IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: EXIDE TECHNOLOGIES, Reorganized Debtor.[1]	**Chapter 11** **Case No. 13-11482 (KJC)** **Hrg. Date: TBD** **Obj. Due: TBD** **Related Docket Nos.: 4414**

THE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT'S MOTION FOR A DETERMINATION THAT IT HAS ALLEGED A PRIMA FACIE CASE FOR APPLICATION OF THE 11 U.S.C. § 1141(d)(6) EXCEPTION TO DISCHARGE

Pursuant to and in accordance with that certain *Order Resolving the Reorganized Debtor's Motion [to Enforce]* [Docket No. 4414], the South Coast Air Quality Management District (the "District") respectfully requests a determination by this Court that the District has alleged a prima facie case for application of the exception to discharge contained in section 1141(d)(6) of the Bankruptcy Code as to the District's allegations against Exide Technologies ("Exide" or the "Reorganized Debtor") in the District's *Third Amended Complaint for Civil Penalties and Injunctive Relief* filed on May 28, 2015 (Pfister Decl. Ex. 21)[2] (the "Third Amended Complaint" or "TAC") in the Superior Court of the State of California (the "California State Court"). In support of this motion, the District relies upon the *Declaration of Robert J. Pfister [Etc.]* [Docket No. 4247-1] (the "Pfister Declaration") that was submitted in opposition to

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

[2] Many of the exhibits referenced herein are attached to the Pfister Declaration (as defined below), and accordingly this Motion references the declaration when such an exhibit is cited in the first instance.

The Reorganized Debtor's Motion for Entry of an Order (I) Enforcing the Plan Injunction Under the Confirmation Order and the Confirmed Plan of Reorganization and (II) Awarding Costs and Attorney's Fees [Docket No. 4023] (the "Motion to Enforce"), and respectfully states as follows:

PRELIMINARY STATEMENT

1. Exide's lead-acid battery recycling facility in Vernon, California single-handedly took the District out of compliance with federally mandated, health-based air quality standards. *See infra* ¶ 24. Operating in this fashion has consequences – for the community that must breathe the polluted air, for the homeowners whose befouled properties must be remediated, and also for Exide itself, which incurred tens of millions of dollars in civil penalties by virtue of its unlawful practices.

2. Exide went to great lengths to hide what it was doing. The Vernon facility supplied nearly a third of Exide's lead requirements and thus was critical to the company. Additionally, the sizeable civil penalties that were accruing would meaningfully affect the company's bottom line. Thus, Exide: (i) falsely certified under penalty of law that it was in compliance with its *Facility Permit to Operate* (the "Title V Permit"); (ii) deliberately concealed test results that would have exposed the scope of the problem; and (iii) manipulated testing conditions to make Exide's pollution appear less extensive than it actually was.

3. ***False Certifications***: As a condition of its Title V Permit, Exide was required to submit to the District Annual Compliance Certifications disclosing any violations of the permit. Exide submitted sworn Annual Compliance Certifications on October 20, 2010 (for 2009), March 1, 2011 (for 2010), October 10, 2012 (for 2011), March 1, 2013 (for 2012), and April 1, 2014 (for 2013) (collectively, the "Certifications"). Some of the Certifications disclosed violations of Exide's Title V permit that were already known to the District, but at least one of

the Certifications (for 2010) reported no violations whatsoever. None of the Certifications disclosed Exide's violations, described below, related to lead-contaminated crushed battery casings.

4. On March 11, 2015, Exide and the U.S. Attorney's Office for the Central District of California (the "USAO") entered into a non-prosecution agreement (the "Non-Prosecution Agreement" or "NPA") (See Pfister Decl. Ex. 18). As part of that agreement, Exide admitted that it "committed the felony violations set forth in the Statement of Admissions and Facts" appended to the NPA, and "accept[ed] and acknowledge[d] responsibility for such criminal conduct." NPA at 1. Among the crimes Exide admitted to was a violation of the federal Hazardous Materials Transportation Act, 49 U.S.C. § 5124 ("Section 5124"), which Exide admitted to violating "knowingly and willfully" "a significant number of times over the last two decades." NPA App'x 1 at 2.

5. The conduct giving rise to the NPA was Exide's storage and transportation of broken battery casings in trailers that literally leaked lead onto the ground and into the atmosphere at the Vernon facility. Exide received up to 40,000 spent batteries per day at the Vernon facility, and used a hammer mill to crush and break them into three primary components: acid, lead, and plastic. The crushed plastic casings that result from this process are corrosive, lead-contaminated, and constitute hazardous waste. Exide unlawfully stored this lead-contaminated hazardous waste in van trailers parked at the Vernon facility, and then unlawfully transported the waste to an unpermitted facility in Bakersfield, California.

6. Had the van trailers performed their most basic function – keeping the lead-contaminated waste inside sealed, leak-proof containers – Exide's crimes in connection with the battery casings would have been a matter between Exide, the USAO, and other pertinent

regulators, not the District. But as Exide admitted in the Non-Prosecution Agreement, the van trailers allowed "fugitive" lead to escape and become airborne at the Vernon facility.[3] That fugitive lead contributed to Exide's unlawful exceedances of lead, which in turn constituted a violation of District Rule 1420.1(d)(2) by contributing to the unlawfully high lead readings in the ambient air as detected by sensors located around the perimeter of the Vernon facility.[4]

7. Critically, the admission in the Non-Prosecution Agreement that Exide "knowingly and willfully" violated Section 5124 means both: (i) that Exide had "actual knowledge of the facts giving rise to the violation," *see* 49 U.S.C. §§ 5124(b)(1)(A) (first sub-part of definition of "knowingly") & (c)(1) (incorporating first sub-part of definition of "knowingly" into definition of "willfully"); ***and*** (ii) that Exide "ha[d] knowledge that the conduct was unlawful," *id*. § 5124(c)(2) (definition of "willfully"). Thus, with Exide's CEO's signature on the Non-Prosecution Agreement, Exide well knew that it was storing wet, lead-contaminated hazardous waste in leaky van trailers at the Vernon facility over the past two decades, and that such conduct was unlawful.

8. Exide's admissions in the Non-Prosecution Agreement demonstrate that Exide's sworn Certifications to the District regarding its Title V Permit compliance were false. False Certifications are no mere "paperwork violations," as Exide would have the Court believe. The District issues permits to more than 28,000 entities. Federal law confirms that the self-reporting provisions of these permits are a key compliance tool. *See* 42 U.S.C. § 7661c(c) (requiring Title

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[3] District Rule 1420.1(c)(8) defines fugitive lead dust as "any solid particulate matter containing lead that is in contact with ambient air and has the potential to become airborne."

[4] The rule prohibits "emissions … discharged into the atmosphere which ***contribute to*** ambient air concentrations of lead that exceed [certain limits]." District Rule 1420.1(d)(2) (emphasis added).

V Permits to contain "inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions"). Exide's concealment of one source of the high lead emissions being registered on sensors around the perimeter of the Vernon facility is a betrayal of the District's – and the public's – trust that businesses licensed to handle dangerous toxins will work in good faith with health and safety regulators.

9. ***Concealed Test Results***: Exide's knowingly duplicitous and deceptive conduct is not limited to the leaky van trailers. Exide also concealed the results of a July 2011 source test at the Vernon facility that revealed significant arsenic emissions – despite having a duty (as a condition of its Title V Permit) to disclose source test results, and despite affirmatively representing to the District that it would forward results "as received." Exide concealed the July 2011 test results because they confirmed the accuracy of prior tests, which showed that Exide's regular operations did in fact emit high amounts of arsenic, notwithstanding Exide's false representation that prior results were anomalous.

10. ***Manipulation of Testing Conditions***: Moreover, Exide dramatically altered operating conditions during its May 2012 source test in violation of District rules. The District requires such tests to be "conducted while operating at a minimum of 80% of equipment permitted capacity[,]" District Rule 1420.1(k)(7), but the three individual tests comprising the May 2012 source test were run between approximately 46% and 60.9% of capacity. This was not an honest mistake. Rather, as set out in great detail in the Third Amended Complaint, Exide shifted material from the particular furnace being tested into another furnace, which in turn ran at nearly 100% capacity (far higher than usual). The only other time Exide operated its furnaces under such artificial conditions was three days in October 2008 – the same days during which another source test was being prepared for and conducted. These circumstances strongly suggest

intentional manipulation of testing conditions to yield favorable but inaccurate results.

11. In April 2013, Exide again ran the tests at significantly less than 80% of the equipment's permitted capacity. This time the tests ranged from approximately 31% to 61% of the equipment's permitted capacity.

12. There is no genuine dispute that Exide's conduct has given rise to millions of dollars in strict-liability civil penalties, as the air test results and other evidence indisputably show that Exide did, in fact, emit more lead and arsenic than the law allows. The real question is Exide's state of mind. If Exide is merely strictly liable for the violations, one set of penalties applies; if Exide was negligent, a higher set of penalties applies; and if Exide acted knowingly or willfully and intentionally, even higher sets of penalties apply. The key factual issue (Exide's knowledge) will be determined in the California State Action.

13. The narrow question for determination on this motion is whether the District has alleged a prima facie case for application of the exception to discharge contained in section 1141(d)(6) of the Bankruptcy Code.[5] That section excepts from a corporate debtor's discharge "any debt … of a kind specified in paragraph 2(A) or 2(B) of section 523(a) that is owed to a domestic governmental unit …." such as the District. 11 U.S.C. § 1141(d)(6). The pertinent cross-referenced section (523(a)(2)(A)) describes debts "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by … false pretenses, a false representation, or actual fraud …." 11 U.S.C. § 523(a)(2)(A). As authoritatively construed by the Supreme Court in *Cohen v. De La Cruz*, 523 U.S. 213, 218, 118 S. Ct. 1212, 1216 (1998),

[5] This Court's *Order Resolving the Reorganized Debtor's Motion [to Enforce]* [Docket No. 4414] defines the scope of what is before the Court on this motion, which is whether the District has alleged "***a prima facie case*** regarding … application of the exception to discharge contained in 11 U.S.C. § 1141(d)(6)." *Id.* ¶ 3 (emphasis added). The adverb "prima facie" (from the Latin for "at first sight") indicates that the District is not required to "pre-prove" the applicability of the 1141(d)(6) discharge exception.

section 523(a)(2)(A) "prevents discharge of 'any debt' respecting 'money, property, services, or ... credit' that the debtor has fraudulently obtained …." Thus it is not the "debt" itself (here, the civil penalties ultimately assessed by the California State Court) that must be "fraudulent," but rather the ***conduct*** that ultimately gives rise to the debt. *Id*. "Once it is established that specific money or property has been obtained by fraud … 'any debt' arising therefrom is excepted from discharge." *Id*. *See also id*. (describing section 523(a)(2)(A) as "barring discharge of debts 'resulting from' or 'traceable to' fraud" (citing *Field v. Mans*, 516 U.S. 59, 61 & 64, 116 S. Ct. 437, 439–40 (1995)).

14. The three categories of deceitful and fraudulent conduct described above and explored in more detail below (*i.e.*, the Certifications, concealment of test results, and manipulation of testing conditions), if proven true in the California State Court, amply suffice to trigger applicability of the section 1141(d)(6) discharge exception.

JURISDICTION AND VENUE

15. This Court has jurisdiction to hear and determine this motion under 28 U.S.C. §§ 157 and 1334, Article XIV of the *Fourth Amended Plan of Reorganization of Exide Technologies* [Docket No. 3409-1] (the "Plan"), and Paragraph 67 of the *Findings of Fact, Conclusions of Law, and Order Confirming the Fourth Amended Plan of Reorganization of Exide Technologies* [Docket No. 3423] (the "Confirmation Order").

16. This is a core proceeding under 28 U.S.C. § 157(b). The District consents to the entry of a final order by this Court if it is determined that the Court, absent consent of the parties, cannot enter a final order consistent with Article III of the United States Constitution.

17. Venue is proper under 28 U.S.C. §§ 1408 and 1409.

18. The statutory predicates for the relief requested herein are sections 105 and 1141

of the Bankruptcy Code.

BACKGROUND

19. *The South Coast Air Quality Management District's Motion for Entry of an Order Concerning the Timeliness of its General Unsecured Claims Against Exide* (the "GUC Claims Motion"), filed concurrently herewith, sets out background facts concerning the District, Exide, the Vernon facility, Exide's bankruptcy case, the District's lawsuit (*People of the State of California, ex rel South Coast Air Quality Management District, a Public Entity v. Exide Technologies, Inc., and Does 1 through 50*, Civ. Case No. BC 533528 (the "California State Action")), Exide's Motion to Enforce, and related matters.[6]

20. The limited facts pertinent to this motion, by contrast, primarily consist of context necessary to understand the District's regulatory function as the state-designated agency that enforces the federal Clean Air Act in the South Coast Air Basin, as well as the portions of the District's Third Amended Complaint detailing three distinct types of misrepresentations and omissions in Exide's communications with the District: (i) false Certifications of compliance with the Title V Permit's terms and conditions despite Exide's now-admitted actual knowledge that it was unlawfully storing lead in a way that contributed to the Vernon facility's unlawfully high lead emissions; (ii) unlawful concealment of a July 2011 source test that contradicted Exide's representations to the District that a particular problem was an anomaly, when in fact the concealed results show that the problem had worsened; and (iii) unlawful manipulation of the conditions under which Exide's May 2012 source test and April 2013 tests were conducted to make it appear as though the particular problem had been addressed, when in fact the

[6] The District does not waive and specifically preserves its arguments made in response to the Motion to Enforce. *See Order Resolving the Reorganized Debtor's Motion for Entry of an Order Enforcing the Plan Injunction Under the Confirmation Order and the Confirmed Plan of Reorganization* [Docket No. 4414] ¶ 7.

manipulated testing conditions were not representative of regular operating conditions.

A. The District's Responsibility to Enforce the Federal Clean Air Act

21. Congress enacted the Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963) (as amended, the "CAA") to assist state efforts to control air pollution. The act has expanded over time, *see* Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485; Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676; Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685; Clean Air Act Amendments of 1989, Pub. L. No. 101-549, 104 Stat. 2399, but has remained a program of cooperative federalism under which "the States and the Federal Government [are] partners in the struggle against air pollution." *General Motors Corp. v. United States*, 496 U.S. 530, 532, 110 S. Ct. 2528, 2530 (1990).

22. The District is the public agency through which the State of California meets and maintains air quality standards under the CAA and California law in the South Coast Air Basin, including the greater Los Angeles metropolitan area. *See* Cal. Health & Safety Code §§ 40410 & 40402. Under the statutory scheme, the federal Environmental Protection Agency ("EPA") "sets ambient air quality standards for a number of pollutants," and California (acting through the District) ensures that those standards are achieved and maintained in the South Coast Air Basin. *W.M. Barr & Co. v. S. Coast Air Quality Mgmt. Dist.*, 143 Cal. Rptr. 3d 403, 407 (Ct. App. 2012). This is a massive undertaking: the area in question includes all of Orange County and the urban portions of Los Angeles, Riverside, and San Bernardino counties – places where the climate, distinctive geography, and high concentration of industry and transportation combine to yield some of the highest levels of air pollutants in the country. The area encompassed by the South Coast Air Basin is home to more than 16.8 million people (nearly half the population of California), and is the second most populated urban area in the United States.

23. The District relies on a number of tools to carry out its mandate. These tools

include the requirements that stationary sources such as Exide test effluent streams to ascertain the type and volume of pollutants being emitted. The tests must be conducted under normal operating conditions and must be complete and precise for the District to determine whether the source is in compliance with District, state, and federal regulations. Additionally, the information derived from these stationary source tests, along with other data, is used to conduct a Health Risk Assessment ("HRA"). The District requires certain stationary (*i.e.*, non-vehicular) sources such as Exide's Vernon facility to disclose the types and quantities of toxic substances they routinely release in an HRA. Data from HRAs are used to identify facilities with localized impacts and to ascertain the risks those facilities pose to public health, allowing the District to notify nearby residents of significant health risks and to work cooperatively to reduce those risks. Finally, the Title V permitting process itself is an important compliance tool, with federal law specifying that each Title V Permit must "include ***enforceable*** emission limitations and standards, a schedule of compliance, a requirement that the permittee submit to the permitting authority, no less often than every 6 months, the results of any required monitoring, and such other conditions as are necessary to assure compliance" with the CAA. 42 U.S.C. § 7661c(a) (emphasis added).

24. The District has made significant progress towards achieving and maintaining compliance with national ambient air quality standards in the South Coast Air Basin. Exide's Vernon facility, however, has been a significant impediment in reaching those goals. For example, in 2007–09, the EPA determined that Los Angeles County was out of compliance with federal lead standards on the basis of data from two source-specific monitors – one in Vernon and the other in City of Industry. *See* South Coast Air Quality Management District, Final 2012 Air Quality Management Plan at 2–10 (2013), *available at* http://www.aqmd.gov/docs/default-

source/clean-air-plans/air-quality-management-plans/2012-air-quality-management-plan/final-2012-aqmp-(february-2013)/main-document-final-2012.pdf (the "2012 Report"). For the 2009–11 data period, only Vernon still exceeded the lead standard. *Id*. The District's report observed:

> Lead concentrations in 2011 were well below the … federal standard at all ambient monitoring sites not located near lead sources. However, the source specific monitoring site immediately downwind of a stationary lead source in the City of Vernon recorded a maximum 3-month rolling average of 0.46 µg/m3 ….

Id. at 2–12. This was approximately three times the standard. The extensive appendices to the 2012 Report leave no doubt about which "stationary lead source in the City of Vernon," *id*., is being discussed. *See* 2012 Report App'x II, Table A-18, *available at* http://www.aqmd.gov/docs/default-source/clean-air-plans/air-quality-management-plans/2012-air-quality-management-plan/final-2012-aqmp-(february-2013)/appendix-ii-final-2012.pdf (listing Exide as the only such source in the City of Vernon, and reflecting ambient lead monitoring results around Exide that were more than five times higher than any other measured source in the South Coast Air Basin).

25. Exide's persistent noncompliance is not abstract or technical. Rather, the toxins it is responsible for emitting have serious consequences to area residents. Lead and arsenic are both classified as toxic air contaminants. Exposure to lead can cause damage to the brain and nervous system, cardiovascular problems, decreased kidney function, and other health problems. Lead also has been linked to stunted growth, learning disabilities, seizures, and a range of illnesses. Arsenic has been identified as a carcinogen that has no exposure threshold below which adverse health effects are not likely to occur. It also has adverse acute and chronic non-cancer health effects.

B. Exide's False Certifications

26. As previewed above, three categories of misrepresentations and omissions are

particularly relevant to this Motion. The first set of allegations relates to Exide's false Certifications to the District. Exide's Title V Permit requires Annual Compliance Certifications under penalty of law. Some of Exide's Annual Compliance Certifications appropriately disclosed unrelated permit violations, but in none of its Certifications did Exide reveal a key source contributing to the high levels of lead being detected in the ambient air by sensors around the perimeter of the Vernon facility: lead-contaminated liquid dripping out of improperly maintained van trailers, which liquid then mixed with dust on the ground and became airborne when disturbed. *See, e.g.*, TAC ¶¶ 123–31.

27. Exide's operations at the Vernon facility involved crushing tens of thousands of spent batteries per day. One byproduct is broken plastic battery casings, which are covered in corrosive lead and acid. Exide sprayed these crushed casings with water, and then stored the resulting hazardous waste in van trailers on the grounds of the Vernon facility until they were (unlawfully) transported to a processing site (which was unlicensed). The fact that Exide engaged in this behavior is now beyond dispute, as Exide has admitted to it in the Non-Prosecution Agreement with the USAO. Nonetheless, had Exide's conduct been limited to storing and transporting the waste inside sealed, leak-proof containers, such conduct would have been a matter between Exide, the USAO, and perhaps Exide's other regulators. But mere storage and transportation is not all Exide admitted to. Rather, Exide confessed in the Non-Prosecution Agreement to "knowingly stor[ing] corrosive and lead-contaminated hazardous waste inside ***leaking van trailers***, owned by Wiley Sanders Truck Line, Inc., ***parked at the Facility***," and that it did so "a significant number of times over the past two decades …." NPA App'x 1 at 2 (emphasis added).

28. That the trailers were discharging lead is not a minor or incidental part of the

admission; it is the crux of Exide's confession to illegally disposing of (not just storing and transporting) hazardous waste: "Exide admits that it knowingly caused the disposal of corrosive and lead-contaminated hazardous waste by allowing it to leak from van trailers owned by Wiley Sanders Truck Line, Inc., which were parked at the Facility." *Id*. When lead leaks on the ground, it does not necessarily stay there. As the lead-infused liquid dries and mixes with dust, the lead becomes airborne when the ground is disturbed (as, for example, when a heavy van trailer loaded with hazardous waste is driven over the ground onto which the lead has leaked). In this way the fugitive lead dust can contribute to, and provide a partial explanation for, the high lead readings being picked up by sensors around the perimeter of the Vernon facility.

29. All the while Exide was discharging lead onto the ground, it was simultaneously swearing to the District that it was not doing so. Specifically, the Annual Compliance Certifications required Exide to disclose any permit violations as a condition of Exide's Title V Permit. Exide knew this, and it disclosed other violations (usually minor and/or already known by the District). But Exide never disclosed the leaking of lead-contaminated hazardous waste from van trailers parked at the facility. Given Exide's admissions in the Non-Prosecution Agreement, including for violating Section 5124 "knowingly" and "willfully," Exide cannot claim ignorance of its conduct. *See supra* ¶ 7 (quoting the pertinent provisions of Section 5124).

30. Exide's false Certifications undermine the integrity of the District's self-reporting requirements, which are an essential component of the District's enforcement program. Entities that have been entrusted with Title V Permits necessarily engage in activities that have the potential to do great harm. Permit-holders must therefore be candid and open with their regulators when public safety is at risk, and the District works cooperatively with permit-holders to ensure that any violations that occur are dealt with promptly, properly, and with minimal risk

to public safety. But such cooperative interactions are impossible if permit-holders conceal their violations – as Exide did here. That Exide concealed its crimes over ***decades***, see NPA App'x 1 at 2–3 (admitting that each violation took place "a significant number of times over the past two decades"), puts these already serious violations in a class by themselves.

31. Had Exide made a full and complete disclosure in its Certifications as it was required to do and as it represented it did, the District would have sought and obtained an Order for Abatement that would have prohibited Exide from continuing to operate the Vernon facility in violation of District Rules and the conditions specified in its Title V Permit.

C. Exide's Concealment of a July 2011 Source Test Report Despite Exide's Duty to Provide This Report to the District

32. The next set of allegations relates to Exide's unlawful concealment of a July 2011 source test. The Third Amended Complaint alleges that Exide concealed the results of a July 2011 source test at the Vernon facility that revealed significant arsenic emissions. *See* TAC ¶¶ 64–66. Despite having a duty under its Title V Permit to disclose source test results, and despite affirmatively representing to the District that it would forward results "as received," Exide concealed the July 2011 test results when those results confirmed prior tests that Exide falsely claimed were anomalous. *Id.* ¶¶ 63, 66, 70, 71.

33. By way of background, in July 2010 the District asked Exide to perform an HRA to assess the full spectrum of toxic air emissions that Exide was releasing regularly during its routine operations, to determine what health risks Exide's normal operations posed. *See id.* ¶ 41. In response to that request, Exide conducted a source test on October 4, 5, and 7, 2010, consisting of three comprehensive emission stack tests that provided a spectrum of air toxics emissions data so that Exide's HRA could be revised. *Id.* ¶¶ 42, 44. (Each source test is comprised of three individual tests run on separate days.) The results of the October 2010 source

test showed that Exide was emitting arsenic at significant levels. *Id.* ¶ 42. In the face of these results, Exide told the District that the October 2010 results were "anomalous" and that a new test would be run and the results would be "submitted to the SCAQMD for review, ***as received***." *Id*. ¶ 49 (emphasis added).

34. Exide conducted a new source test on July 26, 27, and 28, 2011. *Id.* ¶ 50. The results of the July 2011 source test revealed that the October 2010 source test was no anomaly, but rather confirmed that Exide's arsenic emissions had progressively worsened and that Exide's regular operations thus posed an increasing health risk to the surrounding community. *Id.* ¶ 51. Exide received the preliminary results from the July 2011 source test in late August 2011, and received the full results the next month. *Id.* ¶¶ 55, 58.

35. In addition to Exide's representation to the District that it would provide the results of the July 2011 test "as received," *id*. ¶ 49, Exide's Title V Permit required that the results be provided to the District no later than 60 days after the test, *id.* ¶ 63. Yet Exide nonetheless concealed the July 2011 test results from the District, failing to provide the results "as received," or within 60 days of the test, or at all during the remainder of 2011. *Id.* ¶ 64. Had Exide revealed these results (as it was required to do), the District would have sought and obtained an Order for Abatement that would have prohibited Exide from continuing to operate the Vernon facility in violation of District Rules and the conditions specified in its Title V Permit. *Id.* ¶ 65. Instead, Exide did not provide those test results to the District until the Spring of 2012, by which time Exide had made additional false statements to mislead the District. *Id.* ¶ 78.

D. Exide's Alteration of Testing Conditions During the May 2012 and April 2013 Source Tests

36. The final set of allegations relates to Exide's alteration of testing conditions in

May 2012 and April 2013. In March 2012, Exide told the District that its high arsenic emissions had been corrected with the repair of certain air ventilation equipment, and promised to conduct a new test to demonstrate that the arsenic problem was resolved. *Id.* ¶¶ 75–76. But the only way a new test could establish such resolution is if it were conducted under representative operating conditions and in the same manner as prior tests (*i.e.*, comparing "apples to apples") – which is why District Rule 1420.1(k)(7) requires source tests to be "conducted while operating at a minimum of 80% of equipment permitted capacity …." *Id.* ¶ 81.

37. Exide's October 2010 and July 2011 source tests largely complied with the District's 80% capacity requirement. The three individual tests comprising the October 2010 source test were run at 86.5%, 95%, and 83.5% capacity, and the three individual tests comprising the July 2011 source test were run at 81%, 83% and 75% capacity (the average of which is 79.6%, which rounds up to 80%). *Id.* ¶ 83. But for the May 2012 source test, Exide dramatically altered operating conditions, in violation of the District's Rules. Specifically, the three individual tests comprising the May 2012 source test were run at 56.3%, 60.9%, and 46% capacity (the average of which is 54.4%). *Id.* ¶ 85.

38. The Third Amended Complaint describes in great detail how Exide shifted material from the particular furnace being tested in May 2012 to another furnace, which in turn ran at nearly 100% capacity (far higher than usual). *See id.* ¶¶ 86–90. The Third Amended Complaint further explains that the last time Exide operated its furnaces under such artificial conditions was three days in October 2008 – the same three days during which another source test was being prepared for and conducted. *Id.* ¶¶ 91–93. These circumstances strongly suggest intentional manipulation of testing conditions to yield favorable but inaccurate results, all in violation of Exide's Title V Permit, which would have permitted the District to seek an Order of

Abatement. *See id*. ¶¶ 63–65.

39. Exide repeated this gambit in its April 2013 tests. These tests were run between approximately 31% and 61% of the equipment's permitted capacity. *Id.* ¶ 108.

RELIEF REQUESTED

40. The District seeks a determination by this Court that the District has alleged a prima facie case for application of the exception to discharge contained in Bankruptcy Code section 1141(d)(6) as to the District's allegations against Exide in the Third Amended Complaint. This is a narrow inquiry, and does not require (or, respectfully, permit) the Court to determine the merits of the claims (a determination committed in the first instance to the California State Court). Similarly, the Court is not charged at this point with definitely deciding that the claims are, or are not, excepted from discharge. That inquiry will be appropriate if and when the District prevails in the California State Action, at which point the District will bring an appropriate non-dischargeability adversary complaint in this Court. *See* Fed. R. Bankr. P. 7001(6). If the District does not prevail in the California State Action, no further proceedings before this Court with respect to dischargeability will be necessary.

BASIS FOR RELIEF REQUESTED

41. Section 1141(d)(6) of the Bankruptcy Code provides that "confirmation of a plan does not discharge a debtor that is a corporation from any debt – (A) of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit …." 11 U.S.C. § 1141(d)(6). The District is a domestic governmental unit, *see* 11 U.S.C. § 101(27), and the relevant cross-referenced statute (section 523(a)(2)) concerns debts for money, property, or services to the extent obtained by false pretenses, false representation, or actual fraud. 11 U.S.C. § 523(a)(2)(A) ("A discharge under … this title does not discharge an individual

debtor from any debt … for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by – (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition ….").

42. By its plain terms, the statute requires: (i) a "debt … for money, property, [or] services"; (ii) "false pretenses, a false representation, or actual fraud"; and (iii) a sufficient nexus between (i) and (ii) such that the debt is nondischargeable "to the extent" that money, property, or services were obtained by false pretenses, a false representation, or actual fraud. *See, e.g.*, *Cohen v. De La Cruz*, 523 U.S. 213, 218, 118 S. Ct. 1212, 1216 (1998) ("The most straightforward reading of § 523(a)(2)(A) is that it prevents discharge of 'any debt' respecting 'money, property, services, or … credit' that the debtor has fraudulently obtained ….'"). In *Cohen*, the Supreme Court explained that the phrase "'[t]o the extent obtained by' modifies 'money, property, services, or … credit' – not 'any debt ….'" *Id.* As such, "the exception encompasses 'any debt … for money, property, services, or … credit, to the extent [that the money, property, services, or credit is] obtained by' fraud," false pretenses, or false representation. *Id.* (alterations in original).

A. Debt for Money, Property, or Services

43. The threshold condition to the application of section 523(a)(2)(A) is the existence of a debt, which "is defined in the Code as 'liability on a claim,' § 101(12)." *Cohen*, 523 U.S. at 218, 118 S. Ct. at 1216. "[A] 'claim' is defined in turn as a 'right to payment,' §101(5)(A), and a 'right to payment' … is nothing more nor less than an enforceable obligation." *Id*. (internal quotation marks and citation omitted). Here, the "debt" the District seeks to establish in the California State Action is a money judgment against Exide.

44. In *Cohen*, the Supreme Court observed that "it is of no moment that 'debt for' in § 523(a)(2)(A) has as its immediate object a commodity (money, property, etc.)," whereas in

some other exceptions set out in section 523, "['debt for'] has as its immediate object a description of misconduct, *e.g.*, § 523(a)(4) ('debt for fraud or defalcation [by a] fiduciary')." *Id.* at 220, 118 S. Ct. at 1217. In part by relying on how the exception read in the Bankruptcy Act of 1898, the Court concluded that the discharge exception hinges on particular misconduct ("false pretenses, a false representation, or actual fraud"), "even if [the statutory exception] first specifies the ***result*** of that conduct (money, property, etc., obtained)." *Id*. (emphasis added). Accordingly, the Court concluded that "debt for" is best read as "debt arising from" or "debt on account of," such that section 523(a)(2)(A) "prohibit[s] the discharge of any liability ***arising from*** a debtor's fraudulent acquisition of money, property, etc…." *Id*. at 220–21, 118 S. Ct. 1212 at 1217 (emphasis added). *Cf. Archer v. Warner*, 538 U.S. 314, 316, 123 S. Ct. 1462, 1465 (2003) (debt arising from a settlement agreement that resolved a creditor's earlier claim for money obtained by fraud was nondischargeable, even though the settlement agreement itself was not fraudulent); *Brown v. Felsen*, 442 U.S. 127, 128–29 & 138, 99 S. Ct. 2205, 2207–08 & 2213 (1979) (assuming, as to a stipulated judgment resolving a lawsuit for fraud, that the debtor's payment obligation arising from the stipulated judgment could fall within the prior Bankruptcy Act's discharge exception for "liabilities for obtaining money or property by false pretenses or false representations").

45. Accordingly, a money judgment in the District's favor in the California State Action will fall within the scope of the discharge exception so long as it "arises from" or is "on account of" Exide's fraudulent acquisition of money, property, or services. Exide's unsupported assertion that "the regulatory (not financial) nature of [the District's] relationship with Exide" precludes applicability of the 1141(a)(6) discharge exception, *see The Reorganized Debtor's Reply in Support of [Motion to Enforce]* [Docket No. 4291] ¶ 27 n.22, has no basis in the

statutory text and is contrary to *Cohen* insofar as it focuses on the "debt" that Exide will owe the District if the District prevails in the California State Action rather than the conduct of Exide giving rise to such debt.

46. Exide's fraudulent and deceptive conduct resulted in its acquisition of money, property, and services. The unlawfully-operated Vernon facility "supplied approximately 30% of [Exide's] domestic lead requirements," *Second Amended Disclosure Statement with Respect to the Second Amended Plan of Reorganization of Exide Technologies* [Docket No. 3095] § V.J.2, and Exide represented that it "would incur approximately $15 million to $38 million per annum in reduced EBITDA on an annual basis if the Vernon Facility were permanently closed[,]" *id*. § V.K.1. Exide's operations produced the amount of lead that they did, and provided the level of financial benefit that they did, only because of Exide's fraud. The true cost of supplying nearly a third of Exide's domestic lead requirements was actually far higher, and includes (at a minimum) the civil penalties that accrued as a result of the manner in which the lead was produced.

B. False Pretenses, False Representation, or Actual Fraud

47. Under Bankruptcy Code section 523(a)(2), fraud is "any deceit, artifice, trick, or design, with mindful intent to circumvent or cheat another." *Krenowsky v. Haining (In re Haining)*, 119 B.R. 460, 463 (Bankr. D. Del. 1990). "False pretenses involve implied misrepresentations or conduct creating and fostering a false impression. False representations, on the other hand, involve express misrepresentations." *Hendry v. Hendry (In re Hendry)*, 428 B.R. 68, 79 (Bankr. D. Del. 2010) (internal citation omitted); *see also Dastinot v. Kamara (In re Kamara)*, No. 10-12766, 2012 Bankr. LEXIS 5403, at *19 (Bankr. D. Del. Nov. 20, 2012) (explaining that "[f]alse pretenses require proof of an implied misrepresentation promoted knowingly and willingly that creates a misleading understanding of the transaction by the plaintiff" while, "[o]n the other hand, false representation requires that the plaintiff show that the

debtor made a false or misleading statement about something." (internal quotation marks and citations omitted)).

48. Applying these definitions of fraudulent and fraud-like conduct, courts have held that creditors seeking to invoke the section 523(a)(2)(A) discharge exception must prove five elements: (i) "the debtor made the misrepresentations or perpetrated fraud"; (ii) "the debtor knew at the time that the representations were false"; (iii) "the debtor made the misrepresentations with the intention and purpose of deceiving the creditor"; (iv) "the creditor [justifiably] relied on such misrepresentations"; and (v) "the creditor sustained loss and damages as a proximate result of the misrepresentations having been made." *Crowe v. Moran (In re Moran)*, 413 B.R. 168, 182 (Bankr. D. Del. 2009) (alteration in original). These elements are sometimes set out differently, but the substance of the alternative formulations is essentially the same. *See, e.g.*, *Deitz v. Ford (In re Deitz)*, 760 F.3d 1038, 1050 (9th Cir. 2014); *Balascio v. Leitzke (In re Leitzke)*, No. 13-12156, 2014 Bankr. LEXIS 3089, at *7–8 (Bankr. D. Del. July 18, 2014); *Napert v. Casey (In re Casey)*, 2013 Bankr. LEXIS 5168, at *8–9 (Bankr. D. Del. Dec. 10, 2013); *In re Chandler*, No. 13-10687, 2013 Bankr. LEXIS 5196, at *4 (Bankr. D. Del. Nov. 5, 2013); *In re Hendry*, 428 B.R. at 79–80; *Webber v. Giarranto (In re Giarratano)*, 299 B.R. 328, 334 (Bankr. D. Del. 2003); *Whitesel v. Lloyd (In re Lloyd)*, No. 99-4413, 2000 Bankr. LEXIS 1316, at *7 (Bankr. D. Del. Aug. 25, 2000); *Beneficial Nat'l Bank v. Priestly (In re Priestley)*, 201 B.R. 875, 885–86 (Bankr. D. Del. 1996). And for misrepresentation by non-disclosure, rather than proving justifiable reliance the creditor must prove that the omission was material, "'*i.e.*, [that] a reasonable man would attach importance to the alleged omissions in determining his course of action.'" *In re Hendry*, 428 B.R. at 80 (quoting *Starr v. Reynolds (In re Reynolds)*, 193 B.R. 195, 203 (D.N.J. 1996)).

49. Exide's false Certifications are "false pretenses, a false representation, or actual fraud," 11 U.S.C. § 523(a)(2)(A), because Exide knew that the Certifications were false (a fact proven by Exide's admissions in the Non-Prosecution Agreement) yet nonetheless executed them under penalty of law and provided them to the District in an attempt to conceal the accrual of millions of dollars in civil penalties and prevent closure of the Vernon facility. The Certifications are an essential tool for an agency with over 28,000 permit-holders, on the truthfulness of which the District justifiably relies. And Exide's liability for civil penalties flows directly from Exide's continued improper operation of the Vernon facility, which would not have been allowed had the truth been known.

50. The District's allegations concerning Exide's concealment of the July 2011 source test results also amply show an actionable omission under the standards set forth above. Because Exide had a duty under its permit to disclose the source test results to the District, and Exide affirmatively represented that it would do so as and when the results were received, the District was justified in its reliance on Exide's truthfulness. But Exide concealed the test results, and thereby deceived the District as to the true amount of arsenic being emitted into the atmosphere. Had the District known the truth, Exide would not have been permitted to continue operating the Vernon facility and Exide's increasing civil penalty liability would not have continued accruing.

51. So, too, with Exide's manipulation of testing conditions in March 2012 and April 2013: Exide was required under the District's Rules to conduct source tests at 80% capacity. Exide did not do so. Yet Exide nonetheless offered the flawed results to the District as "proof" that its high arsenic emissions had been remedied. Exide's conduct was deceitful, designed to induce the District's reliance, and did in fact enable Exide to continue operations at the Vernon facility when accurate test results would have prevented such continued operations. Exide's

continued operations, in turn, proximately caused the civil penalties that the District is seeking in the California State Action.

52. In short, were it not for Exide's repeated misrepresentations and material omissions in connection with Exide's knowingly false Certifications of ongoing compliance, the concealed July 2011 source test, and the deliberately unrepresentative conditions under which Exide conducted the May 2012 and April 2013 source tests, the District would have sought and obtained an Order for Abatement that would have prohibited Exide from continuing to operate the Vernon facility in violation of District Rules and the conditions specified in its Title V Permit, and no further arsenic and lead emissions violations would have occurred. Thus, civil penalties assessed against Exide in the California State Action as a result of such arsenic and lead emissions violations arise from Exide's fraudulent behavior such that the penalties are non-dischargeable.

53. The circumstances here are more than enough to demonstrate nondischargeability under section 523(a)(2)(A). In *Cohen*, for example, the debtor-landlord unlawfully obtained rental payments from tenants above the levels permitted by local rent-control ordinances and was ordered to refund the excess rent and also to pay fees and treble damages (in essence, punitive damages). 523 U.S. at 215–16, 118 S. Ct. at 1215. The landlord sought to discharge at least the fees and trebled damages, contending that the statute "excepts from discharge only the portion of the damages award in a fraud action corresponding to the *value* of the 'money, property, services, or ... credit' the debtor obtained by fraud." *Id*. at 219, 118 S. Ct. at 1217. The Supreme Court rejected the debtor's argument that "a 'debt for' money, property, or services obtained by fraud is necessarily limited to the value of the money, property, or services received by the debtor," *id*., by noting the absurd consequences that would flow from such a narrow reading:

> For instance, if a debtor fraudulently represents that he will use a certain grade of shingles to roof a house and is paid accordingly, the cost of repairing any resulting water damage to the house could far exceed the payment to the debtor to install the shingles. [Or consider] a debtor who fraudulently represents to aircraft manufacturers that his steel bolts are aircraft quality and obtains sales of $5,000 for the bolts, but the fraud causes a multi-million dollar airplane to crash.

Id. at 222, 118 S. Ct. at 1218 (internal citations, quotations, and alterations omitted). Thus, the Court concluded instead that "***any liability*** arising from money, property, etc., that is fraudulently obtained, including treble damages, attorney's fees, and other relief that may exceed the value obtained by the debtor[,]" is nondischargeable. *Id*. at 223 (emphasis added).

54. As explained above, here, civil penalties ultimately assessed against Exide in the California State Action, to the extent that they flow from the fraudulent and fraud-like conduct that allowed Exide to continue to generate revenue from its unlawful operation of the Vernon facility, meet section 523(a)(2)(A)'s standards as interpreted by *Cohen*. Importantly, the District currently does not seek a determination of the quantum of such damages, only a determination that it has alleged a prima facie case that those damages are within the scope of the section 1141(d)(6) exception to discharge.[7]

[7] The foregoing three categories of misconduct summarized above and described in detail in the Third Amended Complaint are based on the District's knowledge at this point. The District also requests that any order of this Court permitting it to proceed also permit the District to amend or augment these allegations should it discover additional bases for non-dischargeable claims. Any such amendment would have, of course, to comply with the California state court rules applicable to any further amendment of the Third Amended Complaint.

CONCLUSION

WHEREFORE, the District respectfully requests that the Court determine that the District has alleged a prima facie case for application of the exception to discharge contained in Bankruptcy Code section 1141(d)(6) as to the District's allegations against Exide in the Third Amended Complaint, and for such other or further relief as may be appropriate.

Dated: September 30, 2015

By: */s/ Jack Shrum*

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

CERTIFICATE OF SERVICE

The undersigned certifies that on September 30, 2015, I caused a true and correct copy of the concurrently filed pleadings, *The South Coast Air Quality Management District's Motion for Entry of an Order Concerning the Timeliness of its General Unsecured Claims Against Exide*, *The South Coast Air Quality Management District's Motion for a Determination that it has Alleged a Prima Facie Case for Application of the 11 U.S.C. § 1141(d)(6) Exception to Discharge*, and *The South Coast Air Quality Management District's Request for Judicial Notice*, to be served upon all parties via CM/ECF and upon the persons below in the manner indicated.

Date: September 30, 2015

/s/ Jack Shrum
"J" Jackson Shrum (#4757)

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

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