IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
EXIDE TECHNOLOGIES,	:	Case No. 13-11482 (KJC)
Debtor.[1]	:	
	:	**Related Docket No. 962**

DEBTOR'S OBJECTION TO MOTION OF THE WATTLES COMPANY
FOR RELIEF FROM THE AUTOMATIC STAY

Exide Technologies ("Exide" or the "Debtor") hereby objects (the "Objection") to the motion (Docket No. 962) (the "Motion") of The Wattles Company (the "Movant"), for an order for relief from the automatic stay pursuant to section 362 (d) of 11 U.S.C. §§ 101-1532 (as amended, "Bankruptcy Code") to: (i) adjudicate its purported breach of contract and related state law claims; (ii) collect any judgment or settlement against any available insurance proceeds; and (iii) conduct expedited discovery regarding the Debtor's insurance policies in advance of any evidentiary hearing on the Motion. In support of the Objection, the Debtor respectfully represents as follows:

PRELIMINARY STATEMENT

1. Movant seeks permission to prosecute a prepetition state court action involving leased real property that the Debtor vacated in part in September 2009, when the lease related thereto had terminated, and vacated entirely in 2012, when the lease on the remainder of

[1] The last four digits of the Debtor's taxpayer identification number are 2730. The Debtor's corporate headquarters are located at 13000 Deerfield Parkway, Building 200, Milton, Georgia 30004.

the property terminated by its own terms.[2] Movant wishes to pursue the Action and collect any potential judgment from available insurance proceeds. The Motion also requests expedited discovery in advance of a final evidentiary hearing on the Motion so that Movant can review any of the Debtor's insurance policies that potentially might apply to its claims.

2. Movant's requested relief should be denied. Movant's claims are prepetition claims for alleged damages arising under a real property lease that expired over a year ago. Movant fails to demonstrate why its unsecured prepetition claims should be adjudicated now ahead of all other unsecured claims.[3]

3. Moreover, the Debtor has worked diligently with its insurance broker to cooperate with the Movant's information requests, while working toward a consensual resolution of the Motion. To date, the Debtor already has provided Movant with relevant information regarding potentially applicable insurance policies, in particular providing the Movant with the PARLL policy (as defined below) and two of the Debtors' general liability policies. However, most, if not all, policies that might potentially provide coverage are subject to high deductibles or self-insured retentions ("SIRs") that would have to be satisfied by the Debtor before any proceeds would be available. Thus, unless Movant is willing to completely waive any claims against the Debtor up to the applicable deductibles and SIRs, the estate would be forced to divert resources to defend against the allowance of an unsecured claim in the state court up to the de-

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2 The original lease expired by its own terms in September 2009. In or around September 2009, Exide and the Movant entered into an amendment, which reduced the leased portion of the property. The amended lease expired in September 2012.

3 On October 24, 2013, the Debtors filed procedures for the efficient and economic adjudication of prepetition litigation claims, and the Debtor is hopeful a process will soon be in place for the resolution, in due course, of Movant's claims and those of other similarly situated unsecured claimants. The Debtor is continuing to work collaboratively with its key constituencies to fine tune these procedures and has adjourned the hearing on these procedures to the January 22, 2013 omnibus hearing.

ductible or SIR amount. However, to date, Movant has not agreed to waive any claims against the Debtor. Additionally, aside from the deductible and SIR issue, given that the Debtor's PARLL Policy (defined below) has aggregate limitations, allowing the Action to proceed now could deplete any potentially available proceeds to the detriment of other claimants.

4. Moreover, the Debtor has cooperated reasonably with the Movant to try to resolve Movant's information requests and the Debtor will continue to work with Movant to reach a consensual resolution regarding the Motion and Movant's information requests prior to the scheduled hearing on the Motion. However, the Movant has made onerous demands for documents dating back to 1981, and for policies, such as excess policies, that may not be relevant unless Movant can establish initial coverage. Given that the Debtor has already provided the Movant with relevant information regarding potential insurance coverage, Movant's request for additional expedited discovery, which would be nothing more than an end run around the automatic stay, should be denied.

BACKGROUND

A. The Pierce County Action.

5. Movant seeks relief from the automatic stay to prosecute its prepetition action against Exide, which is currently pending in the Superior Court of the State of Washington, Pierce County (the "State Court"), styled The Wattles Co. v. Exide Technologies, Inc., Case No. 13-2-07695-6 (the "Action").

6. The Action involves property, leased by Movant to the Debtor (the "Leased Property") pursuant to a prepetition lease, which the Debtor used for the marketing, processing, distribution, and storage of lead-acid batteries, battery products, and related activities. The Action alleges that Exide released hazardous waste and other harmful chemicals on the va-

cated premises (the "Vacated Premises") of the Leased Property, thereby allegedly causing extensive contamination and structural damage to the Vacated Premises, and creating potential health risks. The Action seeks damages for alleged causes of action, including breach of contract, violation of the Washington Model Toxics Control Act, RCW 70.105D.010, *et seq*., declaratory judgment, trespass, nuisance, breach of the duty of good faith, negligence, property damage, and strict liability for alleged abnormally dangerous activity in an amount exceeding $3.4 million.

7. The Debtor vacated the Vacated Premises in September 2009, and the Debtor's lease with respect to the Vacated Premises terminated on September 30, 2009. Exide vacated the remainder of the Leased Property in 2012, and its lease with Movant terminated by its own terms in September 2012.[4]

8. The complaint was filed on March 28, 2013 (the "Complaint"). As of the Petition Date, the Action was in its incipient stages – the Debtor filed its answer and affirmative defenses to the Complaint on May 15, 2013; however, no discovery in connection with the Action had yet begun, and the Action was stayed by the filing of the Chapter 11 case on June 10, 2013.

B. The Debtor's Applicable Insurance Policy.

9. The Debtor tendered defense of the Action to XL Group (the "Insurer") under its Pollution and Remediation Liability Policy (the "PARLL Policy"). To date, the Debtor has not received a coverage opinion from the Insurer regarding the Action. The PARLL Policy has an SIR of $500,000 per occurrence, and the PARLL Policy requires the Debtor to pay any

[4] Exide leased the Leased Property pursuant to a lease that expired by its own terms in September 2009. In or around September 2009, Exide and the Movant entered into an amendment of that lease, which reduced the leased portion of the property. The amended lease covering the reduced portion of the Leased Property expired in September 2012.

losses and expenses, including any defense costs, up to the amount of the SIR. The Policy is limited to $4 million dollars per occurrence, and $8 million in the aggregate.[5]

OBJECTION

I. Objection to Relief from Stay

A. Legal Standard

10. The automatic stay operates as a stay against: "the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title." 11 U.S.C. § 362(a)(1). Section 362(d)(1) of the Bankruptcy Code requires that a party seeking to lift the automatic stay show "cause" for such relief. The Movant has the burden of showing that "cause" exists to grant relief from the automatic stay. See In re Tribune Co., 418 B.R. 116, 127 (Bankr. D. Del. 2009).

11. When determining whether the stay should be lifted, this Court generally looks at three factors: (1) the likely harm or prejudice to the debtor and the estate that will result if the stay is modified to permit litigation against the debtor in another court, (2) whether maintaining the stay will result in hardship to the movant that "considerably outweighs" the hardship to the debtor if the stay is modified, and (3) whether the movant is likely to succeed on the merits if the stay is lifted. See In re Spansion, Inc., 418 B.R. 84, 97 (Bankr. D. Del. 2009), vacated on other grounds sub nom. Samsung Elecs. Co. v. Ad Hoc Consortium of Floating Rate Noteholders, No. 09-0835 et al., 2010 WL 2636115 (D. Del. June 29, 2010).

[5] The Debtor also carries general liability insurance (the "CGL Policy") with Zurich American Insurance Company ("Zurich"), which policies are subject to an SIR in the amount of $1 million per occurrence. Out of an abundance of caution, the Debtor has also tendered defense of the Action to Zurich. The Debtor has not yet received a coverage opinion from Zurich regarding the Action. The Debtor reserves all rights under its applicable policies with Zurich.

12. Absent exigent circumstances, relief from the automatic stay to allow particular creditors to liquidate their prepetition general unsecured claims is premature in the early stages of a chapter 11 case. See, e.g., In re Plastech Engineered Prods., Inc., 382 B.R. 90, 108 (Bankr. E.D. Mich. 2008). Movant's claims are prepetition claims, see, e.g., In re Teleglobe Commc'ns Corp., 304 B.R. 79, 83-84 (D. Del. 2001) (prepetition breach of contract gives rise to prepetition claims); In re Hayes Lemmerz Int'l, Inc., 340 B.R. 461, 473 (Bankr. D. Del. 2006) (prepetition damage to property gives rise to prepetition claims), and Movant points to no exigent circumstances that justify putting Movant's claims before others'. Because the Action had barely proceeded beyond the filing of the Complaint, there is nothing to be lost by requiring the Action to remain stayed. For these and the additional reasons set forth below, modification of the automatic stay is not warranted here.

B. Movant Has Not Carried Its Burden To Show Cause for Relief From the Automatic Stay.

(a) Permitting the Action To Proceed Would Prejudice the Debtor and Its Estate.

13. The Debtor would be prejudiced if the Action were allowed to proceed at this time. At this juncture in the Chapter 11 case, the Bar Date passed on October 31, 2013, and the Debtor has just begun its assessment of the universe and scope of the claims that have been filed against the Debtor's estate – including the universe of litigation claims.[6]

14. Moreover, on October 24, 2013 the Debtor filed its motion to implement procedures related to the reconciliation and adjudication of certain prepetition litigation claims

[6] Additionally, the Debtor is currently working diligently to develop its comprehensive business plan, which is to be delivered to constituents no later than March 10, 2014 pursuant to the terms of the DIP financing facility. Not until the business plan is fully vetted will the Debtor be in a position to assess potential value available for distribution on account of prepetition unsecured claims such as Movant's.

(the "Litigation Claims Procedures"), which the Debtor believes provide for prompt, comprehensive and efficient mechanisms for the liquidation of those claims. Movant is just one of many parties with a litigation claim pending against the Debtor in another forum, and to which the Litigation Claims Procedures will apply. There is no compelling reason to allow Movant to be put ahead of the line and liquidate its claims before other similarly-situated creditors. Indeed, this Court has already found that now is not the time to allow litigants to proceed with their prepetition litigation. See August 15, 2013 Hr'g Tr. at 31:19-22; September 17, 2013 Hr'g Tr. at 37:13-14.

15. Allowing the Action to proceed at this juncture will create significant distraction to and interference with the Debtor's administration of the Chapter 11 case, and result in prejudice to the Debtor and its stakeholders. See In re Penn-Dixie Indus., Inc., 6 B.R. 832, 835 (Bankr. S.D.N.Y. 1980) (the "key to determining whether to permit an action to proceed in another tribunal" is whether that case will cause "'interference with the pending bankruptcy case'" (citation omitted)); In re Curtis, 40 B.R. 795, 806 (Bankr. D. Utah 1984) ("Even slight interference with the administration may be enough to preclude relief in the absence of a commensurate benefit."). Specifically, litigation of the Action at this time would expose the Debtor and its estate to the burden of defending the Action, including time expended by certain of the Debtor's employees, expenditure of defense costs, the time and participation in completing discovery, and participating in motion practice, and would result in distraction from the Debtor's ongoing reorganization efforts, including its efforts to develop a comprehensive business plan. Movant misses the point when Movant suggests that because the Debtor has retained outside counsel who is familiar with the case, the Debtor will not be distracted if the Action proceeds; the Debtor must expend time and resources working with its local counsel to defend against the Action.

16. Equally importantly, should it be determined that the Action is not covered by insurance, all costs associated with the litigation of the Action would be borne by the Debtor. Moreover, even if covered by insurance, the Debtor's policies are high deductible and high SIR policies; the Debtor has a five hundred thousand dollar ($500,000) SIR under the PARLL Policy, and the PARLL Policy provides that the Debtor pay all costs associated with any litigation – including defense costs – up to the SIR before any insurance coverage is available.[7]

17. The Movant may believe that any claims it may have against the Debtor could be satisfied from insurance proceeds, but such a belief is grounded on a misunderstanding of the nature of the "insurance" that may be available in connection with the Action. Indeed, the insurance proceeds to which the Movant alludes in the Motion, to the extent implicated at all are, in fact, assets of the Debtor's estate. See Will v. Nw. Univ. (In re Nutraquest, Inc.), 434 F.3d 639, 647 (3d Cir. 2006) (proceeds of a debtor's liability insurance policies are considered property of its bankruptcy estate). Movant claims that the proceeds may not be property of the estate if Movant is an additional named insured on an applicable policy maintained by the Debtor. However, the Movant has not been named an additional named insured under the PARLL Policy.

18. Moreover, given the aggregate limitations of the PARLL Policy, there may be other parties with claims who may have a potential interest in pro-rata share(s) of the insurance proceeds; Movant has not demonstrated that Movant should be allowed to deplete the insurance proceeds to the detriment of other parties. See, e.g., In re SN Liquidation, Inc., 388 B.R. 579, 585 (Bankr. D. Del. 2008) ("[A] stay protects creditors from more diligent creditors

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[7] The Debtor also has a one million dollar ($1,000,000) SIR under the CGL Policy, and the CGL Policy also provides that the Debtor pay all costs associated with any litigation, including defense costs, up to the SIR before any insurance coverage is available.

and facilitates the equitable treatment of creditors. The Court expects the Debtors to treat all litigants equitably and that is not possible if one litigant . . . proceeds with its lawsuit and as a result the Insurance is diminished while other litigants honor the stay.") (internal citations omitted).

19. Finally, if the Court were to lift the stay for the Movant, the Court could open the proverbial floodgates to numerous litigations – the very result the Debtor is seeking to avoid by implementation of its streamlined Litigation Claims Procedures.

20. Accordingly, the particular circumstances, status, and expected developments in the Chapter 11 case justify denial of the Motion. To the extent circumstances might support relief sought by the Movant, such circumstances are outweighed by the significant prejudice to the Debtor that would result.

(b) The Hardship, If Any, Suffered By the Movant Does Not "Considerably Outweigh" Hardship To the Debtor.

21. The Motion alleges that Movant will suffer hardship because: (1) litigating the Action in Delaware would cause Movant increased expense and (2) Movant is not receiving rental income on the Leased Property.

22. As a preliminary matter, it is too early in this case and in the Debtor's claims adjudication process to determine the appropriate forum for litigating Movant's claim. Rather, Movant's claim should proceed through the Litigation Claims Procedures, and only if Movant and the Debtor cannot resolve a claim through that process, should Movant's claim be litigated. Only then would it become necessary to determine in which forum Movant's claim should be adjudicated.

23. Furthermore, a denial of the Motion would only continue the status quo. As the Action is in its infancy, the Debtor does not believe that any additional delay will result in any meaningful prejudice to Movant. Indeed, to the extent the lack of rental income is attributa-

ble to a delay in obtaining a judgment,[8] the Movant would continue to experience such a delay and related loss of income as the Parties prepared for and litigated the Action, regardless of the imposition of the automatic stay.

24. Moreover, Movant prevails under this factor only if its harm "considerably outweighs" that of the Debtor. Spansion, 418 B.R. at 97. As Movant is only a potential unsecured, non-priority creditor, the balance weighs against granting relief from the automatic stay. See In re Ronald Perlstein Enters., Inc., 70 B.R. 1005, 1009 (Bankr. E.D. Pa. 1987). Movant has a significant burden to bear in seeking to lift the stay. "It is not enough for the creditor to merely show that it will be hurt by the continuation of the [automatic] stay, rather the creditor must show that neither the debtor nor the other creditors will be injured if the stay is lifted." Healthfirst v. Martha Washington Hosp., 157 B.R. 392, 395 (N.D. Ill. 1993) (emphasis added). The Movant has failed to satisfy this burden. The Movant has demonstrated no special circumstances in this case. The harm to the Debtor and its estate plainly outweigh any harm to the Movant.

(c) The Movant Has Failed to Address The Likelihood of Success on the Merits.

25. Because the Movant has failed to establish cause to justify modifying the automatic stay under the standards discussed above, the probability of success on the merits of any action instituted by the Movant in connection with the Action has little or no significance in determining whether the automatic stay should be modified. See Am. Airlines, Inc. v. Cont'l Airlines, Inc. (In re Cont'l Airlines, Inc.), 152 B.R. 420, 426 (D. Del. 1993) (noting that the

[8] The Debtor denies that the lost rental income is attributable to any damage to the Leased Property alleged to have been caused by Exide.

probability of success should be weighed only after determining that the balance of hardships weighed in favor of movant).

26. However, should this Court consider this factor, the Movant has not attempted to establish that it is likely to prevail. Although the requisite showing of the "probability of success on the merits" may be "slight," more than a mere reference to the bare allegations in a complaint must be provided by Movant. See, e.g., In re Rexene Prods., 141 B.R. at 578 (probability of success on the merits established where debtor – defendant's summary judgment motion had already been denied in the state court action). Critically, Movant cannot point to any development in the Action that shows that Movant is likely to prevail on the merits, and Movant has done no more than merely summarize and attach its Complaint and make the conclusory statement that the "Complaint presents triable factual issues." Motion ¶ 43. Movant's bare statements are insufficient to satisfy the probability of success factor.

II. Objection to Expedited Discovery

27. Debtor voluntarily agreed to produce relevant information regarding the relevant policies pending adjournment of the Motion to the December 18, 2013 hearing. During the interim period, the Debtor has voluntarily provided Movant with a copy of the PARLL Policy for the relevant coverage period, and has provided the Movant with copies of two years of its CGL Policy. Nevertheless, despite the Debtor's cooperation, in addition to the request for expedited discovery contained in the Motion, Movant has issued an onerous discovery request seeking documents and information dating back to the 1980s and for excess liability policies that may not be relevant until and unless Movant can establish that there is some applicable underlying primary coverage.

28. The Debtor will continue to work with Movant to try to reach a consensual resolution regarding this Motion and Movant's information requests, and hopes to reach a consensual resolution prior to the scheduled hearing on the Motion. However, participating in onerous discovery regarding various insurance policies covering periods as far back as October 1981 – records which the Debtor cannot fully access – and with respect to policies that are not relevant would be overly burdensome and harassing and is the very type of distraction from the Debtor's ongoing reorganization efforts that the automatic stay is designed to prevent.

WHEREFORE, the Debtor respectfully requests that the Court (i) deny the Motion and (ii) grant the Debtor such other and further relief as is just and proper.

Dated: Wilmington, Delaware
December 16, 2013

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

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