

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

ORIGINAL

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<b>In re</b>	:	<b>Chapter 11</b>
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<b>EXIDE TECHNOLOGIES, et al.,<sup>1</sup></b>	:	<b>Case No. 02-11125 (KJC)</b>
	:	
<b>Debtors.</b>	:	<b>(Jointly Administered)</b>
	:	
	:	<b>Hearing Date: October 21, 2003 at 10:00 a.m.</b>
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**MEMORANDUM OF LAW IN SUPPORT  
OF MOTION TO COMPEL PRODUCTION OF  
DOCUMENTS AND TESTIMONY IMPROPERLY WITHHELD**

The Official Committee of Unsecured Creditors (the "Committee") of Exide Technologies ("Exide"), by and through its undersigned counsel, hereby moves under Rule 37(a) of the Federal Rules of Civil Procedure for an order compelling Credit Suisse First Boston ("CFSB"), in its capacity as administrative agent to the lenders (the "Pre-Petition Lenders") under the Pre-Petition Credit Agreement; Alvarez & Marsal ("Alvarez"), in its capacity as financial advisor to the Pre-Petition Lenders; Alvarez employee Dennis Stogsdill; Angelo, Gordon & Co. ("Angelo Gordon"); and Angelo Gordon employee Todd Arden to provide documents and testimony that were improperly withheld due to overly broad and improper assertions of the attorney-client privilege by CSFB. In support of the Motion, the Committee states as follows:

1. Early in this case, the Pre-Petition Lenders formed a Steering Committee (the "Steering Committee") for the purpose of "providing strategy to the Pre-Petition Lenders as

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<sup>1</sup> The Debtors in these proceedings are: Exide Technologies (f/k/a Exide Corporation); Exide Delaware, L.L.C.; Exide Illinois, Inc.; RBD Liquidation, L.L.C.; Dixie Metals Company and Refined Metals Corporation.

**DOCKET NO.** \_\_\_\_\_

**DATE** \_\_\_\_\_

a whole . . . .” See Stogsdill Dep. 28: 5-10 (excerpts attached as Exhibit A). It met on a monthly basis, and sometimes more frequently, until sometime in the late summer of 2003, when it stopped meeting based on advice of counsel for CSFB. Id. 103:24-105:9. The Steering Committee made “[a]ll types of decisions ranging from supporting the debtor on actions that it takes during the bankruptcy to negotiating a reorganization plan.” Id. 30:9-14.

2. During the discovery that preceded the instant hearing before the Court, counsel for CSFB took the position that all communications at meetings of the Steering Committee are protected by the attorney-client privilege and on that basis withheld documents relating to those meetings and instructed witnesses not to answer questions about the discussions at those meetings. For example, at the deposition of Dennis Stogsdill, CSFB instructed the witness not to answer any questions about a meeting of the Steering Committee where the original Plan of Reorganization term sheet, prepared by Angelo Gordon, was discussed. Id. 196:9 - 204:10. Likewise, at the deposition of Angelo Gordon employee Todd Arden, counsel for CFSB instructed the witness not to answer any questions about the substance of discussions at Steering Committee meetings. See Arden Dep. 21:20 - 26:19 (excerpts attached as Exhibit B). As a result, the Committee was prevented from discovering communication at the meetings of the Steering Committee.

3. It is well settled that the attorney client privilege applies:

(1) Where legal advice of any kind is sought; (2) from a professional legal advisor in his capacity as such; (3) the communications relating to that purpose; (4) made in confidence; (5) by the client; (6) are at his instance permanently protected; (7) from disclosure by himself or by the legal advisor; (8) except the protection be waived.

United States v. Rockwell Int'l., 897 F.2d 1255, 1264 (3rd Cir. 1990).

4. Because the attorney-client privilege can serve to obstruct the truth finding process, it is construed narrowly. See Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1423-24 (3rd Cir. 1991) (quoting Fisher v. United States, 425 U.S. 391, 403 (1976)). The party asserting the attorney client privilege has the burden of establishing its existence. See Bowne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465, 470-71 (S.D.N.Y. 1990).

5. The privilege does not cover communications between an attorney and a client that are made for business as opposed to legal purposes. See, Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 147 (D. Del. 1977). Communications of business meetings attended or directed by an attorney are not automatically privileged as a result of the attorney's presence. See Kramer v. The Raymond Corp., 1992 U.S. Dist. LEXIS 7418 at \*3 (E.D. Pa. 1992) (Pollack, J.) (citing Super Tire Engineering Co. v. Bandbag, Inc., 562 F. Supp. 439, 441 (E.D. Pa. 1983)). In order for the attorney-client privilege to protect from disclosure a communication at a meeting, the party invoking the privilege ““must clearly demonstrate that the communication in question was made for the express purpose of securing legal not business advice.”” See id. at \*4 (quoting Aamco Transmissions, Inc. v. Marino, 1991 U.S. Dist. 12236 at \*9 (E.D. Pa. 1991)).

6. The attorney client privilege cannot be used to cloak behind a mask of secrecy all communications at a meeting with an attorney present, unless the entire purpose of the meeting was to seek or render legal advice. For example, the Third Circuit upheld the attorney-client privilege in a meeting between corporate executives and in-house counsel where the purpose of the meeting was to discuss a report about product liability litigation relating to the company's product. See In re: Ford Motor Co., 110 F.3d 954, 964-66 (3rd Cir. 1997).

7. In this case there has been no showing that any meeting of the Steering Committee — much less all meetings of the Steering Committee — were conducted exclusively

for the purpose of discussing legal advice. Absent such a showing, it was improper for CSFB through its counsel to withhold documents about the meetings and to instruct witnesses not to answer questions about the discussions at those meetings.

ACCORDINGLY, the Committee requests this Court enter an Order, in the form attached hereto, compelling CFSB and the Pre-Petition Lenders to produce any document evidencing communications at meetings of the Steering Committee and to provide testimony of Alvarez employee Dennis Stogsdill and Angelo Gordon employee Todd Arden about the discussions at those meetings.

Dated: October 25, 2003  
Philadelphia, Pennsylvania

Respectfully submitted,

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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

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In re	:	
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EXIDE TECHNOLOGIES, <u>et al.</u> ,	:	Case No. 02-11125 (KJC)
	:	(Jointly Administered)
	:	
Debtors.	:	
_____	:	<b>Hearing Date: October 21, 2003 at 9:30 a.m.</b>

ORDER

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2003, upon consideration of the Official Committee of Unsecured Creditors' Motion to Compel Production of Documents and Testimony Improperly Withheld, after hearing argument of counsel and for good cause shown, it is hereby ORDERED that the Motion is GRANTED and that the Pre-Petition Lenders and Alvarez & Marsal must produce any document evidencing communications at Steering Committee meetings and must provide testimony of Alvarez employee Dennis Stogsdill and Angelo Gordon employee Todd Arden about the discussions at those meetings.

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Kevin J. Carey  
U.S. Bankruptcy Judge

**MEMORANDUM OF LAW IN SUPPORT  
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**TABLE OF CASES**

<b><u>Tab No.</u></b>	<b><u>Case</u></b>
1	<u>United States v. Rockwell Int'l.</u> , 897 F.2d 1255 (3rd Cir. 1990).
2	<u>Westinghouse Elec. Corp. v. Republic of the Philippines</u> , 951 F.2d 1414 (3rd Cir. 1991)
3	<u>Bowne of New York City, Inc. v. AmBase Corp.</u> , 150 F.R.D. 465 (S.D.N.Y. 1990).
4	<u>Hercules, Inc. v. Exxon Corp.</u> , 434 F. Supp. 136 (D. Del. 1977).
5	<u>Kramer v. The Raymond Corp.</u> , 1992 U.S. Dist. LEXIS 7418 (E.D. Pa. 1992) (Pollack, J.)
6	<u>In re: Ford Motor Co.</u> , 110 F.3d 954 (3rd Cir. 1997).