IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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BEFORE:

THE HONORABLE KEVIN J. CAREY
UNITED STATES BANKRUPTCY COURT JUDGE

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IN RE:	:	NO. 02-11125KJC (11) (DE)
	:	
EXIDE TECHNOLOGIES, INC.	:	

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Philadelphia, Pennsylvania
March 11, 2004
3:18 o'clock p.m.

- - -

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1 (The following occurred in open court at 3:18
2 o'clock p.m.:)
3 THE COURT: Good afternoon, everyone.
4 MR. KLEIMAN: Good afternoon, your Honor. Matthew
5 Kleiman, Kirkland & Ellis, LLP, appearing this afternoon on
6 behalf of the debtors. With me, my co-counsel, Mr. James
7 O'Neill from the Pachulski Stang law firm.
8 Your Honor, first I want to confirm that the Court
9 received the amended agenda for this afternoon's hearing
10 which reflects the two objections to the disclosure
11 statement.
12 THE COURT: I have it.
13 MR. KLEIMAN: I'm sorry, you have?
14 THE COURT: I have it.
15 MR. KLEIMAN: Thank you, your Honor. Your Honor, I
16 thought we should first take up the disclosure statement
17 itself. And before I start with respect to my remarks, I'd
18 like to provide the Court with a blackline version of the
19 joint plan and the disclosure statement which the debtors and
20 the Creditor's Committee intend to file before the end of
21 today. And I'll describe for the Court the significant
22 changes from the February the 27th version.
23 We provided blacklines to the parties in the
24 courtroom as well, your Honor.
25 As the Court knows, the joint plan and disclosure

1 statement were filed by the debtors and the Creditor's
2 Committee who are co-proponents of the plan on February the
3 27th. Since that date we've worked with the principal
4 constituencies in the case primarily addressing certain
5 corrections, updates, as well as non-substantive changes to
6 the plan and the disclosure statement resulting in the
7 current versions of the plan and disclosure statement that we
8 have provided to the Court and to the parties here today, and
9 which the debtors and the Creditor's Committee intend to file
10 with the clerk of the Bankruptcy Court today.
11 We've also agreed with the office of the U.S.
12 Trustee that blacklines comparing the current plan against
13 the fourth amended plan, the one that the Court considered
14 last year, will be made available upon request. So that if
15 any party in interest wish to compare the principal
16 differences between the old plan and the new joint plan, a
17 blackline would be provided for them.
18 Your Honor, allow me to highlight for the Court what
19 the company and the Creditor's Committee are the very few
20 changes from the February 27th version of the joint plan to
21 the March 11th version. First off, let me assure the Court
22 and the parties in the courtroom that there have been no
23 changes whatsoever to the forms of the distributions, the
24 allocations, the stock and the warrants that I previously
25 described to the Court and that are set forth in the February

1 27th version. That continues to be the global agreement of
2 the parties and that continues to be the basis on which we
3 are proceeding towards what we hope will be a consensual or
4 largely consensual confirmation hearing very shortly.
5 Indeed, as I said before, your Honor, the
6 corrections and the updates are largely of a non-substantive
7 nature and I won't belabor the Court with each and every
8 change in the blacklines, but there are a small handful of
9 modifications that I would like to address for the Court.
10 First in the plan, your Honor, I wish to point out
11 that we have added the debtor in possession financing agent
12 and lenders to the definition of releasees. It was an
13 inadvertent omission. It was always intended that as our
14 post-petition lenders those parties would receive the benefit
15 of the releases, injunctions and exculpation provided in the
16 plan.
17 In addition, your Honor, in consultation with the
18 Creditor's Committee we have made some largely procedural
19 modifications to the disputed claims, reserve and resolution
20 procedures. As I think the Court is aware, the disputed
21 claims procedures has a fairly significant effect on not the
22 amount but ultimately the timing of the distributions to
23 unsecured creditors in this case, and therefore we ask the
24 Creditor's Committee to take the lead in devising a set of
25 procedures that they, the committee, were comfortable with,

1 and certain updates were made between February 27th and March
2 11th which are reflected in the current plan.
3 Principally, your Honor, it simply provides that the
4 Creditor's Committee will establish the initial reserve of
5 stock and warrants that will be held back for the resolution
6 of disputed claims, and we have included now mechanisms to
7 make sure that those reserves are distributed out to
8 creditors on as promptly and timely a basis as possible as
9 claims are resolved, giving the Creditor's Committee the
10 discretion to adjust that reserve over time, and insuring
11 that in the event of, for example, a corporate transaction, a
12 sale, a dividend or other transaction affecting the stock or
13 the warrants in the reserve that those shares or the proceeds
14 of those shares and warrants would still be available to the
15 unsecured creditors, but it is always intended that the
16 allocated block of stock and warrants will be ultimately
17 distributed in its entirety to the unsecured creditors. None
18 of that is supposed to revert back to the state.
19 Finally, your Honor, there have been certain
20 procedural modifications to the provisions in the plan
21 pursuant to which the debtors have agreed to pay the fees of
22 certain parties that were involved in the consensual
23 negotiation leading to the deal originally reported to the
24 Court on January 22nd. As the Court may recall at that time
25 I advised the Court that the debtors had agreed and it is

1 still their commitment to pay the reasonable and actual fees
2 and expenses of certain parties principally involved in the
3 negotiation. And by that I'm specifically referring to --
4 I'm sure I'll be corrected if I leave anyone off, your Honor
5 -- the indentured trustees under the two indentures, both the
6 senior notes and the subordinated convertible notes, the
7 Sonnenschein law firm, the Bayard firm, they're co-counsel,
8 they're Delaware co-counsel, counsel to Smith Management
9 who's the largest subordinated bondholder and a member of the
10 Creditor's Committee, R Squared (ph) and certain of their
11 counsel who is the company's largest senior noteholder and
12 indeed we think the largest unsecured creditor of the estate.
13 And I believe that I got them all, your Honor.
14 The changes that we've made since February the 27th
15 to today are, first of all, confirming that the debtor has in
16 fact agreed to pay the reasonable and actual fees related to
17 the bankruptcy case, but it was also brought to our attention
18 that certain of those parties had incurred fees prior to the
19 commencement of the bankruptcy case, which they wished to
20 bring to the company's attention and request payment for as
21 well. Previously there had been a time limitation for all of
22 these applicants between the petition date and the effective
23 date, and we have agreed, your Honor, to amend the plan to
24 provide that in the case of HSBC, the indenture trustee under
25 the subordinated notes and R Squared, that the debtors have

1 agreed to pay expenses going back to January the 1st, 2002,
2 so approximately four months prior to the petition date.
3 And with respect to the Bank of New York the
4 indenture trustee for the senior notes, we've agreed that
5 there won't be a date restriction for when their period will
6 start.
7 I would like to advise the Court that this agreement
8 is in no way an abrogation of the debtor's rights to review
9 those bills and to make appropriate objections. Other
10 parties are also permitted to review the bills and make
11 objections to the extent that anyone believes that any of the
12 fees requested, including the pre-petition fees, are not
13 reasonable or are not related to the bankruptcy cases, and
14 that is a process that is spelled out in the plan, your
15 Honor, and will be followed by all of the parties.
16 With respect to the disclosure statement, your
17 Honor, the changes there, first obviously we've made
18 conforming changes. Any of the changes in the plan where the
19 language is duplicated in the disclosure statement we've
20 updated that.
21 We have also, your Honor, updated the claims
22 estimate for the general unsecured claims. As I reported to
23 the Court on several occasions, the debtor's reconciliation
24 process with respect to the prepetition claim amounts is an
25 ongoing exercise, and one that in particular recently we have

1 been working very close with the Creditor's Committee given
2 their obvious interest and their responsibility to establish
3 the claims reserve. And therefore based on some additional
4 work that took place between February 27th and today, we've
5 updated the claims estimate with the net effect, your Honor,
6 that the debtor's projected distributions to unsecured
7 creditors is actually increased because our estimate of the
8 aggregate claims pool has decreased.
9 Of course, your Honor, and as disclosed in the
10 disclosure statement, the figures for the projected unsecured
11 claims as well as the percentage recoveries are projections.
12 It is based on at present the debtors and the committee's
13 best current view of certain disputed unliquidated claims,
14 and as disclosed in the disclosure statement those numbers
15 could be subject to being allowed in amounts that could be
16 materially higher or lower than what's set forth in the
17 disclosure statement. But certainly what is reflected in the
18 disclosure statement, in particular the modification for the
19 Class P4A claims to 271 million represents the best current
20 understanding of that reconciliation from the debtor's
21 perspective.
22 Having updated the claims estimate in the front of
23 the plan, your Honor, we've also updated the liquidation
24 analysis which is Exhibit B to the plan so that there is now
25 conformity between the estimates, the unsecured claim

1 estimates between the plan protections and the liquidation
2 analysis projections. And then finally, your Honor, we've
3 updated the section in the disclosure statement regarding the
4 solicitation procedures to reflect certain agreed changes
5 that I will go into more detail when we turn to the
6 solicitation motion itself.
7 Your Honor, I think from the tenor of my remarks it
8 would be fair for me to represent to the Court that the
9 modifications are really of a fairly non-material technical
10 nature, and we've certainly worked very hard in consultation
11 with the Creditor's Committee, our co-proponent under the
12 plan, as well as the agent to the pre-petition bank group to
13 insure that there remains global consensus, and we are all
14 here today asking the Court to approve the disclosure
15 statement.
16 The debtors and the committee believe that the
17 disclosure statement as presented to the Court and as updated
18 provides adequate information to permit a hypothetical,
19 reasonable investor to make an informed decision on the joint
20 plan, and we believe that the disclosure statement in all
21 respects conforms to Section 1125 of the Bankruptcy Code as
22 well as all other applicable provisions.
23 I think it's obviously relevant for the Court to
24 take into consideration that the official representatives of
25 the two constituencies that will be voting on the plan, in

1 other words, unsecured creditors and the pre-petition bank
2 group, are also here standing proverbially supporting the
3 disclosure statement and believe that it contains adequate
4 information for their respective constituencies to make an
5 informed decision to vote for or against the plan.
6 Your Honor, there are two objections to the
7 disclosure statement. And before I yield the podium for
8 counsel to present their objections, I would like to inform
9 the Court that I have had, although brief, I think
10 constructive discussions with counsel to both the equity
11 committee and counsel to the lead plaintiffs regarding their
12 objections. I have extended the offer to both of those
13 entities and I believe it has been accepted that to the
14 extent on their respective issues, in the case of the equity
15 committee valuation issues in the case of the lead
16 plaintiffs, the debtor's estimate or underestimate of the
17 lead claims, the debtors have agreed to allow both of those
18 parties to submit to the debtors -- and it would have to be
19 very quickly, but to submit to the debtors an insert for the
20 disclosure statement that would reflect their respective
21 positions on those respective issues, with the understanding
22 that the debtors would note that the debtors dispute the
23 assertions of these respective parties and reserve all of
24 their rights.
25 Since this is a disclosure document and not a

1 substantive determination of the rights of either of the
2 parties on either of those issues, it is my hope that when
3 counsel take the podium they will acknowledge that that at
4 least in part addresses a number of the objections that are
5 before the Court.
6 I would also say, your Honor, by way of preview that
7 the debtors believe that the balance of the issues presented
8 in the two objections are really confirmation issues. I
9 believe the document with the submissions from these parties
10 does satisfy the standards for us to commence our
11 solicitation. We understand that these parties may or may
12 not prosecute objections to confirmation, but we don't
13 believe that today is the time to do so.
14 Finally, your Honor, I would like to further address
15 what I hope is a resolution of the Equity Committee's issues
16 with respect to the releases in the plan. In the first
17 instance the Equity Committee asked what has changed from the
18 old plan. Your Honor on December 30th issued a ruling not
19 granting the releases versus today. And my response then and
20 my response to the Court would be that what has changed is
21 that we now expect to have global consensus on the plan, we
22 expect to have the overwhelming support of those parties that
23 will be giving the releases, i.e. the prepetition bank group
24 and the unsecured creditors, those who will be voting.
25 I have confirmed with Mr. Metz that we did not alter

1 the scope of the releases in any respect and that means
2 several very important things. As it relates to the Equity
3 Committee's constituency, they will not be giving a release.
4 Because equityholders do not receive any recovery nor retain
5 any property under the plan, they are deemed to reject and,
6 as before, the present plan provides that releases are only
7 given by parties who vote in favor of the plan. I have --
8 THE COURT: Mr. Kleiman, I'm sorry to interrupt, but
9 the distractions from the telephone participants have gotten
10 too great for me to remain silent any longer. I feel like
11 I'm on a bridge of a submarine --
12 (Laughter.)
13 THE COURT: -- with sonar readings.
14 This is Judge Carey. I'm hearing some sounds coming
15 from the telephone participants I think, it's a beeping
16 sound. So, if you would all check your telephones and see if
17 you can correct that, I would appreciate it.
18 (Pause.)
19 THE COURT: All right, Mr. Kleiman.
20 MR. KLEIMAN: Your Honor, I thought perhaps if I
21 talked continuously without taking a breath I might be able
22 to overcome that.
23 Further, your Honor, with respect to the releases, I
24 confirmed to Mr. Metz that, as before, the plan does release
25 derivative actions, i.e. those that belong to the estate, but

1 that neither the releases nor the injunctions would affect
2 any direct rights of any equityholder. And, finally, I
3 confirmed with Mr. Metz that the exculpation provisions in
4 the plan, which are identical to the exculpation provisions
5 in the old plan, are limited to actions of officers and
6 directors relating to the restructuring and that, although
7 they do by their terms extend to prepetition acts, which we
8 believe is consistent with law in this circuit, that it is
9 limited in scope to actions taken in connection with the
10 restructuring. And it is my hope that on the basis of those
11 representations Mr. Metz will confirm that at least for
12 today's purposes we have addressed that portion of his
13 objection.
14 But with that, your Honor, I'll reserve further
15 response until after the presentation of the objections. And
16 so at this time, with the Court's -- unless the Court has any
17 questions of me, I would suggest that I yield the podium to
18 Mr. Metz on behalf of the Equity Committee.
19 THE COURT: I have no questions at this point.
20 MR. KLEIMAN: Thank you, your Honor.
21 MR. METZ: Good afternoon, your Honor, Mark Metz for
22 the Official Committee of Equity Security Holders.
23 As we have throughout the case, the Equity Committee
24 has tried to stay focused and concise about the issues that
25 are of importance to it. So our objection raised the two

1 points that Mr. Kleiman mentioned and the resolution that he
2 described with respect to the valuation issue is acceptable
3 and accurate and we will be providing him with an insert, he
4 said quickly, we'll -- I'm not sure what that means, but
5 certainly no later than Monday, tomorrow if we can do it.
6 Likewise, the Equity Committee is satisfied with the
7 clarifications that the plan does not purport to release or
8 enjoin direct claims by shareholders against released parties
9 other than the exculpation provisions, which are limited to
10 their X in connection with the restructuring. We're going to
11 ask for that clarification to again be put on the record at
12 the confirmation hearing but, based on Mr. Kleiman's
13 statements, we are prepared today to withdraw our objection
14 to the joint disclosure statement.
15 THE COURT: Very well. Thank you.
16 MR. KORTANEK: Good afternoon, your Honor, Steve
17 Kortanek from Klehr Harrison and I represent the lead
18 claimants.
19 Your Honor, first let me tell you that we very much
20 wanted to have one or two of my trial counsel with us today,
21 they are traveling up for a meeting with the committee in New
22 York tomorrow and they apologize for not being here. The
23 reason I mention that, your Honor, is that after we talk
24 about disclosure objection I'd like to discuss with your
25 Honor a motion that we filed last night. If things go well

1 among the parties, perhaps that motion won't be necessary to
2 present for your Honor, but it is a motion to estimate our
3 clients' claims for reserve purposes, and I would like to
4 take up the scheduling of that motion after we're done with
5 the disclosure statement.
6 Your Honor, we -- let me first tell your Honor that
7 our clients have two representatives that sit on the official
8 committee and throughout the process, when it was a one-cent
9 case and when it became a 20-cent case, we have participated,
10 myself and the two other lawyers that are principally
11 involved, to a great extent in the overall global process of
12 this Chapter 11, we've been doing it on behalf of our clients
13 and of course on behalf of the greater constituency of tort
14 claimants and of course all creditors. I did want your Honor
15 to know that throughout that process, however, we have always
16 made very clear that it is critically important to our
17 clients as claimants that we have a fair process for them to
18 use and elect their jury trial rights, because they're all
19 personal injury creditors, and also, of course, that our
20 claims be accorded fair distributions under the plan.
21 So, we're down to two focuses as we get toward
22 confirmation. They are, at this moment, what the reserve
23 will be for our claims. And I'll tell your Honor that our
24 very careful, bottoms-up constructed number of what we're
25 going to request as a reserve, just so your Honor is aware,

1 is $207 million, more or less. We literally have it to the
2 penny based on calculations for all 110 of our individual
3 clients who are remaining subject to this procedure.
4 I represent 165 individuals, your Honor, 54 of them,
5 I won't expect your Honor to remember, their exclusive remedy
6 as far as we know for their lead-related harm is workers'
7 compensation statutes under Iowa and last summer we had a
8 lift-stay that was granted as to them. So, we're down to 110
9 people. These are all individuals, they're all children,
10 your Honor, they're all minor children who -- the vast
11 majority of them, 84 of them, live in a trailer park next to
12 what was an Exide facility in Greer, South Carolina, and also
13 some of them lived in a subdivision that was right next to
14 that plant. Exide owned that plant for a period of years and
15 suffice it to say that it is, in my experience and I think in
16 anyone's, the most horrific set of corporate conduct one can
17 imagine. We're not going to go into it now --
18 THE COURT: Mr. Kortanek, with respect, I mean, this
19 is -- this is a situation that's described in all the
20 pleadings that you filed on behalf of your clients and, while
21 I can certainly sympathize with them, I'd like you to get to
22 the relevant part of what's before me today.
23 MR. KORTANEK: I will, your Honor. And I just -- I
24 wanted to tell you that, your Honor, because what -- what
25 we're trying to do, your Honor, is at least have the debtors

1 give some fair disclosure in the context of this disclosure
2 statement. We appreciate Mr. Kleiman's offer that we can
3 write an insert and we'll do that, but we see no disclosure
4 and hence have objected as to what basis might exist for
5 trying to impair our jury trial rights through the -- what we
6 call -- what they're calling the PIDWID (ph.) procedures.
7 And so I'll start there, your Honor. You know, in every case
8 that I've been involved in, when there is -- when debtors
9 claim there's a mass tort, you know, hundreds of thousands of
10 lawsuits, debtors come to the Court early in the process and
11 they have to demonstrate some basis to have special
12 procedures where your Honor would sponsor some kind of an ADR
13 process that would restrain us from the stay and so on and
14 keep us from getting to our home court. There's been no
15 basis or any disclosure for proposing that procedure. I
16 mean, it's telling that it comes at this late stage in the
17 cases, you know, two years into the filing. Frankly, we just
18 think the debtors find it convenient and perhaps, you know,
19 others find it convenient to put that into a plan, frankly
20 because it slows us down, it prejudices our rights and
21 there's no basis disclosed for that. We'll see that in our
22 insert, your Honor, but we do think that the debtors fought
23 to disclose what the basis might be for doing that. They've
24 admitted it's not a mass tort case. Exide is, as your Honor
25 has recently determined, a massive, valuable cash-generating

1 company, and we think that proportionality is important. We
2 don't understand why Exide seeks to keep the stay in place
3 and seeks to have total control over the claims resolution
4 process, so we think it's fair to have them disclose some
5 basis for that. So, that's one issue we have, your Honor.
6 Another issue is, on the reserve we see recent
7 changes that are certainly encouraging that leaves to the
8 Creditors Committee and the larger creditors the choice of
9 setting a reserve. And, as I read those terms, it's clear in
10 a limited sense that it says, before the effective date, a
11 reserve shall be established, but no mechanism for
12 establishing that reserve is described, no timing for doing
13 that is described, other than before the effective date, and
14 what we're left to wonder is, you know, when will we get that
15 reserve amount? I'll describe for your Honor what's
16 happening in terms of settlement discussions after this
17 disclosure statement part, but if that doesn't -- if the
18 settlement efforts on the reserve don't happen, where are we?
19 We filed an estimation motion for that reason, but there's
20 really no description of the process. If it remains a
21 contested process, there ought to be some disclosure -- or
22 maybe it's a scheduling issue as far as when we'll be told
23 our number, when we can react to it. Absent that sort of
24 disclosure, I think creditors are left to wonder, you know,
25 what are the numbers.

1 We believe the debtors have estimated the numbers
2 into which our group would fit a dramatically inadequate
3 number and we're still not sure how they got to that amount,
4 whether they've done any analysis of the very detailed claims
5 that they made us file last summer. Again, sort of a strong
6 turn of events. We filed box upon box of expert reports and
7 all sorts of other essentially discovery, your Honor; as far
8 as we know, no one has lifted a finger to look at it and it's
9 been eight or nine months. We submitted all those claims,
10 basically trial-ready packages. So, to have that kind of
11 information that's been in the debtors' hands and anyone else
12 who wished to see them, yet not have any description as to
13 how the number has been arrived at, what process the debtors
14 undertook to get there, I think leaves disclosure lacking.
15 And, you know, we know what our claims are, but I'm speaking
16 in terms of creditors who are being asked to vote on the
17 plan. If our numbers are as we think they are, frankly, the
18 disclosure statement of the numbers we think have some
19 issues.
20 Your Honor, those were really the main points of our
21 objection, you know, valuation, basis for the PIDWID
22 procedures and the reserve mechanism. We have raised and
23 preserved of course confirmation-type objections and we'll
24 address those later.
25 THE COURT: How long do you think it will take for

1 you to get some suggested language to debtors' counsel?
2 MR. KORTANEK: We can -- we'll be meeting all day
3 tomorrow, so I would think by Monday we can do that, your
4 Honor.
5 THE COURT: Very well.
6 MR. KORTANEK: Thank you.
7 MR. KLEIMAN: Your Honor, let me preface my response
8 by saying that with respect to the background presentation of
9 Mr. Kortanek, suffice it to say the debtors disagree with his
10 recitation and reserve all of their rights with respect
11 thereto. I'll leave it at that.
12 As it relates to the disclosure statement objections
13 themselves, I think the lead plaintiffs have addressed two
14 issues and let me take them in turn. First, the personal
15 injury tort and wrongful death procedures. In the first
16 instance, your Honor, I reiterate, I think this is a
17 confirmation issue. We understood at the last confirmation
18 hearing that they objected to those procedures, I expect that
19 we will see a similar objection this time. The Court may
20 remember that at the last hearing I reached an agreement with
21 Mr. Kortanek that we were going to reserve our rights with
22 respect to that and address that post-confirmation. As it
23 relates to the hearing today, the disclosure, I would
24 respectfully suggest to your Honor that there is no further
25 disclosure that is necessary. The procedures themselves are

1 fully laid out, the disclosures in the disclosure statement
2 about those procedures are identical to the disclosures that
3 your Honor approved with respect to those identical
4 procedures in the last confirmation hearing and, candidly,
5 your Honor, what I'm hearing is really this is just a preview
6 of the fact that the lead plaintiffs don't agree with those
7 procedures and that we may have some issues with respect to
8 them later. I accept that, your Honor, and, as Mr. Kortanek
9 indicated, I fully expect that their insert will address that
10 and we will reserve all of our rights with respect thereto.
11 I don't think that giving trade creditors or
12 bondholders any additional disclosure about why the debtors
13 have elected to propose these procedures will help any of
14 them, nor, candidly, do I believe it will help the lead
15 claimants make a decision whether to vote for or against the
16 plan. I suspect we already know what their respective
17 viewpoints may be based on their opposition to that aspect of
18 the procedures itself.
19 As it relates to the reserve issue, your Honor, a
20 couple of points in response. First, I don't want Mr.
21 Kortanek to leave you with the impression that this reserve
22 substantively affects the recoveries of his constituencies
23 vis-a-vis any of the other unsecured creditors, that is not
24 the case. The plan provides -- and I have to make this point
25 because in their written objection they argue that disclosure

1 statements should be denied because there is -- the plan is
2 non-confirmable due to unfair discrimination against their
3 clients, nothing could be further from the truth. This plan
4 provides that the lead plaintiffs, along with all other
5 general unsecured creditors, will receive the same pro rata
6 recovery of their allowed claims. The only issue that we're
7 talking about today is the reserve, that is, how much stock
8 and warrants to hold back from the initial distribution, so
9 that the estates will in fact be able to assure that everyone
10 gets that same pro rata recovery as the claims are settled,
11 arbitrated, mediated, liquidated or tried.
12 So, in the first instance, your Honor, I think this
13 is really not a substantive objection, and this in part goes
14 to as well the motion that was filed for an estimation for
15 reserve purposes. We're really only talking about the
16 disputed claims reserved, not the recoveries themselves. I
17 would also point out, as Mr. Kortanek conceded in his
18 remarks, the procedure for the establishment of the reserve
19 is very well laid out in the plan, it is provided that the
20 Creditors Committee will establish that reserve and that the
21 debtors will support them in that process. But I think it's
22 a little bit disingenuous for a constituency that has two
23 members on the Creditors Committee, the entity who is
24 responsible for determining the amount of the reserve, to
25 come to this Court and argue that there is inadequate

1 disclosure about the process for establishing the reserve
2 that affects their clients.
3 THE COURT: Well, it's conceivable that with two
4 votes on the committee that constituency was outvoted about
5 what should be there, so...
6 MR. KLEIMAN: But, your Honor, then I would
7 respectfully argue that that's a disclosure -- excuse me, a
8 confirmation issue. In other words, if they don't think the
9 reserve is the right size, that presumably goes to
10 feasibility of the plan, as opposed to disclosure issues,
11 which is all we really should be talking about today.
12 THE COURT: Well, on these objections from the lead
13 claimants, I'll say two things: One, I tend to agree with
14 the debtor that, unless the circumstances have changed with
15 respect to things which directly affect these claimants, I
16 don't know why I should consider approving something
17 different than what I approved the first time. However,
18 recognizing that it may be that simply by the assertion of
19 language upon which the parties can agree it will satisfy the
20 disclosure objections in any way of the lead claimants, I
21 still would like counsel to submit language to debtors'
22 counsel and see whether counsel can agree on the insertion of
23 some language. You know, you're back here Monday afternoon,
24 so that to the extent there is no agreement on language, I'll
25 make the decision then on what should or shouldn't go into

1 the disclosure statements, so the debtor will be in a
2 position at the close of the hearing Monday to move forward
3 with its disclosure statement.
4 MR. KLEIMAN: That's perfectly acceptable, your
5 Honor. And again I'll reiterate my initial comment, which is
6 to the extent that the lead plaintiffs wish to provide an
7 insert, we're prepared to put that in the disclosure
8 statement, as long as we're permitted to reserve our rights
9 with respect to it. So, it would be my hope, your Honor,
10 that we could actually resolve this before Monday, so that we
11 can proceed on this expeditious time table toward the
12 commencement of the solicitation.
13 THE COURT: Very well.
14 MR. KLEIMAN: Unless there are any other issues with
15 respect to objections, your Honor, I didn't want to be
16 presumptuous and turn to the solicitation procedures if your
17 Honor had any further questions with respect to the adequacy
18 of the disclosure statement itself.
19 THE COURT: No, I've reviewed it and don't have any
20 questions. Let me ask, though, if anyone else cares to be
21 heard on the disclosure statement?
22 (Pause.)
23 MS. MASELLA: Good afternoon, your Honor, Mary
24 Masella for the Creditors Committee. Your Honor, I just
25 wanted to confirm to the Court that the committee is working

1 hard to set the reserve. As Mr. Kortanek alluded to, the
2 committee is meeting tomorrow and will continue to work hard
3 to set that reserve as soon as possible.
4 THE COURT: Thank you.
5 MR. KLEIMAN: Your Honor, again, at the risk of
6 being somewhat presumptuous, I think I can interpret the
7 Court's remarks as indicating that with the inclusion of
8 inserts from the two constituencies as described on the
9 record the Court is prepared to find that our disclosure
10 statement is adequate. And, therefore, I would like to turn
11 to the debtors' motion for approval of solicitation
12 procedures, the forms of notices and ballots.
13 THE COURT: Yes, I am, I am prepared to approve it
14 as containing adequate information subject to those items
15 that we talked about today. And, for the record, I'll simply
16 state that, to the extent there are any other objections, for
17 example, that the plan is unconfirmable on its face, they are
18 overruled.
19 MR. KLEIMAN: Thank you, your Honor.
20 Your Honor, the debtors have filed and on the agenda
21 is the motion for approval of solicitation procedures, forms
22 of ballots and forms of notices. I would represent to the
23 Court that the procedures, the ballots, the notices are
24 substantially identical to the procedures and forms approved
25 by the Court last year. Indeed, your Honor, the only real

1 change on the forms other than the new dates that we hope
2 your Honor will set momentarily, and of course updating the
3 plan references to refer to the joint plan, is a statement in
4 the ballots that confirms that your old ballot won't count as
5 a ballot on the new plan.
6 There are two changes I wish to advise the Court of
7 from the relief that is set forth in the motion itself.
8 First, your Honor, the motion asked the Court to approve a
9 record date of March 3rd. We are asking the Court to modify
10 that request and instead set the voting record date for March
11 the 11th. The reason for this change, your Honor, as to
12 which we have consulted with the Creditors Committee and the
13 prepetition banks, is that DTC, the entity that maintains the
14 recordholder list for the bonds, have advised us that they
15 need three days advanced notice of when we want to set the
16 voting record date, so they can get us full and accurate
17 lists of the parties to whom we need to send the solicitation
18 materials. Unfortunately, your Honor, we weren't aware they
19 needed that advanced notice when we first proposed March the
20 3rd, so now that we knew that, we have made that request and
21 did so three days ago and, therefore, DTC has confirmed that
22 setting a record date of March 11th will permit us to have a
23 fully accurate bondholder list. I respectfully submit, your
24 Honor, this is an immaterial change and we would ask the
25 Court to allow us to make that modification on the record.

1 The second change that we're making from the
2 procedures set forth in the motion relates to the treatment
3 of ballots as to which a creditor neither indicated a yes or
4 a no vote on the plan. This was an issue raised by the U.S.
5 Trustee not in a formal objection, but in a phone call. And
6 I apologize to the Court and to Mr. Kenney, if he is in court
7 or on the phone. We had agreed at the last hearing, the last
8 disclosure statement hearing, that we would amend that
9 provision to provide that a ballot which neither indicates a
10 yes or a no won't be counted, as opposed to being deemed a
11 yes. Unfortunately, as we conformed to the old pleadings to
12 use for the present hearing, that change was not reflected.
13 It was never our intention to go back to the old way. And so
14 I have confirmed with Mr. Kenney and we have updated the
15 forms, the notices and the order to provide that a ballot
16 which neither indicates a yes or a no vote will not be
17 counted for purposes of plan acceptance. It will be counted
18 for purposes of -- for example, the prepetition lenders have,
19 the Court will recall, an Option A or an Option B treatment
20 election, so if a creditor were to select an Option A or an
21 Option B but not vote on the plan, it would still count for
22 purposes of their Option A or Option B election, but we would
23 not include it in the solicitation results itself.
24 That then, your Honor, takes us to the dates to fill
25 in to the order. And, as the Court will note from the

1 motion, what we have asked in terms of confirmation hearing,
2 subject of course to your Honor's availability, would be
3 something approximately 30 days from today to give us a full,
4 fair opportunity to conduct a solicitation on the new joint
5 plan. It is obviously an accelerated time table to some
6 extent, but still, your Honor, I think fully and adequately
7 gives creditors an opportunity to review the changes, to
8 understand the new deal, to consult with the Creditors
9 Committee and their advisors and make an informed decision.
10 So, your Honor, subject -- and I think since most of
11 the other dates sort of key off of the Court's availability
12 for a confirmation hearing, I think we would be looking at
13 the week of April the 12th, subject to your Honor's
14 availability.
15 THE COURT: Well, the omnibus date is Thursday the
16 15th at 11:00, there's presently a two-hour time slot there.
17 What do you think about that, or do you think you'll require
18 more time?
19 MR. KLEIMAN: Your Honor, I think in large part that
20 may depend on Mr. Metz and whether we're going to have any
21 new evidentiary presentations on valuation. I think in all
22 fairness Mr. Metz would tell you that right now he is
23 reserving the right to argue that we have undervalued the
24 company and Mr. Metz would probably tell you that he wishes
25 to reserve the right to present evidence on that. The

1 debtors do not agree with that proposition, nor do we believe
2 that such an evidentiary presentation would be permitted, let
3 alone warranted, but at least for today's purposes I don't
4 think that's an argument we need to get into. So, I think,
5 your Honor, it might be safer, at least for today, to predict
6 that we might need a larger block of time.
7 THE COURT: Friday, April 16th. How's that?
8 MR. KLEIMAN: Very good, your Honor.
9 THE COURT: 10:00 o'clock.
10 MR. KLEIMAN: And, your Honor, just to confirm the
11 other dates that we would fill in for the solicitation order
12 itself, we have proposed that the voting deadline be seven
13 days prior to the confirmation hearing, which would be... my
14 math not being very good... April the 9th?
15 THE COURT: Yes.
16 MR. KLEIMAN: We have also proposed, your Honor,
17 that the objection deadline for objections to confirmation be
18 seven days prior, that would be April the 9th. And, your
19 Honor, we have proposed that any responses to confirmation
20 objections would be due two days prior to confirmation, April
21 the 14th.
22 THE COURT: Okay.
23 MR. KLEIMAN: And then finally, your Honor, we've
24 proposed that the deadline for any 3018 motion for temporary
25 allowance of an objected claim would be seven days prior to

1 confirmation, so April the 9th.

2 THE COURT: Very well.

3 MR. KLEIMAN: What I would propose, your Honor,

4 insofar as I think that then addresses all of the relief

5 requested in the solicitation procedures motion, is that we

6 hold off submitting the order to your Honor until we have an

7 opportunity to receive the submissions from the parties that

8 are going to be providing us with inserts. To the extent we

9 can agree consensually on those inserts, we will submit that

10 order under certification to your Honor or, if we find

11 ourselves at the omnibus hearing on Monday, we can present it

12 then. I also note that we'll be seeing you tomorrow, your

13 Honor, so I think we're going to have plenty of opportunity

14 to hand up that order once we have the agreed inserts from

15 the parties.

16 THE COURT: Very well.

17 MR. KLEIMAN: Your Honor, the -- that takes us then

18 to the last item on the agenda itself --

19 THE COURT: Before we get there, Mr. Kleiman --

20 MR. KLEIMAN: Yes.

21 THE COURT: -- someone wants to make a comment.

22 MR. KORTANEK: Thank you, your Honor. On the

23 scheduling issue -- again, Steve Kortanek -- the -- as I

24 advised your Honor earlier, we filed an estimation motion

25 last night, if we are unable to resolve the reserve issues,

1 we do -- would like to discuss scheduling that with your
2 Honor today and we think that should happen before the
3 confirmation hearing. I think that to have a more detailed
4 dialogue about exactly what that hearing would look like,
5 obviously we -- you know, we need input from your Honor given
6 the complexity of the claims and so on. The presentation
7 that our trial attorneys are going to be giving to the
8 committee at large tomorrow and another large creditor I
9 imagine will be a two-or-three-hour presentation with
10 considerable detail and Power Point and so on. You know,
11 there's a lot of claims there, there's a lot of volume, there
12 are expert reports for the claims. I don't know if your
13 Honor has had an estimation proceeding for reserve purposes
14 that is at all similar to this --
15 THE COURT: I have not.
16 MR. KORTANEK: I haven't either, but we can envision
17 one that would be, you know, perhaps a half-day hearing. We
18 know that in that span of time we wouldn't really scratch the
19 surface, but I do -- I have some optimism that your Honor
20 could, you know, have enough information to at least make a
21 determination on the reserve issue. We appreciate Mr.
22 Kleiman's comments earlier that suggested we shouldn't be
23 concerned about the reserve, that we have no risk of mootness
24 or harm, but given the gap between the estimates at this
25 point, you know, we don't quite have that confidence yet.

1 So, I think it would be fair to look for a half day some time
2 before the 16th.
3 THE COURT: Mr. Kleiman, any view about that?
4 MR. KLEIMAN: Your Honor, on this issue I'm going to
5 yield to Ms. Masella on behalf of the committee since the
6 reserve falls squarely within their purview.
7 MS. MASELLA: Your Honor, we would like to, if
8 possible with the Court's schedule, have the hearing heard
9 before the confirmation hearing, so that at the confirmation
10 hearing we're address just those issues.
11 THE COURT: Well, there's agreement on that then.
12 (Pause.)
13 THE COURT: I have... I can give you a half a day on
14 Friday, April 2nd.
15 MR. STRATTON: Your Honor, may I have one moment to
16 confer?
17 (Discussion held off the record.)
18 MR. SILFEN: Your Honor, just so you know what the
19 discussion is -- and we appreciate your patience -- the
20 committee and the bondholders are concerned that they won't
21 have sufficient time to prepare for this hearing, and we're
22 having a discussion as to timing and whether that affects the
23 date of the confirmation hearing.
24 MR. KLEIMAN: And, your Honor, and I have been put
25 in the untenable position of being asked if I would agree to

1 push back the confirmation hearing so that the 16th could be
2 used for purposes of the estimation hearing and, candidly,
3 your Honor, the debtors would be very reluctant to do that
4 for reasons that the Court is very well aware of. We're
5 interested in proceeding into confirmation and exiting
6 Chapter 11 as promptly as possible.
7 THE COURT: The voting deadline that tentatively we
8 talked about?
9 MR. KLEIMAN: The 9th, your Honor.
10 THE COURT: Well, I have some time on the 8th.
11 (Discussion held off the record.)
12 MR. SILFEN: I also asked the question to Mr.
13 Seagal, because since we're trying to do a tight time frame
14 with voting, given that these ballots have to go --
15 MR. SEAGAL: There is a way to expedite that, so I'm
16 sure the debtor, if they need to -- I want to be fair about
17 this, I mean, in terms of delivering ballots to public
18 holders, that time frame ordinarily is very tight, but there
19 are these services you can use for like $10,000 that will
20 expedite getting it to them. But I didn't think we needed to
21 talk about this at this moment, I assume you want ballots
22 back, but --
23 MR. KLEIMAN: I can assure the Court and the parties
24 that we use any means necessary to ensure that the parties
25 entitled to vote would receive ballots so that our

1 solicitation procedures are complied with.
2 (Discussion held off the record.)
3 MR. KLEIMAN: Your Honor, against my better
4 judgment, I would have to ask the Court if there was any
5 other time shortly before the confirmation hearing, hopefully
6 preserving the 16th, that your Honor might be able to
7 entertain this issue. I understand your Honor's desire to
8 have this issue resolved prior to the voting deadline and I
9 think under different circumstances that would be perfectly
10 appropriate. It would be my expectation, your Honor, that
11 this could be an issue that's decided shortly before
12 confirmation and we would still be in a position to proceed,
13 but were there some time shortly before the 16th that your
14 Honor could accommodate these parties, we would --
15 THE COURT: Well, the 8th through the 9th really is
16 about as shortly before the confirmation as I have any decent
17 chunk of time available. The 9th is Good Friday, so, you
18 know, I wouldn't twist anybody's arm to come to court on a
19 religious holiday.
20 MR. KLEIMAN: And, your Honor, I know we have a two-
21 hour slot on the 15th, am I correct that there is no way to
22 enlarge that?
23 (Pause.)
24 THE COURT: Yes, I have omnibus hearings at 1:00,
25 2:00, 3:00 and 4:00 following that, so I don't see how I

1 could push that.
2 MR. KLEIMAN: Your Honor, could we perhaps have a
3 couple of moments to confer?
4 THE COURT: Sure.
5 MR. KORTANEK: Your Honor, just to -- Steve Kortanek
6 -- one issue, we don't -- we're not concerned about the
7 balloting deadline as far as our claims because, as I
8 understand it, our temporary allowance from the last go-round
9 might hold here and that's, you know, not a big issue for us,
10 so...
11 THE COURT: All right.
12 (Discussion held off the record.)
13 MR. KLEIMAN: Your Honor, I have been asked if I
14 could request the Court's indulgence perhaps for a brief
15 recess. We don't want to force your Honor to sit and look at
16 our backs while we check calendars.
17 THE COURT: Well, I'll tell you what, do you want to
18 take up the last item on the agenda before I take a break? I
19 don't know if anyone is waiting around just for that or...
20 MR. KLEIMAN: That's fine, your Honor, we can
21 certainly proceed with respect to that. And I will note for
22 the record, your Honor, there's one item not on the agenda
23 that I wanted to address with the Court before we adjourn.
24 But the third item on the agenda today, your Honor,
25 is a stipulation and agreed order allowing for the payment of

1 certain fees and expenses of the Sonnenschein firm and the
2 Bayard firm, special counsel to the Creditors Committee.
3 Your Honor will recall that these two firms have been
4 retained pursuant to Section 327 on behalf of the Creditors
5 Committee and actively participated in several aspects of the
6 case. However, because of the restrictions that exist under
7 the cash collateral order, these parties were not permitted
8 to receive the monthly or interim payments that the other 327
9 parties were receiving throughout the case.
10 THE COURT: And I understand that, I only asked -- I
11 did receive the certification regarding the stipulation and I
12 just wanted to make sure that I understood it correctly, and
13 that is will the applied-for compensation and reimbursement
14 of expenses be subject to examine -- review by the fee
15 examiner in this case and otherwise subject to, you know, the
16 Court's ultimately signing off on such compensation as with
17 the other professionals?
18 MR. KLEIMAN: The answers are yes and yes.
19 THE COURT: Okay.
20 MR. KLEIMAN: The procedures that are described in
21 the stipulation really address the debtors' ability to make
22 an interim payment of 40 percent, which is subject to
23 disgorgement upon final review, and sets the objection
24 periods for the debtors and for the bank group, for example,
25 but is not intended in any way to abrogate the authority of

1 the fee auditor to perform its function as directed by the
2 Court, nor is it in any way intended to abrogate your Honor's
3 final authority to review and approve the bills of any 327
4 professional.
5 THE COURT: Okay, those were my questions. Does
6 anyone else care to be heard on this matter?
7 (Pause.)
8 MS. FALKOWITZ: Your Honor, Holly Falkowitz from
9 Sonnenschein Nath & Rosenthal. I just want to confirm that
10 Mr. Kleiman's description of the stipulation is accurate and
11 correct. We did not intend to abrogate any of the
12 authorities that the Court has to finally review the fee
13 app., as well as the fee examiner, trustee and the normal
14 requirements that are imposed on Section 327 professionals.
15 THE COURT: Okay.
16 MS. FALKOWITZ: Thank you.
17 THE COURT: I have signed it.
18 MR. KLEIMAN: Thank you, your Honor.
19 Your Honor, the one item that I wanted to address
20 that's not on the agenda is of a purely informational nature
21 for the benefit of the Court, and I won't even say for the
22 benefit of the parties because this is actually something
23 that is well known by all of the principal constituencies.
24 The Court may recall from the discussions at last year's
25 disclosure statement hearing, coincidentally enough, that the

1 debtors have determined to continue their qualified pension
2 plans as opposed to terminating them. This decision was made
3 in consultation with the Creditors Committee and the
4 prepetition lenders, and it's obviously a decision that's
5 supported by the Pension Benefit Guaranty Corporation who,
6 would the debtors have reached a different decision, would
7 have potentially been saddled with termination liability.
8 The debtors made this decision because, on economic analysis,
9 it turned out to be the right decision from the estate's
10 perspective and ultimately the right decision in terms of the
11 PBGC as well.
12 Now, as part of that decision the company also
13 determined to pursue certain statutorily permitted funding
14 deferrals for plan years 2003 and 2004. And, again, your
15 Honor, this deferral request has been discussed with and
16 assented to by both the Creditors Committee and the
17 prepetition lenders and has been discussed with the Pension
18 Benefit Guaranty Corporation.
19 At this time, we are not seeking the Court's
20 approval of any aspect of this deferral request because the
21 only step that's required now is the filing of an application
22 with the IRS to initiate the application and review process.
23 There is nothing binding on the estates at this time, the
24 application can be withdrawn without penalty or cost at any
25 time, and there really is no immediate substantive effect of

1 the commencement of this process. Indeed, your Honor, it's
2 expected that this review of our deferral request will take
3 approximately six months and I think it would be fair to say,
4 your Honor, we very much hope and expect to be out of Court
5 supervision by the time any substantive decisions are
6 presented to the estate with respect to committing itself to
7 a deferral, were one offered and negotiated with the IRS and
8 the PBGC. Nevertheless, the debtors wish to advise the Court
9 of this development and represent to the Court that, to the
10 extent there are any substantive steps that need to be taken
11 with respect to this process while we are still Chapter 11
12 debtors, we would bring those to the attention of the Court.
13 THE COURT: This is a situation that's described in
14 the disclosure statement as presently drafted and, if not, is
15 anyone of the view that it ought to be included?
16 MR. KLEIMAN: Well, your Honor, I don't know that
17 the -- there is a specific disclosure of this item, but I
18 candidly don't think it probably rises to the level of
19 requiring disclosure, and let me briefly explain why. The
20 request that's being made is not a request for waiver of any
21 funding obligations, it is merely a deferral of certain
22 payments from one time period to another time period in order
23 to give the debtors additional liquidity in those more
24 critical first years following emergence. So, the debtors'
25 view is that this request is merely supportive of its view

1 that the plan is feasible, but ultimately does not have a
2 substantive impact on the enterprise value of the estates or
3 ultimately the recoveries or value of those recoveries to any
4 creditors.
5 THE COURT: All right. We'll take a brief recess.
6 MR. KLEIMAN: Thank you, your Honor.
7 (Court in recess; 4:21 to 4:44 o'clock p.m.)
8 MR. KLEIMAN: Thank you, your Honor, for that
9 accommodation. We all know what happens when you ask for
10 five minutes.
11 I think, your Honor, what we have a consensus with
12 respect to the scheduling of the lead plaintiffs' reserve
13 motion is that we would ask the Court to tentatively slot
14 that for our time on April the 15th. The parties will
15 continue to talk and if -- the hope is that we can get
16 comfortable that that two-hour allocation you have for us can
17 be made to work. The people are going to put on their
18 thinking caps. And, as I said before, we're in front of you
19 all day tomorrow and we're in front of you on Monday as well,
20 so if there are any updates to that scheduling, we figure
21 we'll have an opportunity to address them with your Honor at
22 those times. But, tentatively, everyone is going to work
23 towards the 15th for that purpose so that we can hold the
24 16th for our confirmation hearing.
25 THE COURT: Okay, that's fine. Anything else for

1 today?

2 MR. KLEIMAN: I believe that's all, your Honor.

3 THE COURT: All right. Tomorrow we'll start --

4 we'll resume the Enersys rejection hearing at 9:30 and, as I

5 think I indicated previously, I'm willing to go as late as

6 6:00, but no later. And the courtroom will be open at 8:30.

7 MR. KLEIMAN: Thank you, your Honor.

8 THE COURT: Okay? Thank you. That concludes this

9 hearing. Court is adjourned.

10 MR. KORTANEK: Thank you, Judge.

11 (Court adjourned at 4:45 o'clock p.m.)

12 * * *

CERTIFICATION

I hereby certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

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Date