

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DOUGLAS N. PEARSON : CIVIL ACTION  
 : NO. 99-4104  
Plaintiff, :  
 :  
v. :  
 :  
EXIDE CORPORATION, et al., :  
 :  
Defendants. :

**MEMORANDUM AND ORDER**

**AND NOW**, this **12th** day of **June**, **2001**, following a hearing on defendant Exide's objections to plaintiffs' claims for advancement of litigation claims, defendant Exide's motion for leave to take discovery regarding plaintiffs' claims for advancement of litigation expenses, plaintiff Gauthier's motion for further relief in support of declaratory judgment, and plaintiff Pearson's motion to strike defendant Exide Corporation's reply memorandum in support of objections regarding advancement of litigation expenses, it is hereby **ORDERED** that:

1) Defendant Exide's objections to plaintiffs' claims for advancement of litigation claims (doc. no. 86) are **SUSTAINED IN PART** and **OVERRULED IN PART**;

2) Defendant Exide's motion for leave to take discovery regarding plaintiff's claims for advancement of litigation expenses (doc. no. 85) is **DENIED**;

3) Plaintiff Gauthier's motion for further relief in support of declaratory judgment (doc. no. 97) is **DENIED WITHOUT**

**PREJUDICE;**

4) Plaintiff Pearson's motion to strike defendant Exide Corporation's reply memorandum in support of objections regarding advancement of litigation expenses (doc. no. 99) is **DENIED AS**

**MOOT;**

5) Exide is ordered to pay to Gauthier and Pearson \$299,521.26 and \$1,027,027.99 respectively. The amount advanced to Gauthier represents the total expenses requested by Gauthier minus copying costs. The amount advanced to Pearson represents the total expenses requested by Pearson minus copying costs and the \$17,864.31 of litigation expenses withdrawn by Pearson.

The court's order is based on the following reasoning:

Pursuant to this court's order attached to its memorandum dated April 19, 2001, Exide filed objections to Gauthier and Pearson's individual written claims for advancement of litigation expenses. Exide objected to \$25,250.00 and \$288,120.00 in copying costs of Gauthier and Pearson, respectively. Exide also filed specific objections to \$17,864.31 of litigation expenses sought by Pearson as well as a general objection to paying to Pearson anything beyond \$299,521.26, the costs Exide agrees it owes Gauthier. In addition, Exide filed a motion for additional discovery in order to demonstrate the unreasonableness of Pearson's overall request for litigation expenses.

After filing its objections, Exide then sent individual

checks to both Gauthier and Pearson for \$299,521.26, the amount of expenses it finds reasonable. However, Exide first made the checks payable to Gauthier and Pearson and their respective counsel and, after Gauthier and Pearson objected, then made the checks payable only to plaintiffs' counsel. In addition, Exide included an endorsement on the first set of checks and then in a letter accompanying the second set of checks indicating that the payees on the checks are responsible for reimbursing Exide in the event that it is determined that Gauthier and Pearson are not entitled to indemnification.

In response to Exide's objections to plaintiffs' written claims for litigation expenses, Gauthier and Pearson have responded with three arguments. First, Gauthier and Pearson argue that their requests for copying costs are reasonable as the documents they wish to copy are needed for their upcoming criminal trial in federal court in the Southern District of Illinois. Second, Pearson has asserted that Exide's generalized objection to any litigation expenses over \$299,521.26 should be denied as such an objection fails to abide by the court's order to base objections on particular litigation expenses. Third, Pearson argues that simply because Pearson's litigation expenses exceed Gauthier's does not make Pearson's expenses per se illegal. Finally, in response to Exide's objections to \$17,864.31 in litigation expenses, Pearson has agreed to forego such expenses in the interest of obtaining prompt payment for the

remaining litigation costs.

In response to Exide's refusal to make the checks payable to Gauthier and Pearson alone and its insistence on including an endorsement that holds their counsel responsible for reimbursing Exide should a court determine they are not entitled to indemnification, Gauthier has filed a motion requesting a declaratory judgment that "Exide has no right to recover any advancements from [plaintiffs'] legal counsel and . . . that in the event that it is ultimately determined that Gauthier is not entitled to indemnification, Exide's sole remedy to recover its advances is against Gauthier alone, through enforcement of the undertaking that he has already provided pursuant to Exide's Bylaws." Gauthier further requests the court order Exide to make the checks payable to Pearson and Gauthier alone and not to permit Exide to include an endorsement on the checks or in any other form stating that their counsel are responsible for reimbursing Exide in the event that it is ultimately determined that they are not entitled to indemnification.<sup>1</sup>

Exide has responded that its attempt to hold plaintiffs' counsel responsible for reimbursing Exide is permitted because the agreement between the parties is for payment of litigation expenses and Exide's actions assure that

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<sup>1</sup> Although Gauthier filed this motion, the court will treat this motion as if asserted by Gauthier and Pearson. Although Pearson did not officially join in this motion, he did raise nearly identical issues in his response to Exide's objections to his claims for litigation expenses.

the funds remitted are used for that purpose alone. In support of their argument, Exide cites the Uniform Commercial Code ("U.C.C.") and analogizes between the advancements at issue in this case and a "purchase money security interest" described in section 9-107(b) of the U.C.C.

On the day of the hearing in this matter, Exide filed a reply memorandum in further support of its objections to Gauthier and Pearson's request for litigation expenses. The reply memorandum reasserts (1) Exide's objections to Gauthier and Pearson's request for copying costs; (2) Exide's generalized objection to the reasonableness of Pearson's overall request; and (3) Exide's request for further discovery. In addition, Exide objects to "over \$50,000 in fees and expenses described in vague terms" as well as \$22,460 in "excessive, duplicative, or repetitive fees and expenses." Exide does not enumerate each invoice item that totals these \$72,460 in vague or duplicative expenses, but does give examples that mostly include those expenses listed in its originally-filed list of objections. The only additional items specifically noted in the reply memorandum that are not listed in the originally-filed objections are a \$561.11 telephone bill, a \$2,475 claim "for having J. Serebrenick digest Joseph Calio's deposition," and a "\$2,914.50 J.D. Wetchler charge." The items specifically listed do not total \$72,460. Pearson has filed a motion to strike Exide's reply memorandum on the grounds that it is untimely and fails to abide by the court's

April 19th order.

For the reasons enumerated below, the court (1) sustains in part and overrules in part Exide's objections; (2) denies Exide's motion for additional discovery; (3) denies without prejudice Gauthier's motion for further relief in support of declaratory judgment; and (4) denies as moot plaintiff Pearson's motion to strike Exide's reply memorandum in support of objections regarding advancement of litigation expenses.

a) Exide's Specific Objections to Copying Costs

The court finds that Gauthier and Pearson's requests for copying costs involve charges for unnecessary duplication of efforts as well as the copying of documents not relevant in the Government's prosecution of plaintiffs. Gauthier's claim for \$25,250 in copying services represents the cost of copying fifty (50) boxes of documents in the federal criminal matter brought against Gauthier and Pearson in the Southern District of Illinois. Pearson's claim for \$288,120.00 is the costs of copying all 490 boxes of documents held in storage by the Government in the same matter. Both invoices were for copying services from F.Y.I. Legal Copy Services. During the hearing, however, counsel admitted that (1) there exists overlap between the documents Gauthier and Pearson wish to copy; (2) that the United States Attorney prosecuting the case against plaintiffs stated that at least seventy-five (75) boxes are not relevant to

the criminal indictment brought against them; and (3) that the only quote obtained by Pearson and Gauthier was from F.Y.I. Copying Services. Consequently, the court establishes the following procedure for procuring an appropriate vendor for copying services as well as for avoiding duplication and the copying of documents not relevant to the Government's case against plaintiffs.

By June 19, 2001, Exide may find a qualified vendor, acceptable to the United States Attorney's Office in the Southern District of Illinois, who agrees to copy fifty (50) boxes each for Gauthier and Pearson respectively and scan all documents in 415 of the stored boxes onto a CD-ROM at a lower price than originally quoted by F.Y.I. Legal Copy Services. In turn, by June 19, 2001, Gauthier and Pearson shall submit to Exide a revised invoice obtained from F.Y.I. Legal Copy Services for the cost of doing the same copying job described above. By June 21, 2001, Exide shall inform the court in writing whether it elects to have plaintiffs use the services of F.Y.I. Legal Copy Services or of another qualified vendor. The court will then enter an order authorizing payment of the copying expenses to the copying service chosen by Exide.<sup>2</sup>

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<sup>2</sup> Unlike Exide's insistence on paying Gauthier and Pearson's counsel directly, Exide has not raised an objection to the direct payment of the copy service provider. Nor has Gauthier and Pearson's counsel argued that their clients must receive payment for the costs of copying service. In fact, they have indicated that they desire direct payment of the copy service provider. Therefore, the court will order payment to the copying service

ii. Exide's General Objection as to Reasonableness of the Fee

The court denies Exide's generalized objection to any litigation expenses of Pearson that exceeds the amount it has agreed to pay Gauthier because this objection fails to abide by this court's order that Exide outline particular objections to specific litigation expenses. Despite this court's memorandum that allowed Exide to object, "in good faith, particular litigation expenses which are unreasonable," Exide only filed such objections to \$17,864.31 of expenses submitted by Pearson. Exide, however, now attempts to argue that any expenses over \$299,521.26--the amount it concedes it owes Gauthier-- is unreasonable as it is excessive. Because Exide failed to abide by the court's order regarding the proper method for objecting to particular litigation expenses--an order which Exide clearly understood (see Exide's specific objections to \$17,864.31 of litigation expenses and examples of unreasonable expenses provided by Exide's counsel at the hearing)--the court will reject Exide's generalized objection to any expenses over \$299,521.26.

Assuming that the objection was sufficiently specific to put the reasonableness of the request at issue, the objection is still overruled. The only grounds supported by defendant is

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provider ultimately chosen by Exide.

that the request for reimbursement by Pearson is four times that of Gauthier. The mere discrepancy in the amounts requested between Gauthier and Pearson, both of whom are involved in multi-district, multi-party litigation against Exide and are defendants in complex criminal cases, does not even state a prima facie case that the request for the higher compensation by Pearson is unreasonable.

Exide's generalized objection also runs counter to the very purpose of the agreement it reached with Gauthier and Pearson to pay Gauthier and Pearson's litigation expenses before there was a finding that Gauthier and Pearson were or were not entitled to indemnification. It was Exide who agreed to advance litigation expenses unconditionally. Because the litigation has turned out to be between it and Gauthier and Pearson does not license Exide to narrow the undertaking or to turn it into a limited or conditional one.

iii. Exide's Specific Objections to Pearson's Fees

With respect to Exide's specific objections to \$17,864.31 of litigation expenses sought by Pearson, the court denies as moot this objection because Pearson has agreed to forgo those expenses. To the degree that Exide seeks to raise additional objections to other specific litigation expenses in its reply memorandum in support of Exide's objections, the court overrules these objections as they are untimely and fail to abide

by the court's order regarding the proper procedure for raising objections. Pursuant to the court's order attached to its memorandum dated April 19, 2001, Exide was required to file specific objections to litigation expenses by May 9, 2001. However, Exide has sought to raise additional objections in its reply memorandum, filed on May 31, 2001, totaling \$72,460 without detailing each expense to which it objects. Therefore, the court overrules those objections.

In light of these rulings, the court orders Exide to pay Gauthier and Pearson \$299,521.26 and \$1,027,027.99, respectively.<sup>3</sup>

iv. Exide's Motion for Discovery

With respect to Exide's motion for leave to take discovery regarding plaintiff's claims for advancement of litigation expenses, the court denies the motion because the court has disposed of all objections raised by Exide. Pursuant to this memorandum and order, the court has (1) allowed defendant Exide to seek a less expensive qualified vendor for the copying expenses sought by plaintiffs; (2) rejected defendant Exide's generalized objection against the expenses sought by plaintiff

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<sup>3</sup> The sum to be paid Gauthier represents the total amount of expenses and costs requested by Gauthier minus the copying costs Gauthier sought. The sum to be paid Pearson represents the total amount of expenses and costs requested by Pearson minus the copying costs and the \$17,864.31 of expenses specifically objected to by Exide and later withdrawn by Pearson.

Pearson; (3) denied as moot the \$17,864.31 of plaintiff Pearson's expenses objected to by defendant Exide; and (4) denied additional specific objections filed with Exide's reply memorandum. Therefore, there exists no need for further discovery.

Even if there were still unresolved objections, the broad-based discovery sought by Exide in this case would run perilously close to infringing upon, if not outright invading, communications protected by the attorney-client privilege or the attorney work product. Therefore, general discovery of the breadth sought by Exide would not be appropriate in a case in which Exide itself is an adverse party in the litigation.

v. Exide's Motion for Declaratory Judgment

With respect to Gauthier's motion for further relief in support of declaratory judgment, the court grants in part and denies in part the motion. Because the court finds that Exide entered into an agreement with Gauthier and Pearson, not with Gauthier and Pearson's lawyers, to advance their litigation expenses, the court grants Gauthier's motion requesting that the checks be made payable only to them and that those checks or other written document not include any endorsement holding their counsel responsible for reimbursing Exide in the event plaintiffs

are found not to be entitled to indemnification.<sup>4</sup>

With respect to plaintiff Gauthier's request for a declaratory judgment stating that Exide has no right to recover any advancements from plaintiffs' legal counsel, the motion is denied without prejudice as not ripe for disposition.<sup>5</sup>

vi. Pearson's Motion to Strike Exide's Reply Memorandum

Finally, because defendant Exide Corporation raised the issues presented in its reply memorandum supporting its

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<sup>4</sup> In reaching this conclusion the court rejects Exide's analogy between the advancements at issue in this case and a purchase money security interest. Section 9-107(b), relied upon by Exide, reads as follows: "A security interest is a 'purchase money security interest' to the extent that it is . . . (b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used." However, the advancement of litigation expenses are not "collateral" as defined by the U.C.C. See U.C.C. § 9-102(12). Furthermore, the agreement between the parties does not state that Exide may be reimbursed for advancements from counsel but instead makes clear that any advancements are recoverable from the individual to whom the advancement is made. Of course, upon request by Exide, Exide is entitled to confirmation from Gauthier and Pearson that the monies advanced are being remitted to counsel. Failure to provide adequate confirmation may serve as a basis for a future objection to further advancements.

<sup>5</sup> No demand on counsel for reimbursement has been made by Exide in this case. The best that Exide has done is to put counsel on notice of such a future possibility. The court finds that ruling on this matter at this time is premature. First, it could well be that Gauthier and Pearson are entitled to indemnification. Second, no demand for payment has been made on counsel because a finding that Gauthier and Pearson are not entitled to indemnification would be a prerequisite for such a demand for reimbursement. Therefore, the court declines to exercise its declaratory power in this matter at this time.

objections at the hearing on May 31, 2001 and because the court considered those arguments in ruling on this matter, the court denies as moot plaintiff Pearson's motion to strike defendant Exide Corporation's reply memorandum in support of objections regarding advancement of litigation expenses.

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EDUARDO C. ROBRENO, J.