Proceeding, even if it were apparent (as it is here) that the Creditors Committee Adversary Proceeding was unlikely to succeed. That would be a dangerous precedent to set, particularly in cases like this one where the Debtors cannot emerge until the Creditors Committee Adversary Proceeding has concluded.[10]

In effect, what the Creditors Committee is trying to do is veto the Debtors' right to propose a plan of reorganization, and to wrest oversight of the bankruptcy proceeding from the Court. The Court should not give the Creditors Committee that authority.

a. Case Law Makes Clear That a Bankruptcy Court May Approve a Proposed Settlement Over the Objection of the Party Prosecuting the Action.

As the Debtors have explained in the past, numerous bankruptcy courts have done exactly what the Creditors Committee claims this Court cannot do – they have approved proposed settlements of claims belonging to the debtor over the objections of the parties prosecuting the claims. Each of those cases makes clear that the Bankruptcy Code and the Bankruptcy Rules provide a bankruptcy court with that authority. The Committee has not articulated any reason to disregard those cases, or the Bankruptcy Code provisions and Bankruptcy Rules that support them. It cites ***no*** case holding, or even suggesting, that a court cannot approve a proposed settlement over the objection of the party pursuing the claims.

One of the most analogous cases on this point is, of course, Cellular Information. As discussed in some of the Debtors' earlier filings, the court in Cellular Information approved the involuntary settlement of an adversary proceeding commenced by the debtors against certain lenders. See id. at 947. After the termination of exclusivity, the lenders—who were the

[10] As discussed below, the Creditors Committee's half-hearted suggestion that the Debtors could emerge from bankruptcy while the Creditors Committee Adversary Proceeding is still pending (by placing all of Reorganized Exide's stock in a trust), is completely unworkable and underscores the Committee's fundamental misunderstanding of the size and complexity of the Debtors' business and financing needs.

defendants in the adversary proceeding—filed a proposed plan of reorganization that called for the settlement of the debtors' litigation against them. See id. at 929. The debtors had been prosecuting the claims and objected to the settlement. See id. at 929, 947. In fact, the debtors had not been involved in any negotiations with the lenders regarding the settlement, and the Court found that the proposed settlement was "not the product of arms-length negotiations between the Plaintiffs and the Banks." Id. at 947. None of that mattered. As the court explained, those facts "in no way bar[red] consideration of the proposed settlement." Id. Ultimately, the court approved the proposed settlement over the debtors' objection, and confirmed the lenders' plan. See id. at 953.

A bankruptcy court in Pennsylvania reached the same conclusion in In re Allegheny Int'l, Inc., 118 B.R. 282 (Bankr. W.D. Pa. 1990). There, one of the provisions of the debtors' proposed plan of confirmation called for the settlement of claims brought by the creditors' committee and the equity committee on behalf of the debtors against certain prepetition banks. See id. at 307-08. The creditors' committee supported the proposed settlement, but the equity committee—which was itself a plaintiff in the adversary proceeding and was actively pursuing the litigation—objected to the proposed settlement. See id. The equity committee's objection, however, did not prevent the court's approval of the proposed settlement as part of the debtors' plan of reorganization. The Allegheny International court made clear that a "plan may provide for compromise of litigation," and that the "court has discretion to approve a settlement as part of a reorganization plan." Id. at 309. Ultimately, the court approved the proposed settlement over the objections of the plaintiff equity committee. See id. at 311.

Other courts have applied such reasoning to approve proposed settlements as part of plan confirmations even when the party prosecuting the claim on behalf of the debtors

objected to the settlement. Thus, in In re BBL Group, Inc., 205 B.R. 625, 634 (Bankr. N.D. Ala. 1996), the court confirmed a plan of reorganization proposed by a creditor that settled the debtor's fraud and fraudulent transfer claims without the debtor's consent. Relying on Cellular Information, the court specifically rejected the debtor's argument that a creditor's proposed plan of reorganization could not settle claims that the debtor was pursuing. See id. at 634. Similarly, in Texas Extrusion Corp., 844 F.2d at 1158-59, the Fifth Circuit affirmed the bankruptcy court's confirmation of a plan that settled claims brought by the debtors over the debtors' objection.

The Creditors Committee, in its Objections to the Plan, makes no meaningful effort to explain how these authorities could be wrong. In fact, the only case the Creditors Committee discusses at all is Cellular Information. See Creditors Committee Objection, at ¶¶ 31-33. But try as it might to pretend the case is legally inapposite, the Creditors Committee's arguments boil down to assertions that certain facts in that case rendered that settlement reasonable. Nowhere in its 89 pages of objections does the Creditors Committee argue that the Cellular Information court erred by approving a settlement over the objection of the party prosecuting the case. That, in itself, is a tacit admission by the Creditors Committee that courts can approve settlements in these circumstances.

The Creditors Committee's efforts to distinguish Cellular Information are entirely without merit. *First*, the Creditors Committee's characterization of the negotiations that took place in Cellular Information is misleading at best. In that case the court made clear that the proposed settlement was "***not the product of arms-length negotiations*** between the Plaintiffs and the Banks." Cellular Information, 171 B.R. at 947 (emphasis added). The court correctly ruled, however, that the lack of arms-length negotiations "in no way bar[red] consideration of the proposed settlement." Id. Thus, while the Creditors Committee goes to great lengths to argue

that the Debtors' proposed settlement is not the product of arms-length negotiations—an assertion the Debtors will vigorously dispute if the Court is even interested in and permits evidence of the negotiations—the Creditors Committee's argument is as irrelevant here as the same argument was in Cellular Information.

Second, the Creditors Committee's complaint that there has been no independent evaluation is both inaccurate and irrelevant. The Debtors have examined the allegations in the Creditors Committee's Complaint and concluded that the Creditors Committee will not be able to substantiate those allegations. See Debtors' Responses To The Committee's Second Set Of Interrogatories, Resp. No. 4. In addition, the Debtors will present expert testimony that the value of the Creditors Committee's post-2000 claims—without discounting for any litigation risk—is less than $50 million, which is only a small fraction of the amount the Creditors Committee speculates its claims are worth. See Expert Report of Keith A. Bockus, at 3, 11. And in any event, the Creditors Committee is ignoring the fact that the Court will make an independent evaluation of the Creditors Committee's claims, and of the proposed settlement.

Third, the Creditors Committee is simply wrong to suggest that the parties and the court in Cellular Information were more competent to undertake the Rule 9019 analysis than the parties and the Court are in this case. The discovery that took place in Cellular Information, which the Creditors Committee characterizes as "extensive," pales in comparison to the discovery that has taken place in this case. Compare infra, p. 78. (discussing the massive discovery that has taken place here, including the production of some 415,000 pages of documents and depositions of more than 25 witnesses) with Cellular Information, 171 B.R. at 949-50 (reviewing approximately 25,000 documents produced during the course of discovery, and excerpts of deposition testimony of five witnesses).

Fourth, the fact that the creditors' committee in Cellular Information supported the settlement does nothing to distinguish it from this case. There, the debtor was pursuing the claims that were the subject of the proposed settlement, to which the debtor objected. Here, the situation is the same, but the roles are reversed. The Debtors support the settlement, while the Creditors Committee that is pursuing the claims does not. That does not render Cellular Information distinguishable.

Smith's efforts to avoid the clear application of section 1123(b) and Bankruptcy Rule 9019 similarly fail. Smith argues that the Court cannot approve the settlement of the Creditors Committee's equitable subordination claim, even if it can approve the settlement of the Creditors Committee's other claims. Like the Creditors Committee, Smith is wrong. In Allegheny International, 118 B.R. at 312, the court did exactly what Smith claims this Court should not be able to do. The equity committee in that case was pursuing a claim for equitable subordination (among other claims) when the debtor proposed a settlement of the adversary proceeding as part of its plan of reorganization. See id. at 309, 312. The equity committee did not join in the settlement proposal. See id. at 309. Nevertheless, the court approved the settlement in total, including the equity committee's equitable subordination claim. See id. at 312.

Likewise, in In re WCI Cable, Inc., 282 B.R. 457, 468 (Bankr. D. Ore. 2002), the court was also presented with the argument that a proposed settlement could not settle a number of claims, including equitable subordination. See id. at 468 n.6. The court rejected that argument and held that all of the claims being released—including the equitable subordination claims—belonged to the estate. See id. at 468-69 ("The claims that the WCI Group propose to release in section 15.5 of the WCI Plan are solely WCI Group claims. They are assets of the

WCI Group bankrupt estates."). Accordingly, the court went on to consider whether to approve the settlement. See id.

The cases Smith cites in its Objection are all distinguishable. Those cases held only that a creditor has standing to bring a claim for equitable subordination ***on its own behalf*** against other creditors, apart from the standing of the trustee or debtor in possession to seek equitable subordination on behalf of the estate. See In re Vitreous Steel Prods. Co., 911 F.2d 1223, 1231 (7th Cir. 1990); In re Granite Partners, L.P., 210 B.R. 508, 511-12 (Bankr. S.D.N.Y. 1997); American Cigar Co. v. MNE Commercial Corp. (In re M. Paolella & Sons, Inc.), 85 B.R. 965, 967-68, 973 (Bankr. E.D. Pa. 1988). As such, they simply have no bearing on this case, because the claims that the Creditors Committee is asserting belong to the estate. As the Creditors Committee makes clear in its First Amended Complaint: "The Committee has standing to bring these claims ***belonging to the Debtors, on behalf of the Debtors' estates*** . . . ." First Am. Compl. and Objection to Claim, at ¶ 21. No one—*including the Creditors Committee itself*—has claimed that the Creditors Committee is asserting an equitable subordination claim on behalf of anyone other than the Debtors. Accordingly, the Debtors have every right to propose a settlement of these claims.

Of course, all of these court decisions that approve settlements over the objections of the party pursuing the claims are firmly grounded in the provisions of the Bankruptcy Code and the Bankruptcy Rules. The Creditors Committee has not argued otherwise. As the Cellular Information court explained, section 1123(b)(3)(A) of "the Code expressly provides that a plan proponent may propose a settlement of any claim held by the estate." Cellular Information, 171 B.R. at 947 (citing 11 U.S.C. § 1123(b)(3)(A)). This provision squares perfectly with section 1109(b), which provides that certain parties, including the debtor, "may raise and may appear

and be heard on any issue in a case under" chapter 11. 11 U.S.C. § 1109(b). And once the plan proponent actually does propose a settlement, the procedures established by Bankruptcy Rule 9019 apply, and the Court may approve the proposed settlement if it finds that the settlement falls within the range of reasonableness. See RFE Indus., 283 F.3d at 165; Cellular Information, 171 B.R. at 950. See also In re Drexel Burnham Lambert Group Inc., 138 B.R. 723, 759 (Bankr. S.D.N.Y. 1992).

These procedures established by the Bankruptcy Code and the Bankruptcy Rules, and applied by numerous courts, are the procedures that the Debtors are using in this case. The Debtors have proposed a settlement in their Plan of Reorganization, and they have requested the Court to approve it. That is exactly what happened in Allegheny Int'l, 118 B.R. at 307-08, and it is no different from what happened in Cellular Information, 171 B.R. at 947, BBL Group, 205 B.R. at 634, and Texas Extrusion, 844 F.2d at 1158-59. This procedure in no way violates or circumvents the provisions of the Code. It is a clear application of the Code and of the case law interpreting it, and the Debtors should be allowed to pursue it.

b. The Committee's Arguments Are Inconsistent with the *Cybergenics* Case and the Bankruptcy Code.

Rather than discuss any of these cases or statutory provisions that are directly on point, the Creditors Committee tries to obscure the issue by using an incorrect interpretation of the Third Circuit's en banc decision in Cybergenics, supra, to argue that the Court lacks authority to approve the Debtors' proposed settlement. The Creditors Committee's argument stretches the Cybergenics decision far beyond any legitimate application of either its holding or its dicta.

To be clear, the en banc decision in Cybergenics addressed one narrow issue – whether an entity other than a trustee or debtor in possession could have standing to pursue claims on behalf of the debtor following the Supreme Court's decision in Hartford Underwriters

Ins. Co. v. Union Planters Bank, 530 U.S. 1 (2000). See Cybergenics Corp., 330 F.3d at 552. The Third Circuit held that it could. See id. That decision is simply not the same as holding that a bankruptcy court can never approve a settlement proposed by anyone other than the party prosecuting the claims.

In fact, read fairly and in its entirety, the Cybergenics case supports the opposite conclusion – a bankruptcy court's equitable powers provide it with more than ample authority to approve a settlement proposed by an entity other than the party pursuing the claim. In Cybergenics, the court explored several Bankruptcy Code provisions throughout its opinion, but ultimately held that the Bankruptcy Code itself did not expressly provide the authority for unsecured creditors' committees to pursue claims on behalf of debtors. See id. at 567. As the Third Circuit emphasized, the "missing link" that provided this authority was the "bankruptcy courts' equitable power to craft flexible remedies in situations where the Code's causes of action fail to achieve their intended purpose." Id. Thus, the court held that "the ability to confer derivative standing upon creditors' committees is a straightforward application of bankruptcy courts' equitable powers." Id. at 568. This is a necessary element of a bankruptcy court's equitable authority because, according to the court, in situations where a trustee or debtor-in-possession does not bring certain claims on behalf of the debtor, a bankruptcy court must "substitute *itself* as gatekeeper" of those actions. Id. (emphasis in original).

Given that Cybergenics established that the Creditors Committee's standing to pursue claims on behalf of the Debtors comes from the Bankruptcy Court, and given that Cybergenics made clear that the Court itself is the "gatekeeper" of those claims, it is disingenuous for the Creditors Committee to read Cybergenics as preventing the Court from approving any settlement proposal that does not come from the Creditors Committee. Just as a

bankruptcy court becomes the "gatekeeper" of certain claims when a trustee or debtor-in-possession decides not to bring them, it must retain equitable authority over those claims after a creditors' committee is granted standing to pursue them. See Cybergenics Corp., 330 F.3d at 567 ("The Supreme Court has long recognized that bankruptcy courts are equitable tribunals that apply equitable principles in the administration of bankruptcy proceedings."). Otherwise, the creditors' committee that is pursuing the claims could use them not to benefit the estate as a whole (which is the purpose of allowing the committee to pursue the claims in the first place), but instead to benefit the individual members of the committee. That result would fly in the face of Cybergenics.

Just as Cybergenics does not support the Committee's unprecedented position, the Creditors Committee's policy arguments do not support it either. The hypothetical parade of horribles that the Creditors Committee claims would result if the Court even considered the Debtors' proposed settlement ignores one critical point: the settlement proposed by the Debtors must be approved by the Court before it takes effect. 11 U.S.C. § 1123(b); Fed. R. Bankr. P. 9019(a).

During that approval hearing, the Creditors Committee will be able to present evidence as to why it thinks the proposed settlement is not reasonable. Thus, if the settlement is approved, the debtors will not be "forc[ing] a settlement upon the creditors committee," as the Creditors Committee suggests. Initial Objection at 14. Instead, the Court will be finding that the proposed settlement is above the lowest level of the range of reasonableness, which is all the protection that the Creditors Committee needs, and all the protection to which it is entitled. See RFE Indus., 283 F.3d at 165; Cellular Info., 171 B.R. at 950; Drexel Burnham Lambert Group, 138 B.R. at 759. Giving the Creditors Committee a veto over any settlement proposal that it

does not agree with, including a settlement that the Court finds to be within the range of reasonableness, would thus improperly intrude on the procedures established in the Code and on the authority vested in the Court. See, e.g., 11 U.S.C. § 105(a). The Committee's argument should therefore be rejected.

c. The Final DIP Order Does Not Preclude the Debtors From Proposing a Settlement of the Creditors Committee Adversary Proceeding.

Finally, the Creditors Committee's suggestion that the Final DIP Order somehow precludes the Debtors from proposing a settlement is also unsupported. As an initial matter, the Creditors Committee's argument fundamentally misconstrues the purpose and the nature of the Final DIP Order. As is often the case in Chapter 11 filings, in order for the Debtors to continue to operate post-petition, it was necessary for them to obtain additional financing immediately upon the bankruptcy filing. And because the Debtors at that point were essentially operating on funds belonging to the Prepetition Lenders, any adversary proceedings commenced by the Debtors would have been paid for by the Prepetition Lenders, including any proceedings commenced by the Debtors against the Prepetition Lenders. The Prepetition Lenders, quite understandably, would not allow the Debtors to use the funds in that manner, and therefore required the Debtors to agree not to commence any such claims against the Prepetition Lenders. But that agreement by the Debtors not to pursue those claims themselves was ***not*** an agreement by the Debtors to waive their statutory authority to propose a settlement of those claims if they were brought by another party. The fact that the Prepetition Lenders (who, unlike the Creditors Committee, were actually parties to the agreement) have not advocated such an argument is itself evidence that the Debtors' waiver did not extend to their statutory right to propose a settlement.

In short, the Final DIP Order was nothing more than a fee-shifting arrangement that made clear that the Prepetition Lenders would not pay for litigation against themselves. It was not intended to, nor did it, affect the Debtors' substantive rights contained in section 1123.[11]

In any event, this exact type of arrangement was no obstacle to the debtor's proposed settlement in Allegheny Int'l, 118 B.R. at 307-11. There, as part of an adequate protection agreement, the debtor agreed not to commence certain actions against the banks. See id. at 307-08. Later, after the creditors' committee and the equity committee in that case had commenced those actions on behalf of the debtor, the debtor proposed a settlement of those claims as part of its plan of reorganization. See id. at 308-09. As discussed above, the court ultimately approved the debtors' proposed plan (including the proposed settlement) over the objection of the equity committee. See id. at 309-11. Notably, the court made no suggestion that the debtor had somehow waived its right to propose the settlement when it agreed not to commence the action itself. See id. Instead, the court simply performed the analysis called for by Rule 9019 and examined whether the debtor's proposed settlement fell within the range of reasonableness. See id.

Similarly here, the Debtors did not waive their rights to propose a settlement as part of a plan of reorganization.[12] Those are substantive rights clearly established in the Bankruptcy Code, and the Final DIP Order did not purport to change them. The Creditors Committee has characteristically failed to present any authority to the contrary.

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11 Similarly, the Creditors Committee's reliance on the statements of the Debtors' counsel that the Debtors are not parties to the Creditors Committee Adversary Proceeding is also misplaced. Those statements were not waivers of the Debtors' right to propose a settlement. The Debtors do not, and never have, disputed that they are not parties to the Creditors Committee Adversary Proceeding. That fact, however, is completely irrelevant to the Debtors' ability to propose a settlement as part of their Plan of Reorganization. 11 U.S.C. § 1123(b).

12 A "[w]aiver is the 'intentional relinquishment or abandonment of a known right.'" RFE Industries, 283 F.3d at 164 (quoting United States v. Dispoz-O-Plastics, Inc., 172 F.3d 275, 282 (3d Cir. 1999)). This is an exceedingly high and difficult standard to meet, and the Creditors Committee has cited no authority to suggest that it was met here.

2. The Evidence Before the Court Will Show That the Proposed Settlement Easily Satisfies the Applicable Legal Standard of Being Above the Lowest Point In The Range Of Reasonableness.

"'[C]ompromises are favored in bankruptcy.'" In re Martin, 91 F.3d 389, 393 (3d Cir. 1996) (quoting 9 Collier on Bankruptcy ¶ 9019.03[1] (15th ed. 1993)). The reason for this is simple – settlements of adversary proceedings "minimize litigation and expedite the administration of a bankruptcy estate." Id. Because of the important public policy interests in promoting settlements, bankruptcy courts apply a deferential standard in reviewing proposed settlements: under well-settled case law, a proposed settlement should be approved as long as it does not "fall below the lowest point in the range of reasonableness." Neshaminy Office Bldg. Assocs., 62 B.R. at 803; see also Cellular Info., 171 B.R. at 948.

Courts in the Third Circuit have developed a simple four-part analysis to make that determination. Thus, in analyzing a proposed settlement, courts examine four factors:

- the probability of success in the litigation;
- the difficulties, if any, in collection;
- the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and
- the paramount interests of the creditors.

RFE Indus., 283 F.3d at 165. If, as in this case, these four factors indicate that "the value of the claim that is being compromised" is less than "the value to the estate of the acceptance of the compromise proposal," then the settlement is within the range of reasonableness and the settlement should be approved. Martin, 91 F.3d at 393.

Importantly, these four factors and the cases that apply them make clear that the paramount concern of the analysis is the substantive fairness of the proposed settlement, ***not*** the procedures used to craft it. Bankruptcy courts therefore simply do not explore the machinations

and debates that go into the proposal. Indeed, in applying the four-factor test, courts routinely reject complaints about what procedures were or were not followed, so long as the settlement is reasonable. See e.g., In re Pennsylvania Truck Lines, Inc., 150 B.R. 595, 601 (E.D. Pa. 1992) (affirming the Bankruptcy Court's approval of a settlement even though the "analysis of the merits of potential litigation was sketchy," and the committee argued the debtor "did not seriously investigate the merits of litigating any of these claims so [the judge] could and did make only superficial, conclusory findings as to the reasonableness of the settlement"); Cellular Information, 171 B.R. at 947 (stating the objecting party "correctly note[s] that the proposed disposition and adjustment of the Lender Liability Suit . . . is not the product of arms-length negotiations between the Plaintiffs and the Banks. This, however, in no way bars consideration [and approval] of the proposed settlement.").

The relevant inquiry is therefore straightforward, and the Court should not be distracted by the Creditors Committee's lengthy effort to cast doubt on the eminently reasonable terms of the proposed settlement by focusing on the ancillary issue of preliminary negotiations. Again, what counts in the Third Circuit is the substance of the proposed settlement, not how the parties got there.

Given this background, the Debtors' proposed settlement is ripe for approval by this Court at the Confirmation Hearing. The Creditors Committee and the other parties have had plenty of opportunity to discover the relevant information. A few statistics bear this out. In this case, the Debtors alone have responded to 101 interrogatories (including all subparts), and an incredible 188 document requests, resulting in the production of ***well over 200 boxes*** containing ***more than 415,000 pages of responsive documents***. The Debtors estimate that by the start of the Confirmation Hearing, the parties will have deposed more than 25 witnesses. This massive

discovery far exceeds the discovery conducted in any other case that the Debtors are aware of in which a bankruptcy court approved a proposed settlement. See, e.g., Cellular Information, 171 B.R. at 949-50 (reviewing approximately 25,000 documents produced during the course of discovery, excerpts of deposition testimony of five witnesses, and the party's legal memoranda); In re Continental Inv. Corp., 637 F.2d 8, 10-11 (1st Cir. 1980) (finding a record comprised of two day-long depositions, numerous documents, and thirteen affidavits filed at a hearing on a motion for a preliminary injunction, was sufficient).

These statistics do not include all of the information that the Creditors Committee obtained during the informal discovery that took place earlier this year, well before the hearing on August 22nd. In fact, as early as October 23, 2002, counsel for the Creditors Committee admitted that "[w]e got reams of documents" through the informal process. Tr. of 10/23/02 Mot. Hr'g at 27. In that same hearing counsel for the Creditors Committee told the Court that it had received a "huge volume of documents that began to flow" in September 2002—more than a year ago. Id. at 26-27. These efforts "to really ease the information flow to the Committee" were spearheaded by Exide's General Counsel, Stuart Kupinsky, and the Creditors Committee considered the informal discovery to have "been an enormous assistance to the Committee . . . in [its] entire investigation and understanding of the company's operations." Id. at 27.

In short, the Creditors Committee's assertion that "[i]n this case, quite unlike *Cellular Communications* . . . there has been almost no discovery," Creditors Committee Objection, at ¶ 33, plainly ignores reality. It is a stark example of the desperate lengths the

Creditors Committee is willing to go to divert the Court's attention away from the inherent reasonableness of the Debtors' proposed settlement.[13]

Moreover, the Court, having read the parties' briefs and decided the motion to dismiss, is already very familiar with the Creditors Committee's claims, and its knowledge will only increase next week when it hears three days of live testimony from ten or more witnesses and reviews the parties' submissions of documents and deposition designations. The fact is that the parties and this Court are "well within the loop of familiarity with respect to the complexities of this litigation," and are therefore fully prepared to assess the inherent reasonableness of the Debtors' proposed settlement. Cellular Info., 171 B.R. at 950. See also Drexel Burnham Lambert, 138 B.R. at 759 ("Approval of a settlement [under § 1123(b)] does not require a 'mini trial' on the merits.").

The Court should apply the four-factor test, and based on the evidence presented at the hearing, approve the Debtors' proposed settlement.

a. Probability of Success in the Litigation.

In examining the probability of success in the litigation, the "purpose is not to make findings of fact and conclusions of law, but to canvass the issues to assess the risks associated with prosecuting the various claims." Cellular Info., 171 B.R. at 950. As discussed below, that inquiry should lead to one unavoidable conclusion: the most likely outcome if the Creditors Committee's claims are pursued is that the Creditors Committee either will lose its case altogether or obtain a negligible recovery (i.e., one that would not return value to the

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13 Notably, the Creditors Committee uses *10 pages* of its Objection to resurrect old discovery disputes about irrelevant issues such as the "low hanging fruit" email. That the Creditors Committee is again trying to twist Mr. Kupinsky's words into something they are not, after it has already received massive amounts of discovery, simply underscores the weakness of the Creditors Committee's substantive arguments. In any event, the Court has already received voluminous submissions on Mr. Kupinsky's email and the Debtors incorporate those submissions by reference.

unsecured creditors). The first factor of the reasonableness test therefore cuts decidedly in favor of approving the proposed settlement.

The Debtors, of course, disagree with the Creditors Committee's misleading characterization of the facts in its Objection, but the hearing, not this response brief, is the place to refute those mischaracterizations in detail. Nevertheless, as a preview, the Debtors intend to introduce testimony and documents from key Exide witnesses such as Craig Muhlhauser (Exide's current Chairman and CEO), Lisa Donahue (Exide's current Chief Restructuring Officer and former CFO), and Robert Lutz by deposition (a current member of the Exide board, and the former Chairman and CEO of Exide), which will show that:

- Exide was solvent in 2000, when the largest transaction being challenged by the Creditors Committee—the financing related to the acquisition of GNB—occurred;
- Exide, in its business judgment, decided to acquire GNB for legitimate and proper business reasons;
- The Prepetition Lenders in no way forced Exide to acquire GNB for the purpose of securing their position in a subsequent Exide bankruptcy;
- Exide's Board of Directors and Management were in full control of Exide and made decisions for the company according to ***their*** business judgment;
- The Prepetition Lenders were not insiders at Exide;
- Exide negotiated all of the amendments to their credit agreement that the Creditors Committee has challenged through arms-length negotiations with the Prepetition Lenders;
- Exide's CEO exercised his business judgment to retain Alix (including Ms. Donahue to be Exide's CFO and CRO), and the Prepetition Lenders were not involved in that decision; and
- Exide's senior management used its business judgment to determine the appropriate time to file for bankruptcy, which was only after Exide was able to negotiate and finalize the DIP and Standstill Agreement in mid-April 2002.

In addition, the Debtors will also present expert testimony from ~~a~~ financial expert that will show:

- Exide was solvent as of September 29, 2000;
- Exide received reasonably equivalent value from its lenders in conjunction with the financing raised for the GNB transaction; and
- The total value of the consideration provided by Exide to the Prepetition Lenders in the amendments that the Creditors Committee claims were improper (including the value of the 35 percent equity stakes in subsidiaries in Europe and Asia), is at most $48 million—an amount that would likely be reduced further due to various negative factors diminishing the value of the collateral.

Moreover, the Court will receive evidence from officials of the Prepetition Lenders that will further confirm the weakness of the Creditors Committee's claims. For example, Didier Siffer and Doug Cruikshank, both of CSFB, have testified in deposition that:

- The amendments to the credit agreement were the result of "intense" and "full-blown" negotiations between Exide and the Prepetition Lenders in late 2001 (when Exide was in breach of certain covenants). Dep. Tr. of Didier Siffer at 169-70, 177-78, 284-85.
- The Prepetition Lenders viewed the GNB acquisition as beneficial to Exide for at least the following reasons: GNB gave Exide new customers, especially in the western United States and Australia, where GNB dominated the market; the GNB telecom business was seen as very advantageous at the time; and the synergies between the two companies would reduce costs and make the new company more efficient. Dep. Tr. of Doug Cruikshank at 117-19.
- The purpose of the amendments to the credit agreement was to give Exide time to evaluate its options going forward. Dep. Tr. of Didier Siffer at 214.
- The Prepetition Lenders did not control Exide's decision regarding the timing or fact of chapter 11 restructuring. Dep. Tr. of Doug Cruikshank at 231-32; Dep. Tr. of Didier Siffer at 258.
- At no time did the Prepetition Lenders have operational control over Exide. Dep. Tr. of Didier Siffer at 243-44, 272-73.
- Craig Muhlhauser, not the Prepetition Lenders, made the decision to hire Lisa Donahue as Exide's CFO. Dep. Tr. of Doug Cruikshank at 315.

- Ms. Donahue and Exide's Management had an arms-length and adversarial relationship with the Prepetition Lenders in the pre-filing period. Dep. Tr. of Didier Siffer at 281-82.

A review of this evidence leads to the unavoidable conclusion that all of the Creditors Committee's claims are meritless. Specifically,

- By presenting evidence that will show that Exide's Management and directors at all times exercised business judgment and fulfilled their fiduciary duties in the best interests of the company, the Debtors will demonstrate that the Creditors Committee's Counts 1, 2, 4, 5, 8, 10, and 11 are all unlikely to succeed.

- By presenting evidence that the Prepetition Lenders were not insiders and that Exide's dealings with them were arms-length at all times, both the Debtors and the Prepetition Lenders will demonstrate that the Creditors Committee's Counts 2, 3, 5, 7, 10, 11, and 12 are all unlikely to succeed.

- By presenting evidence that Exide was solvent at least as of September 2000, the Debtors will show that the Creditors Committee's Counts 6, 8, and 9 are all unlikely to succeed.

- By presenting evidence that the various credit agreements and amendments were negotiated at arms-length, and that Exide received reasonably equivalent value in all of those agreements, the Debtors and the Prepetition Lenders will show that the Creditors Committee's Counts 4, 5, 6, 7, 8, 9, 10, and 12 are all unlikely to succeed.

- Finally, by demonstrating for the Court that all of the Creditors Committee's claims in Counts 1 through 12 are unlikely to succeed, the Debtors and the Prepetition Lenders will also prove that the Creditors Committee's Counts 13 through 17 (which are all dependent on the previous counts) are all also unlikely to succeed.

In addition to these factual issues, the Court's canvassing of the legal landscape will highlight the untenable legal basis for the Creditors Committee's constant refrain that, if it prevails in the Creditors Committee Adversary Proceeding, it would recover anywhere from several hundred million dollars to over a billion dollars.[14] That assertion is based on the Creditors Committee's contention that its equitable subordination claim (Count II) will somehow

allow it to step ahead of *all* of the secured creditors' $1.285 billion dollar claims. That is just not true. As the Third Circuit has held, "equitable subordination is remedial rather than penal," and therefore a court may equitably subordinate a claim "only to the extent necessary to offset the harm suffered by the debtor and its creditors as a result of the inequitable conduct." Citicorp Venture Capital, Ltd. v. Comm. of Creditors Holding Unsecured Claims, 323 F.3d 228, 234 (3d Cir. 2003). Thus, the Creditors Committee could equitably subordinate the Prepetition Lenders' claims ***only*** to the extent it could show that it suffered damages as a result of the Prepetition Lenders' allegedly inequitable conduct. See id.; see also In re Submicron Sys. Corp., 291 B.R. 314, 327 (D. Del. 2003) ("[T]he doctrine [of equitable subordination] is remedial, not penal, and should be applied only to the extent necessary to offset specific harm that creditors have suffered on account of the inequitable conduct."). If the Creditors Committee cannot show that the allegedly inequitable conduct caused damages greater than the difference between the value of the Prepetition Lenders' claims ($1.285 billion) and the value of the estate (which Blackstone puts at a $1 billion mid-point total equity value), then the Creditors Committee will not be able to recover anything even if it is successful on one or more of its claims.

Contrary to the Creditors Committee's Objection, nothing in this Court's ruling on the motion to dismiss conflicts with the conclusion that the Creditors Committee's claims are unlikely to succeed. The Court did ***not***, as the Creditors Committee now contends, "h[o]ld that if the allegations the Creditors Committee made in the Creditors Committee Adversary Proceeding are true, the Creditors Committee would prevail on its claims." Creditors Committee Objection, at ¶ 45. Rather, the Court explicitly stated that "all I'm looking at [is] the sufficiency of the pleading rather than the merits of the claims." Tr. of 10/22/03 Omnibus Hr'g at 10. That the

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14 As discussed below, the Creditors Committee itself cannot put a number on what it thinks is the value of its own claim.

Creditors Committee may have satisfied an "exceedingly low" pleading threshold as to certain of its claims, In re Exide Tech., Inc., 2003 WL 22079513, at *5 (Bankr. D. Del. Aug. 21, 2003) (internal citation omitted), does nothing to change the fact that the Creditors Committee is unlikely to succeed on the merits in this litigation.

In short, the evidence and legal argument presented at the hearing will make clear that the Creditors Committee is unlikely to succeed on any of its claims. Accordingly, under the four-factor test, the first factor clearly favors approval of the proposed settlement.

b. Difficulty of Collection.

Even if the Creditors Committee's claims had a substantial probability of success (which they do not), it would be extremely difficult for the Creditors Committee to collect should it obtain a favorable judgment. The second factor therefore also favors approval of the settlement.

As an initial matter, the Court should note that although the Creditors Committee criticizes the Debtors for allegedly failing to perform a meaningful analysis of the worthiness of the Creditors Committee's claims, at this advanced stage of the litigation the Creditors Committee has yet to provide any specific valuation of its own. Compare, Creditors Committee Objection, ¶ 38 (asserting that "the likely rewards of the litigation . . . could be as high as $1 billion) with Id., ¶ 49 (describing the Creditors Committee's suit as a "multi-hundred million dollar litigation"). In fact, the actual value of the Creditors Committee's claims in the Creditors Committee Adversary Proceeding are much less than it avers. A substantial portion of the Prepetition Lender's claims are against affiliates located outside of the United States, and which are not Debtors before this Court. No relief requested in the Creditors Committee Adversary Proceeding can affect those claims. Moreover, when the deadline arrived for the parties' fact and expert witness lists to be exchanged on October 2, 2003, this is what the Creditors

Committee disclosed as an expert on the valuation of the Creditors Committee Adversary Proceeding:

WITNESSES THE CREDITORS' COMMITTEE WILL CALL

Name	**Address**
Expert to Value the Creditors Committee Adversary Proceeding	Unknown

Witness List of the Official Committee of Unsecured Creditors of Exide Technologies, at 2.

In any event, even accepting *arguendo* the Creditors Committee's imprecise (and unsubstantiated) estimate of several hundred million dollars as a supposedly accurate valuation of its claims, the likelihood that the Creditors Committee could collect that amount is extremely low. In order for the Creditors Committee to prevail on its equitable subordination claim, it would have to subordinate nearly $300 million of the Prepetition Lenders' claims. As discussed above, that is not likely at all, given the law of equitable subordination.

In addition, as the Debtors have discussed elsewhere (including at the August 22, 2003 hearing), and as discussed below, should the Creditors Committee succeed in derailing the proposed settlement, the Plan would also be lost. And with the impending expiration of the Standstill Agreement and the DIP, the Debtors would in all probability be forced to liquidate. That would destroy the vast portion of the value of the Debtors, and the Creditors Committee's recovery would almost certainly be nil. Given that reality, it is difficult to see why the Creditors Committee is willing to take such a huge risk.

c. Complexity, Expense, Inconvenience, and Delay of Litigation.

As with the previous two factors, the complexity, expense, and inconvenience caused by a full-blown litigation—not to mention the harm to the estate that would inevitably result from a delay in confirmation caused by a litigation—all further support approval of the settlement.

(i) Complexity.

The Creditors Committee Adversary Proceeding is a ***model of complex litigation***. The First Amended Complaint of the Creditors Committee Adversary Proceeding alleges 17 counts, covering virtually every aspect of a banking relationship that spans from 1997 to the present. The substantive issues in this matter involve multiple intricate lending arrangements, including a technical valuation of collateral in connection with each agreement. And the Creditors Committee's claims will only get more complex should the Creditors Committee Adversary Proceeding be permitted to go forward. Whereas at this stage, the "court's mission is 'not to decide the numerous questions of law and fact raised by (the parties) but rather to canvass the issues and see whether the settlement 'fall(s) below the lowest point in the range of reasonableness,' " Cellular Information, 171 B.R. at 948, a full-blown trial on the merits would require both sides to obtain extensive expert testimony on solvency, valuation, causation, secured lending, and damages. Wide-ranging third-party discovery also would be necessary, involving Exide, Exide affiliates, accountants, restructuring advisers, former employees and lawyers. And, it must be remembered, all of this discovery would take place in addition to the unbelievable amounts of material the parties have already exchanged. See Creditors Committee Objection at p. 78 (noting that over 415,000 pages of documents have been produced thus far by the Debtors alone). Fortunately, with the approval of the settlement, none of that will be necessary.

(ii) Expense.

Responding to the Creditors Committee's virtually limitless discovery requests already has been an enormously expensive process for the Debtors.[15] In the last few weeks the Debtors have been forced to employ more than two dozen lawyers at four major law firms and Exide's in-house law department to work virtually around the clock collecting, reviewing, and producing hundreds of thousands of pages of documents located in five different cities.

To cite just one example of these discovery efforts, the Creditors Committee's unfounded suspicions of a collusive relationship between the Prepetition Lenders and the Debtors has led to the production of more than 40,000 pages of electronic mail messages to date. Compiling this type of material is especially expensive and burdensome. Stated generally, for every individual from whom discovery is sought, the Debtors' information technology personnel must retrieve and restore backup tapes for Exide's computer system. For each backup tape, they then must retrieve the tape's inventory to determine if it contains emails. That process alone takes approximately six-and-a-half hours for each tape. Then the contents of the tape must be restored, so that the tape's emails may be put in a searchable format. That takes another two to three hours per tape. Each person's email on the tape then must be separately searched electronically by attorneys to cull and transfer responsive documents to a disk. At 4000-5000 emails per CD-Rom, it can take an attorney days just to review one CD. The responsive emails that the attorneys identify are next provided to an outside vendor for printing and copying. Finally, each document printed by the outside vender is reviewed again by an attorney for privilege. The result, at least in this case so far, has been the time-intensive production and

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15 The Creditors Committee Adversary Proceeding has been enormously expensive for other parties as well. As counsel for R2 Investments said last month, his client spent $700,000 on the Creditors Committee Adversary Proceeding before formal discovery even began. See Tr. of 9/23/03 Hr'g at 169.

review of literally hundreds of thousands of documents, all at extraordinary cost to the Debtors. And if the proposed settlement is not approved, it will only get worse.

The Creditors Committee, of course, claims that "[t]he bulk of the costs associated with the litigation – collecting and producing documents – have likely been incurred." Creditors Committee Objection, at ¶ 103. But that wholly self-serving statement is disingenuous at best. Throughout the recent discovery, the Creditors Committee has repeatedly stated that it agreed to limit discovery for the moment because of the imminence of the Confirmation Hearing, but that if confirmation is denied, it reserves its right to broaden its discovery demands. Indeed, the Scheduling and Discovery Order specifically contemplates additional discovery in the Creditors Committee Adversary Proceeding if confirmation is denied. See Scheduling and Disc. Order, at 1 n.2. There are numerous indications that, if the settlement proposal is not approved, the Creditors Committee will seek the full breadth of its initial discovery requests, and in all likelihood propound new waves of discovery requests. In fact, in all of the recent depositions, the Creditors Committee has stated that it may depose the witnesses ***again***. See e.g., Dep. Tr. of Didier Siffer at 5-6 ("The Committee therefore expressly reserves its right to conduct further depositions of CSFB upon completion of a review of those documents that are still being delivered and, accordingly, today's deposition is being conducted without prejudice to the Committee's right to request additional depositions upon its completion of the review of the documents that are being produced or that have just recently been produced by Shearman & Sterling."); Dep. Tr. of Doug Cruikshank at 2 (same).

The Creditors Committee cannot have it both ways. Either the costs of continued litigation will not be high (which would mean that the Creditors Committee must concede the record is already sufficiently complete for the Court to evaluate the proposed settlement), or

there will need to be extensive further discovery (which, if the previous discovery is any indication, will entail astronomical costs). But there is no doubt that the continued litigation of the Creditors Committee Adversary Proceeding, and the expanded discovery that inevitably would accompany it, would be a crippling burden for a company striving to minimize costs and emerge from bankruptcy.

(iii) Inconvenience.

A decision not to approve the proposed settlement will entail significant inconvenience for all parties. In the case of the Debtors, if the Creditors Committee Adversary Proceeding survives, key members of Exide's Management will be required to continue to focus on the litigation, appear for depositions, collect and review documents, and consult with attorneys, all of which is a distraction from the more productive pursuit of rebuilding the company. See Cellular Information, 171 B.R. at 952.

(iv) Delay.

Any additional delay in approving the settlement and confirming the Plan would not only be inconvenient, but potentially ruinous. To delay confirmation at this time would directly undermine all of the Debtors' progress since the start of the restructuring process. And critically, with the expiration of key agreements in the next several weeks, failure to emerge from bankruptcy on schedule poses a serious risk of a global liquidation of the company. Any delay in Plan approval could therefore sound the death knell for Exide.

Moreover, even if liquidation could be averted, the consequences of a delay in confirmation would still be unacceptable. At the Omnibus Hearing before this Court on August 22, Exide's senior executives testified unequivocally that failure to meet the scheduled exit date simply is not a viable option. For example, according to Craig Muhlhauser, because two-thirds of Exide's earnings occur in the last half of the fiscal year, any extension of the restructuring

period would prompt customers to doubt Exide's prospects for survival. This, in turn, would impair Exide's ability to bid on both short and long-term contracts, and depress earnings for the current and future years. See, e.g., Tr. of 8/22/03 Omnibus Hr'g at 139. In addition, Lisa Donahue testified, further delay would cause the banks to withdraw their exit financing, requiring the Debtors to begin the restructuring process anew. See id. at 148 ("If we were to extend, I believe that would put the plan in peril and the process would have to start all over again as far as negotiating with these or other lenders.").

The Creditors Committee's suggestion that the Debtors could emerge from bankruptcy while the Creditors Committee Adversary Proceeding is ongoing is completely impractical. Although the Creditors Committee theorizes that all of Exide's equity could be placed in a trust pending the completion of the Creditors Committee Adversary Proceeding, that is just not feasible, and is no way to operate a company of Exide's size or complexity. The Creditors Committee does not even attempt to answer basic questions such as: who would oversee the trust; what authority would the trust have over Exide's Management; how would such a trust affect corporate governance issues; and even more fundamentally, who would make all those decisions about how the trust would operate. The Creditors Committee's proposal is in fact no proposal at all. It is a red herring designed to distract the Court from the realities of the situation.

Finally, it should be noted, if the Creditors Committee Adversary Proceeding were allowed to proceed, there is little doubt that it would take years to complete. The Creditors Committee's argument that the entire case could be completed in six months is a pipe dream. The Creditors Committee spent months investigating these claims before it brought them. It then took six months to litigate a motion to dismiss, where it was assumed that all of the allegations

were true. If the litigation proceeds, the Creditors Committee (as it has already indicated) will continue to unleash burdensome discovery requests, the facts and legal issues will be re-briefed during summary judgment, and ultimately the case could require a lengthy trial. And after all of that, the losing party would likely appeal, which would add perhaps another year to the case. The delay associated with continued litigation weighs heavily in favor of approving the settlement because the pendency of the litigation threatens to keep the Debtors trapped in bankruptcy and result in liquidation.

d. Interest of the Creditors.

The final criteria of the reasonableness test—whether the proposed compromise is in the paramount interest of the creditors—also decidedly favors approval of the settlement. It is important to note that this factor requires the Court to consider the interests of ***all*** the affected creditors, not simply those who object to the settlement. See In re Grant Broad. of Philadelphia, Inc., 71 B.R. 390, 399 (Bankr. E.D. Pa. 1987) (rejecting argument that the Court cannot approve a proposed settlement unless all the creditors support it). Without citation to any authority, the Creditors Committee asserts that because only the Prepetition Lenders support the proposed settlement of the Creditors Committee Adversary Proceeding, it should not be approved over the objection of the unsecured creditors. This argument has been soundly rejected. See Drexel Burnham, 138 B.R. at 758 ("While a Court may consider the objections of parties in interest who oppose a proposed settlement, such objections certainly are not controlling. A Court may properly give weight to the debtor's informed judgment that a settlement is fair and reasonable and consider the competency of the counsel who favor the compromise.") (internal citations omitted).

Here, the approval of the proposed settlement is in the best interest of the creditors. Without it, there is a very real danger that the Debtors will be liquidated. That result

would not only render hopeless any recovery at all by the unsecured creditors, but it would also greatly reduce the recovery of the secured creditors. Given those realities, it is clearly in the best interests of the Debtors, the secured creditors, and even the unsecured creditors, that the proposed settlement be approved.

3. The Debtors and Their Subsidiaries Are Worth $1 Billion.

The cornerstone of the Plan is that the Debtors' enterprise value is approximately $1.0 billion. No experts are needed to reach this conclusion – the market has indicated that Exide and its affiliates (collectively the "Company") are worth a maximum of $1.0 billion. Earlier this year, the Debtors and their advisors marketed the Company to over 70 different private equity firms. Exide also solicited bids on its industrial business from a select group of strategic buyers. The results of that process demonstrate that no buyer – strategic or financial – would pay more than $950 million for the Company.

Additionally, the Debtors' financial advisors have performed a comprehensive, multi-pronged theoretical valuation analysis, which further supports the market's valuation of the Company at nearly $1.0 billion. The Debtors' expert valuation reflects the best business judgment of the Company's management and the financial advisors who have been assisting the Debtors throughout their restructuring and who are the intimately familiar with the Company, its business, its products and its market. The evidence at the Confirmation Hearing will demonstrate that the Debtors' $1.0 billion valuation is reasonable, well-founded and supported by every unbiased expert who has looked at the Company.

a. The Debtors' Valuation is Based On the Market As Well as The Analysis of People Who Know and Understand the Company Best.

The Debtors' valuation of $1.0 billion rests on three pillars: the Company's five-year business plan, a valuation analysis performed by Blackstone and the market.

(i) The Company's Business Plan.

No one understands Exide better than its Management. Exide's Management, along with its financial advisors, are in the best position to project the Company's future performance, and determine what steps the Company can take to successfully improve profitability.

The Company's five-year business plan was built from "the ground up." Members of senior management and Alix met repeatedly with the management of the Company's various operating units to create a one-year business plan and five-year projections. They tested and re-tested every assumption and every projection, and the resulting plan represents the best business judgment of the people who know this Company better than anyone – its Management, and its long-time consultants.

(ii) Blackstone's Valuation.

Blackstone is one of the nation's premier investment banking and financial consulting firms. Arthur Newman, a senior managing director at Blackstone, has advised dozens of major companies through the restructuring process and has testified as an expert in 20 of those cases. Mr. Newman has vast experience in valuing troubled companies and is well versed in the effects that the restructuring process has on a company's enterprise value. Blackstone was retained by the Debtors to assist with the restructuring. After many months of working closely with Management, Blackstone initially placed a value on the company of $950 million in December 2002.

For the past year, Mr. Newman has analyzed and re-analyzed the Company's value. Based on many months of work, he believes the Company's present total enterprise value is $950 million to $1.050 billion, with a mid-point of $1.0 billion. In arriving at this conclusion, Mr. Newman performed a number of analyses, including (1) a comparable companies analysis;

(2) a comparable transactions analysis; and (3) a discounted cash flow ("DCF") analysis. In performing these analyses, he utilized his many years of experience, his vast knowledge of the Company and its markets and his professional judgment.

(iii) The Market.

In January 2003, the Company decided to investigate the value the Company would capture in a sale process. The Company authorized Blackstone to do two things: (1) contact private equity bidders, and (2) contact strategic buyers who may be interested in the industrial business.

After soliciting over 70 private equity firms, only seven initial bids were submitted, ranging from $700 to $950 million. After conducting substantial due diligence, three entities submitted second round bids. Despite strong signals from the Company and Blackstone that offers under $950 million might not be entertained, the highest bid was just $950 million, and the other two were substantially below that mark. Blackstone's contacts with strategic buyers were no more promising – one declined to make an offer, and the other offer was far below what Blackstone believed was appropriate. After receiving these disappointing results, the Company terminated the sale process.

b. The Valuations Offered by the Creditors Committee and Smith Are Based on Erroneous Information and Improper Methodology.

The Creditors Committee and Smith's constituents are not "in the money" unless the Company is worth well over $1.28 billion. In an effort to convince the Court that the Company is worth that much, the Creditors Committee and Smith will present three separate experts to support their contention that the Company is worth anywhere from $1.4 - $1.8 billion. However, the valuation work performed by these experts is based on flawed assumptions. (The Court will not be surprised to learn that *all* of those erroneous assumptions operate to increase

value, rather than decrease it.) Debtors will address the majority of those flaws at the Confirmation Hearing. However, two overarching points must be raised now.

First, Blackstone, the Company's Management and the numerous market bidders who have valued the Company at $1 billion or less all have strong personal and business incentives to arrive at the *correct* value. When they valued the Company, they had no particular incentive to understate or overstate its value, i.e., the Debtors are mere stakeholders in this case. On the contrary, they had strong personal and professional incentives to get it right in order to facilitate a prompt and orderly exit from chapter 11, regardless of how the valuation turned out. The Creditors Committee and Smith cannot say the same –their valuations were created solely for the purpose of this litigation and were crafted by "experts" whose clients need them to arrive at a value which will place them "in the money."

Second, the Creditors Committee has badly misstated the authority it cites in its objection to the Plan. For example, on page 2 of its objection, the Creditors Committee cites an article co-authored by Edith Hotchkiss (one of the Creditors Committee's experts), for the proposition that a comparable company analysis may understate a company's long-run growth prospects when compared to a cash flow analysis. In fact, Hotchkiss is not expressing any such opinion in her article. Rather, the quoted language comes from a part of the article in which she is discussing an opinion she believes is held by the press. Hotchkiss goes on to directly refute any such opinion:

> All three methods [capital cash flow, comparable company multiple methods, and "fresh start"] produce unbiased estimates of value. The similarity between the results of the capital cash flow and comparable companies methods suggests that using a single year of EBITDA for the latter method is not distorting the results.

Valuation of Bankrupt Firms, Gilson, Hotchkiss and Ruback at p. 53.

The Creditors Committee's citations to cases are equally overstated. The Creditors Committee cites several cases for the proposition that DCF is the favored analysis in valuing a business. Those decisions state no such thing. Rather, in those cases (In re Peregrine Sys., In re Zenith Elecs. Corp., and In re Cellular Information Systems), courts simply noted that a DCF analysis was a proper method *under the circumstances presented.* Not surprisingly, courts have found that other valuation methodologies are also appropriate. See, e.g., Peltz v. Hatten, 279 B.R. 710, 737-742 (D. Del. 2002) (rejecting DCF analysis and holding the comparable acquisitions analysis to be most probative analysis).

c. The Creditors Committee's Attack On the Private Equity Process Is Unfounded.

The Creditors Committee recognizes that the private equity auction is fatal to their claims that the Company is worth over $1.0 billion. Market evidence is, by definition, objective and irrefutable. Accordingly, they attempt to discredit that process in a number of ways. First, the Creditors Committee argues that the process was cut short, and that it would have resulted in higher offers had it been allowed to continue. There is no basis for such criticism. The fact remains that only one bidder met the *minimum* price established by the Debtors. Indeed, at the time of the auction, the Creditors Committee wanted to terminate the process entirely, and its consultants bemoaned the "low" offers received.

Second, the Creditors Committee claims the process was tainted by the Company's decision to pursue bids at the time it was also looking for exit financing. Such a course of action, however, is hardly unusual in a restructuring process. Moreover, none of the auction participants voiced any such concerns.

Third, the Creditors Committee complains that the Debtors did not entertain any "strategic buyers" such as EnerSys – Exide's creditor, litigation opponent and bitter competitor