtor, the trustee, the proponent of the plan, any committee appointed under the Code and any other entity designated by the court, within a time fixed by the court." FED.R.BANKR.P. 3020(b)(1).

7. The court shall rule on confirmation of the plan after notice and hearing as provided in Rule 2002. If no objection is filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues." FED.R.BANKR.P. 3020(b)(2). Even if no objection is filed, however, the Court has an obligation to determine that a plan complies with the appropriate sections of the Bankruptcy Code. *In re Fesq*, 153 F. 32 113, 120 (3d Cir. 1998) *citing In re Szostek*, 886 F.2d 1405, 1414 (3d Cir. 1989).

Relevant Substantive Law

8. The Court may confirm a plan under Chapter 11 only if each of the thirteen enumerated requirements of 11 U.S.C. § 1129(a) are met. A limited exception is made if the requirements of 11 U.S.C. §1129(a)(8) (requiring acceptance by all impaired classes of claims or interests) is not met, permitting confirmation under 11 U.S.C. § 1129(b) (the so-called cram-down provisions) if the provisions of that subsection are met.

9. The UST objects to confirmation of the Plan on the grounds that it fails to meet several of the requirements enumerated in 11 U.S.C. § 1129(a).

A. Overly Broad Release and Exculpation Provisions

1. Releases by the Debtors

10. The Plan contains an impermissibly broad release by the Debtors. Specifically, it provides in Article X, Section B, for the release and waiver by the Debtors of their own claims and causes of action against all of the Releasees[1/] for both pre- and post-petition conduct. The Debtors should be required to meet their burden of demonstrating the propriety of such releases. *See In re Zenith Electronics Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999); see also In re Genesis Health Ventures, Inc., 266 B.R. 591, 606-609 (Bankr. D. Del. 2001) (discussing Zenith).

11. In *Zenith*, supra, the Court addressed the issue of debtor releases of third parties. The *Zenith* Court adopted the five part test enunciated in *Master Mortgage Inv. Fund, Inc.*, 168 B.R. 930 (W.D. Mo. 1994) to determine the propriety of allowing a release of a third party as a part of a plan of reorganization. These factors are:

> (1) an identity of interest between the debtor and the third party, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate; (2) substantial contribution by the non-debtor of assets to the reorganization; (3) the essential nature of the injunction to the reorganization to

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[1/]"Releasees" is a defined term encompassing the Debtors and their affiliates, the Reorganized Debtors and each of their affiliates, the Creditors' Committee, the Equity Committee, Credit Suisse First Boston in its capacity as agent under the pre-petition credit facility, certain holders of pre-petition credit facility claims, and all current and former officers, directors, members, employees, attorneys, financial advisors, accountants, investment bankers, agents and representatives of each of the foregoing, whether current or former, as long as they served in such capacity on or after the petition date. *See* Plan, Article I, Section B, ¶ 129 (the Plan contains 149 defined terms).

> the extent that, without the injunction, there is little likelihood of success; (4) an agreement by a substantial majority of creditors to support the injunction, specifically if the impacted class or classes "overwhelmingly" votes to accept the plan; and (5) provision in the plan for payment of all or substantially all of the claims of the class or classes affected by the injunction." 168 B.R. at 937

241 B.R. at 110. The enumerated factors must be separately applied to each of the entities that the Debtors seek to release; absent such a showing, and appropriate finding by the Court, the release set forth in Article X, Section B renders the Plan unconfirmable. Some proposed Releasees may qualify for the protection afforded by the provision and some may not.

12. Recently, in *In re Genesis Health Ventures, Inc.*, 266 BR. 591 (Bankr. Del. 2001), the Court examined a similar provision and tested its applicability as to each party to be affected by the provision. For example, the Court rejected an attempt to release the debtor's post-petition management from claims arising from pre-petition conduct, stating

> As to the debtor's management personnel here, there is no showing that the individual releasees have made a substantial contribution of assets to the reorganization. ... The officers and directors of the debtors no doubt made meaningful contribution to the reorganization by designing and implementing the operational restructuring of the companies, and negotiating the financial restructuring .... However, the officers, directors and employees have been otherwise compensated for their contributions, and the management functions they performed do not constitute contributions of "assets" to the reorganization. 266 B.R. at 606-07).

Accordingly, the *Genesis* Court struck the proposed release as to the debtor's management and certain other proposed releasees.

(a) Here, too, members of Exide's management team may assert that their efforts were a meaningful contribution to the proposed reorganization. However, as in *Genesis*, they were compensated – and compensated handsomely. Indeed, in addition to salaries and bonuses already received post-petition, some members of Exide's

management and some of Exide's professionals will receive further bonuses if the Plan is confirmed before December 15, 2003. And as in *Genesis*, Exide's management has not contributed any "assets" to the reorganization; the officers' and directors' only "contribution" has been sweat equity for which they have already been paid.

13. To the extent that Article X, Section B purports to release committee members and estate professionals for conduct taking place during the case, without excluding willful misconduct or gross negligence from the scope of the release, the provision is also unacceptable. In *Genesis*, *supra*, the Court disapproved similar language to the extent it failed to exclude wilful misconduct and gross negligence from its effect. 266 B.R. at 607, *citing In re PWS Holding Corp.*, 228 F.3d 224 (3d Cir. 2000).

2. Claimant Releases of Non-Debtor Third Parties

14. Article X, Section C provides that each holder of a claim "who has accepted the Plan" shall grant a broad release to the Releasees. It is not clear from this provision whether the release applies only to claim holders who have *voted* to accept the Plan, or instead applies also to claim holders who are deemed to accept the Plan. If the release applies to claim holders who are deemed to accept the Plan without having voted to accept it, the Plan cannot be confirmed.

15. As a general rule, third-party claims against non-debtors cannot be released without *"the affirmative agreement of the creditor affected." Zenith, supra,* 241 B.R. at 111 (citations omitted); see also Gillman v. Continental Airlines, (In re Continental Airlines), 203 F.3d 203, 214 (citing Zenith with approval).

16. The "hallmarks" of permissible non-consensual third-party releases are fairness, necessity to the reorganization, and specific factual findings to support these conclusions.

Continental Airlines, supra, 203 F.3d at 214 (3d Cir. 2000). Absent such hallmarks, a plan providing for non-consensual third-party releases is not confirmable.

17. Nothing in the Plan or the accompanying Disclosure Statement demonstrates the existence of the requisite hallmarks. Accordingly, if and to the extent the proposed third-party release purports to bind claim holders who are deemed to accept the Plan without actually voting to accept it, the third-party release should be stricken.

3. Exculpation of Releasees

18. The Plan also contains an overly broad exculpation clause at Article X, Section E:

> The Releasees shall neither have nor incur any liability to any Person or Entity for any pre or post-petition act taken or omitted to be taken in connection with, or related to the formulation, negotiation, preparation, dissemination, implementation, administration, Confirmation of Consummation of the Plan, the Disclosure Statement or any contract, instrument, release or other agreement or document created or entered into in connection with the Plan of any other pre or post-petition act taken or omitted to be taken in connection with or in contemplation of the restructuring of the Debtors.

(a) First, the exculpation clause contains no exception for gross negligence or willful misconduct. For that reason alone, the exculpation clause must be modified to provide for the appropriate standard of liability. *In re PWS Holding Corp., supra*, 228 F.3d at 246.

(b) Second, the scope of conduct covered by the exculpation clause goes significantly beyond the exculpatory language approved in *In re PWS Holding Corp., supra*. Unlike the language approved in *PWS Holding,* the Plan's exculpation clause exonerates the Releasees from liability not only for conduct "in connection with" the

restructuring of the Debtors, but also for conduct "in contemplation of" such a restructuring.

(i) On its face, and especially given the absence of any exception for gross negligence or willful misconduct, this provision insulates tortfeasors from liability for acts completely unrelated to the reorganization itself as long as they were undertaken in anticipation of the bankruptcy proceedings. Thus, collecting preferential payments, receiving fraudulent transfers of the Debtors' assets, self-dealing, and even embezzlement from the Debtors, would all be forgiven as long as they were undertaken with knowledge that the Debtors were about to file Chapter 11 petitions and that such acts could be "exculpated" under a plan of reorganization. Claims for torts against non-debtors, such as insider trading, securities fraud and even violation of claimants' civil rights, would also be extinguished.

(ii) As presently phrased, this provision acts as an involuntary release of third party claims. However, unlike the release of third party claims set forth in Article X, Section C of the Plan (applicable only to claim holders who "accept" the Plan),[2/] the "release" buried in the exculpation clause would apply to *all* creditors, *all* equity holders, *all* other parties in interest, and even potentially to persons who are not even parties in interest in these bankruptcy cases.

[2/] *But see* ¶¶ 14-17 above regarding ambiguity of who has "accepted" the Plan for purposes of the third-party release.

(iii) The hallmarks of permissible non-consensual releases do not exist in these cases. Accordingly, the "release" provisions of the exculpation clause should be stricken.

B. Disputed Claims Resolution Procedures

19. Article VIII, Section A, Paragraph 4 of the Plan addresses the payments and distributions on disputed claims. Among other things, it provides that if a claimant holds both an allowed (*i.e.*, undisputed) claim and a disputed claim, the Reorganized Debtors ("Debtors") may withhold distribution on account of the allowed claim until the disputed claim is resolved by settlement or final order.

(a) The Plan and Disclosure Statement do not offer any justification for permitting the Debtors to withhold distributions on a clamant's allowed claim while negotiating or litigating a separate, disputed claim.

(b) The most plausible explanation for this provision is that the Debtors desire to gain a negotiating advantage by holding distributions on allowed claims "hostage."

(c) This provision does not appear to be proposed in good faith and, accordingly, raises serious concerns about whether the entire Plan has been proposed in good faith as required by 11 U.S.C. § 1129(a)(3).

20. The Plan purports to grant the Debtors authority after the effective date to settle or compromise *any* disputed claim without approval of the Bankruptcy Court, thereby sidestepping the Court's supervisory role.

(a) FED.R.BANKR.P. 9019(a) provides for court approval of compromises and settlements after notice and a hearing. Rule 9019(a) specifically provides that "notice

shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct."

(b) FED.R.BANKR.P. Rule 9019(b) authorizes the court, after notice and a hearing, to fix a class or classes of controversies that may be settled without further hearing or notice. The Advisory Committee Note (1983) to Rule 9019 indicates that "[s]ubdivision (b) permits the court to deal efficiently with a case in which there may be a large number of settlements."

(c) The UST respectfully submits that Rule 9019(b) does not authorize the fixing of an unlimited "class" consisting of *all* disputed claims, as proposed in the Plan. While the Court may establish procedures to deal efficiently with a case by establishing a limited range of disputed claims that may be settled without further hearing or notice, the Court should not approve procedures which eliminate judicial supervision as provided in Rule 9019(a).

(d) "Notice ... is the cornerstone underpinning bankruptcy procedure." *In re Beyond.Com Corporation*, 289 B.R. 138, 143 (Bankr. N.D. Cal. 2003). Dispensing with notice, or providing only for the least amount of notice to the fewest people, reduces oversight by parties in interest and by the Court. *Id.* The Debtors should not have absolute authority to settle disputed claims without notice to parties in interest and the Court after the effective date. Instead, the Debtors should be granted only limited authority to settle disputed claims within a fixed class or classes pursuant to FED.R.BANKR.P. 9019(b), with notice to the UST and those parties desiring such notice; settlements falling outside the limited range should require Court approval.

C. Personal Injury Tort and Wrongful Death Claims Resolution Procedures

21. The Plan provides for all personal injury tort and wrongful death ("PITWD") claims to be resolved in accordance with the PITWD Claims Resolution and Distribution Procedures ("PITWD Procedures") annexed to the Plan.

22. The proposed PITWD Claims Procedures would vest the Debtors with excessive control over the process of resolving PITWD claims and permit the Debtors to modify those procedures to their advantage at any time merely by giving notice to claimants who may be affected by such modifications. (PITWD Procedures, ¶ 6.1).

1. Alternative Dispute Resolution Procedures

23. If a PITWD claimant elects binding alternative dispute resolution ("ADR"), the Debtors may, "in their sole discretion," require the claimant to participate in mediation which, if unsuccessful, would be followed by binding arbitration. (PITWD Procedures, ¶ 4.3.3 (c)).

(a) PITWD claimants would have no reciprocal right to compel the Debtors to proceed by way of mediation.

(b) The PITWD Procedures do not provide for the additional direct and indirect costs imposed on a claimant when the Debtors demand mediation as a prerequisite to arbitration. The Debtors should not be permitted unilaterally to impose such additional expenses on claimants.

24. The ADR procedures grant the Debtors the right to full discovery, including depositions, independent medical examinations and expert testimony. (PITWD Procedures, ¶ 4.33(d)). Notably, the ADR procedures do not expressly provide for reciprocal discovery by claimants.

25. The ADR procedures provide for procedural law, including evidentiary burdens and standards, to be governed by th Federal Rules of Civil Procedure and the Federal Rules of Evidence, "except as may be modified by the Debtors in their sole discretion." (PITWD Procedures, ¶ 4.33(e)). Thus, in any instance where the Federal Rules of Civil Procedure or the Federal Rules of Evidence are not favorable to the Debtors, the Debtors would be permitted to modify them unilaterally and impose their own rules and evidentiary burdens. From such a description, it would appear that if the Debtors so desired, they could require claimants to prove their claims "beyond a reasonable doubt."

26. The ADR procedures would permit the Debtors to modify the mediation and arbitration procedures in their sole discretion merely by giving notice to ADR claimants that may be affected by such amendments. (PITWD Procedures, ¶ 4.33(m), (n)). No provision is made for a claimant to revoke his ADR election if the Debtors modify the mediation and/or arbitration procedures.

2. Trial Procedures

27. The trial procedures proposed by the Debtors in their PITWD Procedures permit the Debtors to usurp the role and authority not only of this Court but also of the Judges of every District Court responsible for adjudication of PITWD claims. Among other things:

(a) If a claimant elects to proceed to trial, the Debtors, in their sole discretion, could elect to have either a single trial as to both liability and damages or to bifurcate the trial into a proximate cause trial to be followed by a damages trial if the Debtors were found to be the proximate cause of the alleged injury or death. (PITWD Procedures, ¶

4.34(a)). Neither the claimant nor the trial judge would have any input or discretion, such discretion being reserved solely to the Debtors.

(b) If the Debtors so chose, they would be permitted to consolidate the trials on all personal injury claims that involve a common question of law or fact under FRCP 42. (PITWD Procedures, ¶ 4.34(d)). The discretion to consolidate or to hold separate trials would rest, it appears, with the Debtors rather than the trial judge.

(c) If the Debtors and a claimant are unable to settle a PITWD claim, the trial court would be required to hold a mandatory settlement conference, during which the Debtors and the claimant would be required to make a settlement offer/demand, which would be required to remain open for thirty days. (PITWD Procedures, ¶ 4.34(h)). Apparently, the trial court would have no discretion on whether to hold a settlement conference and whether to require a claimant to make a "settlement demand."

28. The PITWD Procedures, being as one-sided as they are, do not appear to have been proposed in good faith. Accordingly, they raise substantial concerns about whether the Plan as a whole has been proposed in good faith as required by 11 U.S.C. § 1129(a)(3).

29. The UST leaves the Debtors to their burdens of proof and reserves any and all of her rights, including discovery rights.

WHEREFORE, the UST requests that this Honorable Court deny confirmation of the Debtors' Plan and grant such other relief as this Court deems appropriate.

Respectfully submitted,

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ACTING UNITED STATES TRUSTEE, REGION 3

Dated: October 7, 2003

BY: /s/ Mark S. Kenney

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