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 Nos.: 4414, 4505**
	Hrg. Date: February 2, 2016 at 10:00 a.m. (Eastern)

THE REORGANIZED DEBTOR'S RESPONSE TO 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

Exide Technologies, the reorganized debtor in the above-captioned case ("Exide" or the "Reorganized Debtor"), hereby submits this response to The South Coast Air Quality Management District's (the "District") 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 (Docket No. 4505) (the "Motion").[2]

PRELIMINARY STATEMENT

1. The District has filed two substantive motions – this one, which seeks an advisory determination that regulatory claims (if any) on which it may prevail (or not) years from now after trial on the merits in California state court are nondischargeable in, and rode through, Exide's bankruptcy confirmation in 2015; and a motion to have the unsecured claims in its third amended complaint (the "Third Amended Complaint") "relate back" to its original state

[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] Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

court complaint. The common theme in both is that the rules for everyone else in the bankruptcy process just do not apply to the District. On the dischargeability Motion, its arguments obfuscate and twist the clear statutory language beyond recognition. On the relation back motion, the District ignores the only remedy to revive untimely prepetition claims – an excusable neglect motion – and, instead, argues endlessly about pleading amendment standards of Rule 15 of the Federal Rules of Civil Procedure that have nothing to do with its improper post-bar date and post-confirmation effort to amend its proof of claim.

2. The District's square pegs do not fit into the round holes – the normal bankruptcy rules and standards do apply to its claims and require a denial of the motions. Exide and its creditors should be allowed to move forward with the "fresh start" in their ordinary business operations that chapter 11 affords, without the District's limitless claims about a shuttered Los Angeles facility hanging over them while millions of dollars in unnecessary expense are racked up litigating claims in state court that are dischargeable, and have been discharged, in this bankruptcy case.

3. With respect to this Motion, the District seeks a determination from this Court that it has alleged a prima face case for application of the corporate discharge exception in section 1141(d)(6) of title 11 of the United States Code (the "Bankruptcy Code") via its incorporation of the section 523(a)(2)(A) discharge exception for individuals for debts for money obtained by fraud. The District's ostensible goal is to get this Court's permission – after Exide moved to enforce the discharge – to proceed with its action in the Superior Court of California (the "California State Action") seeking $80 million in non-pecuniary penalties for Exide's alleged violations of environmental regulations in connection with its prior operation of the now closed Vernon battery recycling facility. If the District was allowed to proceed, and ultimately

prevailed, it presumably would seek to collect at least some, if not all, of the penalties from reorganized Exide, thereby sidestepping the bankruptcy process – the District's strategy since it initiated the California State Action against Exide in January 2014. The District, however, fails as a matter of law to allege (or even approximate) a prima facie case for nondischargeability. The District's tortured struggle to fit the California State Action into section 523(a)(2)(A) fails for several reasons.

4. First, section 523(a)(2)(A) is the wrong discharge exception for the California State Action, which seeks penalties that are "not compensation for actual pecuniary loss." Section 523(a)(7) is the only discharge exception that explicitly covers these types of penalties, but Congress did not incorporate that individual discharge exception for penalties into section 1141(d)(6)'s narrow corporate discharge exception. Indeed, the legislative record clearly shows that Congress considered and rejected a proposal for a broader corporate discharge exception that would have included section 523(a)(7) penalties. Instead, Congress opted for a narrowly tailored corporate discharge exception that would not unduly punish innocent creditors invested in a corporate reorganization. The Supreme Court has mandated that "exceptions to the discharge 'should be confined to those plainly expressed.'" Kawaauhau v. Geiger, 523 U.S. 57, 62 (1998) (internal quotations omitted). Thus, the District cannot smuggle its alleged section 523(a)(7) penalty claims into the narrow corporate discharge exception.

5. Second, the California State Action is not premised on false pretenses, a false representation, or actual fraud, which are the fundamental elements for nondischargeability under section 523(a)(2)(A). Without that, the District's Motion fails. Notwithstanding the District's long-winded description of Exide's allegedly fraudulent and deceitful conduct, its complaint in the California State Action simply does not contain a single count premised on false

pretenses, false misrepresentation, or actual fraud; nor do any of the counts bear on any of the prima facie elements that bankruptcy courts consider in evaluating whether section 523(a)(2)(A) applies. Indeed, the District admits that the state regulations at the center of the California State Action assess strict-liability penalties for exceeding lead and arsenic emissions standards. If it could establish that Exide negligently, knowingly, willfully or intentionally violated these rules, the District could increase the amount of penalties. But at no point in the California State Action will the District be required to establish a fraud claim or any of the other prima facie elements of section 523(a)(2)(A).

6. Third, the District has not alleged any facts to satisfy section 523(a)(2)(A)'s requirement that there be a debt "for money . . . obtained by . . . fraud." The District offers a convoluted misinterpretation of Cohen v. De La Cruz, 523 U.S. 213 (1998), which only highlights the incongruity of its Motion. The District's flawed logic is that Exide may have financially benefitted from the allegedly fraudulent conduct because, but for its alleged failure to disclose allegedly unlawful conduct and prior violations, the District might have shut down the Vernon facility, and Exide would not have generated revenue from its operation. These attenuated allegations do not satisfy section 523(a)(2)(A)'s "debt for money obtained by fraud" requirement.

7. Cohen is on point. There the Supreme Court made clear that section 523(a)(2)(A):

> encompasses "any debt . . . for money, property, services, or . . . credit, to the extent [that the money, property, services, or . . . credit is] obtained by" fraud. The phrase thereby makes clear that the share of money, property, etc., that is obtained by fraud gives rise to a nondischargeable debt. Once it is established that specific money or property has been obtained by fraud, however, "any debt" arising therefrom is excepted from discharge.

Cohen v. De La Cruz, 523 U.S. at 218 (alterations in original) (emphasis added).

8. Applied here, Cohen exposes the glaring hole in the District's "Exide made money by operating Vernon" argument: no "share" of profits made by Exide's operation of Vernon "gives rise to a nondischargeable debt" in the first instance. The District did not even contribute to the Vernon facility's revenues, and Exide did not defraud its customers who did by allegedly concealing its supposed non-compliance with California state environmental regulations.

9. Contrary to the District's position, section 523(a)(2)(A) does not except from discharge "any debt . . . for [any] money . . . obtained by fraud." 11 U.S.C. § 523(a)(2)(A). Rather, as Cohen makes clear, the provision has a "specific money" requirement: "[o]nce it is established that specific money . . . has been obtained by fraud," then the underlying fraud claim can be augmented by other consequential damages resulting therefrom. Id. at 214 (emphasis added). Thus, under Cohen, the District first would have to establish that the alleged fraud gave rise to a nondischargeable debt owed to the District before the door would be open to tack on additional damages (or, in this case, penalties). The District conveniently skips this step by arguing that any debt arising from fraud is nondischargeable so long as some money (any money) was obtained somehow from someone other than the District itself. Cohen precludes this bootstrapping argument; under no circumstance can the District establish an initial debt owed to it for money obtained by fraud and thus there is no debt to which it could conceivably attach the penalties it seeks.

10. Fourth, the District's claim for nondischargeability is time-barred under the bankruptcy court's reasoning in U.S. ex rel. Minge v. Hawker Beechcraft Corp. (In re Hawker Beechcraft, Inc.), 493 B.R. 696 (Bankr. S.D.N.Y. 2013), rev'd, 515 B.R. 416, 430 (S.D.N.Y. 2014). The bankruptcy court there was correct to bar as untimely a claim for

nondischargeability raised under section 1141(d)(6) via section 523(a)(2)(A), and the reversal by the district court (whose decisions are not binding on this Court) was not sound. Here, the District had until 60 days after Exide's meeting of creditors to initiate a nondischargeability adversary proceeding. It did not do so and, therefore, is barred from doing so now.

RESPONSE

I. NONCOMPENSATORY FINES AND PENALTIES OWED TO A GOVERNMENTAL UNIT ARE NOT EXCEPTED FROM A CORPORATE DEBTOR'S DISCHARGE.

11. As a threshold matter, the section 523(a)(2)(A) discharge exception incorporated into section 1141(d)(6) is not available to the District. A different statute, section 523(a)(7), is the only discharge exception that could apply to the penalties sought by the District in the California State Action, but Congress declined to include this provision in the narrow discharge exception applicable to corporate debtors.[3]

12. The unique characteristics of the penalties covered in section 523(a)(7) – "payable to . . . a governmental unit" that are "not compensation for actual pecuniary loss" – describe precisely the penalties sought by the District in the California State Action. Specifically, the District seeks the maximum amount of penalties allowed under the applicable state statute for each day of Exide's alleged noncompliance.[4] As such, the District's claims are not based on any

---

3 Section 523(a)(7) excepts from the discharge <u>for an individual debtor</u> "any debt . . . to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss."

4 As the District notes in its Third Amended Complaint (¶ 25), violation of a District rule gives rise to civil penalties of up to $10,000 per day for noncompliance (strict liability), up to $25,000 per day for negligent emission violations, up to $40,000 per day for knowing emission violations, and up to $75,000 per day for willful and intentional emission violations. The District seeks the maximum per diem penalty for each count, as applicable.

actual tangible harm or loss it allegedly suffered.[5] It simply seeks to assess penalties against Exide in preordained amounts relative to the level of fault (not harm) it might establish in the California State Action. These are noncompensatory penalties.

13. As the Supreme Court repeatedly has instructed, "exceptions to discharge 'should be confined to those plainly expressed.'" Kawaauhau, 523 U.S. at 62 (citation omitted); see also Bullock v. BankChampaign, N.A., 133 S. Ct. 1754, 1756 (2013); United States v. Sotelo, 436 U.S. 268, 286 (1978) (noting that Supreme Court has always "construe[d] narrowly any exceptions to the general discharge provisions"); HSSM #7 Ltd. P'ship v. Bilzerian (In re Bilzerian), 100 F.3d 886, 891 (11th Cir. 1996) ("courts should narrowly construe exceptions to discharge against the creditor and in favor of the debtor").

14. Here, Congress plainly did not provide that section 523(a)(7) penalties are to be excepted from a corporate debtor's discharge. To the contrary, Congress expressly declined to do so. Eight years before its eventual enactment pursuant to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. 109-8, 119 Stat. 23 (codified as amended at scattered sections of 11, 18 and 28 U.S.C.) ("BAPCPA"), the initial proposal was to except tax claims arising from fraud from the corporate discharge. This original proposal was then expanded to include broader exceptions.[6] Importantly, at one point the draft legislation

[5] See, e.g., New Hampshire v. Tinkham (In Re Tinkham), 59 B.R. 209, 213 (Bankr. D.N.H. 1986) (where jury's civil verdict imposed maximum civil penalty of $10,000 per day for 67 days of violations, total $670,000 civil penalty "was in fact a true 'penalty' in the sense of 'punishment' and not an attempt [to] reimburse a governmental unit for actual pecuniary loss."); United States v. Serfling, 1998 U.S. Dist. LEXIS 3566, at *7-8 (N.D. Ill. Mar. 3, 1998) (civil penalty assessed by Commodity Futures Trading Commission that was within statutorily mandated range was not "compensation for actual pecuniary loss."); Ky., Nat. Res. & Envtl. Prot. Cabinet v. Seals, 161 B.R. 615, 621 (W.D. Va. 1993) (where statute assesses mandated penalties based solely on violation occurring, not based on cost of repairing damage resulting from violation, and not for any actual loss, penalties are not compensatory in nature).

[6] See Ralph Brubaker, Taking Exception to the New Corporate Discharge Exceptions, 13 Am. Bankr. Inst. L. Rev. 757, 773-74 (2005).

proposed that all 19 of the debts excepted from discharge for individual debtors enumerated in section 523(a), including the penalties covered by section 523(a)(7), also apply to corporate debtors.[7] However, after bankruptcy scholars warned against the consequences of overly broad corporate dischargeability exceptions, Congress ultimately settled on the limited discharge exceptions in their current form.[8] This history, in accord with the principle of *expressio unius est exclusio alterius*, supports a reading of the corporate discharge exception that does not graft section 523(a)(7) onto it.[9]

15. The Supreme Court's ruling in Davenport[10] further reinforces this narrow reading of the corporate discharge exception. In Davenport, the Supreme Court ruled that criminal restitution penalties falling within section 523(a)(7) (as previously decided in Kelly v. Robinson, 479 U.S. 36 (1986)) were dischargeable in a chapter 13 case because Congress did not explicitly carve such penalties out of the "super discharge" available to chapter 13 debtors. The Supreme Court said:

---

7 See H.R. 833, 106th Con. § 321(d) (as passed by Senate, Feb. 2. 2000); see also Goldman, Roger S. et al., Discharging False Claims Liability in Bankruptcy, Section 1141(D)(6)(A) of the Bankruptcy Code: An Incentive to Settle FCA Cases? ABI Journal, 2010.

8 Harvard Law School Professor (and chair of the Congressional Oversight Panel at the time, now U.S. Senator) Elizabeth Warren testified at the time: "The appropriate remedy when management has misbehaved is to fi[r]e the management and to sue them personally, not to saddle the surviving company with litigation that will sink it and repayments that will come out of the pockets of the innocent creditors." 147 Cong. Rec. S2034 (daily ed. Mar. 8, 2001). See also Olympia Equip. Leasing Co. v. W. Union Tel. Co., 786 F.2d 794, 803 (7th Cir. 1986) (Easterbrook, C.J., concurring) ("All punishments inflicted on a corporation in name are collected from investors in fact.").

9 See Barnhart v. Sigmon Coal Co., 534 U.S. 438, 452 (2002) ("[I]t is a general principle of statutory construction that when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (citing Russello v. United States, 464 U.S. 16, 23 (1983)); see also Devon Robotics, LLC v. DeViedma, 798 F.3d 136, 143 (3d Cir. 2015) (applying canon of *expressio unius est exclusio alterius* to find that Congress's enumeration of several categories of appealable orders, but not orders denying summary judgment, indicates that Congress intended orders denying summary judgment to fall outside the scope of statute being interpreted).

10 Pa. Dep't. of Public Welfare v. Davenport, 495 U.S. 552 (1990), *superseded by statute on other grounds*.

> Congress . . . took care to except particular debts from discharge where policy considerations so warranted. Accordingly, Congress secured a broader discharge for debtors under Chapter 13 than Chapter 7 by extending to Chapter 13 proceedings some, but not all of § 523(a)'s exceptions to discharge. Among those exceptions that Congress chose not to extend to Chapter 13 proceedings is § 523(a)(7)'s exception for debts arising from a "fine, penalty, or forfeiture."

Davenport¸ 495 U.S. at 562-63 (emphasis added). The same is true here, as Congress clearly did not extend section 523(a)(7) penalties to the list of specific debts excepted from the broad discharge afforded to corporate debtors.[11]

16. This case is directly akin to Davenport – the only difference is that the chapter 11 discharge is broader than the chapter 13 discharge. Before 2005, corporate debtors enjoyed a full discharge of all debts.[12] The broad chapter 11 discharge provides the mechanism binding virtually all claimants to the treatment in a chapter 11 plan, thus providing finality and

[11] While Congress enacted legislation to overrule the result in Davenport, which allowed the discharge of criminal restitution penalties in chapter 13, the manner in which Congress acted does not detract from its applicability here – indeed Congress' reaction to Davenport buttresses Exide's reading of the corporate discharge exception. In particular, post-Davenport, Congress specifically amended the Bankruptcy Code to make debts "for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime" nondischargeable. 11 U.S.C. § 1328(a)(3). Congress did not import the section 523(a)(7) exception into section 1328(a)(2) discharge, as it easily could have if it had wished to broadly supersede Davenport. But it did not. Subsequently, in 2005, when Congress further narrowed the chapter 13 discharge, it amended section 1328(a)(2) to except from discharge debts "of a kind specified . . . in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8) or (9) of section 523(a)." Once again, Congress chose not to incorporate section 523(a)(7) penalties into the list of explicit chapter 13 discharge exceptions. Congress' particularized legislative reaction hardly denounces Davenport; rather it validates the rule of Davenport that exceptions to the broad chapter 13 discharge must be explicitly included in the legislative text (not inferred therefrom) in order to exist. 11 U.S.C. § 1328(a)(2); see also Kawaauhau, 523 U.S. at 62; Bullock, 133 S. Ct. at 1756.

[12] See Brubaker, supra note 6, at 757. This comprehensive discharge resulted from Congress' close scrutiny of the preceding statute and careful consideration of the implications of exceptions on a successful restructuring. Indeed, the differing scope of the discharge under chapter X (one limited exception for priority taxes) and chapter XI (excluding, among others, debts that would not be dischargeable in an individual's bankruptcy case) of the Bankruptcy Act of 1898 (predecessor to the Bankruptcy Code) was oft-cited as requiring reconciliation. Id. at n.46. After numerous bills passed between the House and Senate, the corporate discharge exception, even in limited form, was entirely eliminated. Id. at n.47. Thus, Congress, informed by the impediment to a successful reorganization imposed by discharge exceptions, decided to enact an even more comprehensive discharge than had been available previously under even chapter X. Id. at 765.

implementation of a reorganized corporation's new capital structure.[13] This extensive discharge ensures that the innocent creditors and the new corporate owners (here, largely, one and the same) are not saddled with debts caused by the past alleged transgressions of the debtor company's agents. Expanding the discharge exception, then, ultimately becomes a burden visited principally on innocent creditors and not the corporate agents, whose alleged actions give rise to the claims at issue, i.e., the civil penalties in this case.[14]

17. With the passage of BAPCPA, Congress enacted a very narrow exception to a corporate debtor's chapter 11 discharge, and rejected broader proposals that would have included section 523(a)(7) penalties, in response to bankruptcy experts' warning against compromising the corporate discharge at the expense of innocent creditors. Again, Congress easily could have included the penalties that it carefully articulated in section 523(a)(7) when it decided to diverge from the pre-BAPCPA rule that a corporate debtor is discharged from all debts. But it did not. Thus, any suggestion that unambiguous section 523(a)(7) penalties – as the District is pursuing in the California State Action – are implicitly excepted from the corporate discharge is without merit. See Kawaauhau, 523 U.S. at 62 ("exceptions to discharge 'should be confined to those plainly expressed'"); Bullock, 133 S. Ct. at 1756. To stretch section

---

13 See Brubaker, supra note 6, at 761. "[T]he chapter 11 corporate discharge is simply effectuating a change in the corporation's capital structure[.]" Id. at n.28. Under another section of chapter 11 – section 1141(d)(3) – a liquidating chapter 11 debtor receives no discharge. This squares with the policy of providing reorganizing debtors with an expansive discharge that effectuates plan finality and ensures that innocent creditors are not punished for the wrongdoings of the debtor corporation, because in a liquidating chapter 11 case all that remains is a corporate shell that does not need any discharge. See id. at n.27. There is no doubt that if Exide had liquidated in a chapter 11 plan or sold substantially all of its assets under section 363, the new owners of Exide's assets would not be on the hook for the penalties sought by the District here. Similar policy reasons underlie the broad chapter 13 discharge. A chapter 13 case requires approval and completion of a plan for repayment of the debtor's creditors, and the broad discharge promotes this policy of repayment of creditors, while providing the debtor with a fresh start.

14 To be clear, Exide vigorously contests the allegations in the Third Amended Complaint and denies any wrongdoing.

523(a)(2)(A) to also cover penalties that fit squarely within the scope of section 523(a)(7) would render the latter "mere surplusage," contrary to the Supreme Court's "deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." Davenport, 495 U.S. at 562; see also In re Rountree, 478 F.3d 215, 219 (4th Cir. 2007).

18. Moreover, if the District could transform its section 523(a)(7) claims into section 523(a)(2)(A) claims, the scope of the reorganized Exide's discharge would be unduly constrained. In effect, this would allow the District to "opt out" of the chapter 11 case to the detriment of Exide's other creditors who gave up fundamental rights by accepting Exide's plan (e.g., secured creditors gave up their "indubitable equivalence" rights by accepting equity worth cents on the dollar for their secured claims) and invested substantial new capital to allow Exide to reorganize in the first place. The District's lie-in-the-weeds strategy – raising allegedly nondischargeable claims on the eve of confirmation[15] by simply uttering the word "fraud" when it is seeking to collect old penalties against the former corporate entity – should not be permitted.[16]

19. As discussed further below, the District's penalty claims do not come within the definitional confines of section 523(a)(2)(A). This analysis underscores the mutual exclusivity of sections 523(a)(2)(A) and 523(a)(7)[17] – the former is pecuniary (i.e., requires

[15] The District first raised the potential for nondischargeable claims in an objection to Exide's proposed plan filed two weeks before the confirmation hearing. For some reason, the District felt compelled to reserve its rights on the eve of confirmation, when it failed to do so earlier in the case as the bankruptcy court's decision in Hawker Beechcraft, discussed below, would have required it to do.

[16] As noted above, Exide could have changed to a sale structure, leaving the corporate discharge exception unavailable to the District. But Exide was on the verge of emerging from chapter 11 with the infusion of new capital in the offing and, therefore, chose to emerge as a reorganized debtor and contest the District on the applicability of the discharge exception to the California State Action.

[17] The cases that have comparatively analyzed these two statutes support their mutual exclusivity. Almost every such case has held that noncompensatory penalties payable to the government are nondischargeable under 523(a)(7), but not section 523(a)(2)(a), even in cases that involved penalties imposed as a result of fraud. See,

(cont'd)

obtaining money by fraud from the creditor asserting nondischargeability), while the latter is non-pecuniary ("not compensation for actual pecuniary loss").[18] And it is obvious that the District is seeking noncompensatory penalties in the California State Action.

II. THE MOTION FAILS TO ESTABLISH A PRIMA FACIE CASE FOR APPLICATION OF THE CORPORATE DISCHARGE EXCEPTION.

20. The California State Action is not premised on false pretenses, false misrepresentation, or fraud, a fundamental element under section 523(a)(2)(A)'s exception to dischargeability. The District acknowledges this gating issue, stating that "'[o]nce it is established that specific money or property has been obtained by fraud,'" then, and only then,

(cont'd from previous page)
e.g., In re Andrews, No. 15-46058, 2015 WL 5813418, at *4 (Bankr. E.D. Mich. Oct. 2, 2015) ("[O]ther than restitutionary penalties and the tax penalties specified in subsections 523(a)(7)(A) and (B), all other penalties 'payable to and for the benefit of a governmental unit' fall within section 523(a)(7)'s ambit[, including] penalty debts . . . assessed as a result of a debtor's fraudulent conduct – until Congress says otherwise"); In re Bocchino, 504 B.R. 403, 408 (Bankr. M.D. Pa. 2013) (holding that SEC's fraud claims for disgorgement fell within section 523(a)(2)(A) discharge exception in a chapter 13 case, but SEC's fraud claims for civil penalties fell within section 523(a)(7) discharge exception, which was not incorporated into exceptions from chapter 13 discharge), aff'd, 794 F.3d 376 (3d Cir. 2015); United States v. WRW Corp., 986 F.2d 138, 144 (6th Cir. 1993) ("As found by the district court, the only provision of § 523(a) which might except the fine or penalty from discharge is § 523(a)(7)."); United States v. Horras (In re Horras), 443 B.R. 159, 168 (B.A.P. 8th Cir. 2011) (holding that government benefit overpayment refund claim was nondischargeable under section 523(a)(2)(A) while government's penalty was nondischargeable under section 523(a)(7)); Winters v. United States, No. 03-40517-L, 2006 Bankr. LEXIS 3678, at *22-23 (Bankr. W.D. Tenn. Dec. 27, 2006) (distinguishing between civil penalties and pecuniary claims held by government), subsequently vacated because the debtor died prior to the entry of the discharge order; In re Adamic, 291 B.R. 175, 180 (Bankr. D. Colo. 2003) ("debts for overpayment of employment compensation benefits in Colorado may be excepted from a Chapter 7 discharge under 11 U.S.C. § 523(a)(2)(A), and monetary penalties may be excepted under 11 U.S.C. § 523(a)(7)"); People v. Hatcher (In re Hatcher), 111 B.R. 696, 700-01 (Bankr. N.D. Ill. 1990) (penalty debts are nondischargeable under section 523(a)(7) as opposed to 523(a)(2)(A)); In re O'Brien, 110 B.R. 27, 31 (Bankr. D. Colo. 1990) (same). Thus, it is not surprising that the District does not cite to a single case supporting its position that section 523(a)(7) penalties might give rise to a debt within the ambit of section 523(a)(2)(A).

[18] The common thread of the corporate discharge exception is that it relates to debts owed for perpetrating fraud against the government that results in a pecuniary harm to the government. In enacting Bankruptcy Code section 1141(d)(6), "Congress focused on fraud committed by the debtor directly against the Government in an attempt to fleece the Government's coffers." William Hildbold, Will Section 1141(d)(6) of the Bankruptcy Code Destroy Corporate Chapter 11 Reorganizations by Rendering SEC Claims Non-Dischargeable, 17 Am. Bankr. Inst. L. Rev. 551, 582 (2009); see also 8 Collier on Bankruptcy 1141.05[1][b][i] (16th Ed. 2015) ("An obvious candidate for a governmental unit's claim of nondischargeability is any government-sponsored loan program . . . . A governmental unit may seek nondischargeability owing under a government contract . . . . Defense and other federal government contractors could be particularly affected by this provision. Medicare and Medicaid providers are other possible targets.").

does the issue of other debts arising therefrom become relevant. Motion ¶ 13 (emphasis added) (quoting Cohen, 523 U.S. at 218).

21. The District tries to reframe its strict-liability penalty claims as compensatory fraud claims in order to make them fit into the section 523(a)(2)(A) mold. But none of the District's claims sound in false pretenses, false misrepresentation, or fraud, and none of the statutes on which the claims are based require a showing of false pretenses, false misrepresentation, or fraud in order for the District to prevail in its California State Action.[19]

22. False pretenses, false misrepresentation, and actual fraud, as contemplated by section 523(a)(2)(A), comprise "frauds involving 'moral turpitude or intentional wrong; fraud implied in law which may exist without imputation of bad faith or immorality are insufficient.'" RecoverEdge L.P. v. Pentecost, 44 F.3d 1284, 1292 (5th Cir. 1995) (internal citations omitted); see also In re Schulman, 196 B.R. 688, 693 (Bankr. S.D.N.Y. 1996) ("The debtor must be guilty of positive fraud or fraud in fact, involving moral turpitude or intentional wrong" to be excepted from discharge under section 523(a)(2)(A)). Central to a section 523(a)(2)(A) claim is a certain level of scienter – specific intent to deceive. See, e.g., Field v. Mans, 516 U.S. 59, 68 (1995) ("[C]ourts that have previously construed this statute[] routinely requir[e] intent, reliance, and materiality before applying § 523(a)(2)(A).") (emphasis added); In re Giarratano, 358 B.R. 106, 111 (D. Del. 2004) ("to prevail under the [section 523(a)(2)(A) discharge] exception[], [c]reditor . . . must establish . . . that [d]ebtor had an intent to deceive and defraud, and an intent to cause injury."); In re Oakley, 503 B.R. 407, 432 (Bankr. E.D. Pa. 2013) ("In order to prevail

[19] As summarized in Exhibit A, the counts pled in the California State Action only allege violations of the District rules and the California Health and Safety Code. Specifically, causes of action 1 through 18 cover penalties for strict liability; causes of action 19, 22 and 25 cover penalties for alleged negligence; causes of action 20, 23 and 26 cover penalties where Exide allegedly knew of an emission and failed to take corrective action; and causes of action 21, 24 and 27 cover penalties where Exide allegedly willfully and intentionally emitted a contaminant.

under section 523(a)(2)(A), . . . a showing of fraudulent intent to deceive is required.") (emphasis added); see also 4 Collier on Bankruptcy ¶ 523.08[d] (16th ed.) ("To except a debt from discharge under section 523(a)(2)(A), the false representations giving rise to the debt must have been knowingly and fraudulently made.") (emphasis added).

23. The District does not and cannot satisfy this threshold requirement. In fact, the District admits in its Motion that the regulations at issue in the Third Amended Complaint impose strict-liability penalties for exceeding lead and arsenic emissions standards. If Exide is merely strictly liable for the violations, one set of penalties applies; if Exide was negligent, the penalties increase; and if Exide acted knowingly, willfully or intentionally, even higher penalties apply. As the District says, "[t]he real question is Exide's state of mind," i.e., Exide's knowledge, Motion ¶ 12, but that is only relevant to determine the amount of penalties, not liability. Exide's state of mind, even at the highest level of intent (i.e., knowingly, willfully or intentionally emitting lead and arsenic in excess of regulation standards), does not rise to the heightened scienter of specific intent to create false pretenses, make a false representation, or commit fraud.

24. The analysis in In re Sabban, 600 F.3d 1219, 1224 (9th Cir. 2010), is on point. In Sabban, the debtor held an interest in a general partnership that performed remodeling work on a claimant's home without a license. Id. at 1220. Before entering into contracts with the claimant to perform the work, the debtor falsely represented that the partnership was licensed to perform such work, when in fact it was not. Id. The claimant sued the debtor in state court, alleging, among other things, violations of two California state statutes. Id. The state court found that the claimant was induced to sign the contracts in reliance upon the false and fraudulent representations made by the debtor. Id. However, the Ninth Circuit held that part of

the judgment was dischargeable because (1) the statute under which the judgment was awarded was not premised on the commission of fraud (rather, the statute imposed a strict liability of recoupment of any compensation paid where a contractor was unlicensed), and (2) the amount of damages was dictated by the statute and was not compensation for any actual harm suffered by the claimant. Id. at 1224. Thus, the debt was "not a debt for money obtained by fraud within the meaning of [section] 523(a)(2)(A)." Id.

25. In re McCarthy, 473 B.R. 485 (Bankr. D. Mass. 2012), mirrors the Ninth Circuit's analysis in Sabban. In McCarthy, the bankruptcy court held that section 523(a)(2)(A) did not exclude from discharge a duty to indemnify a creditor for damages stemming from the breach of a contract. Under an agreement with the plaintiff, a title insurance company, and as required by the Massachussetts bar, the debtor, an attorney retained to act as the company's agent in issuing title insurance policies, was required to maintain a $500,000 professional liability insurance policy, but the policy lapsed. Id. at 488. The insurance company commenced an action in state court alleging that the debtor was negligent in connection with the examination and certification of a title in a real estate transaction and breached the retention agreement. The issue in the bankruptcy case was whether the debtor's resulting liability to the title insurance company involved obtaining property or services from fraud, as required under section 523(a)(2)(A). Id. at 492. The court found that the plaintiff failed to articulate any money or property the debtor received as a result of fraud, noting that the only money paid by the plaintiff was to a third party, which "ha[d] nothing to do with [debtor's] fraud," but, rather was "based on [debtor's] negligence in issuing the title insurance policy or his obligation to indemnify [plaintiff-creditor]." Id. at 493. Instead, the court found that the claims were grounded on the debtor's failure to maintain his malpractice insurance policy and characterized the liability as a

"garden variety breach of contract claim," which is not excluded from discharge by section 523(a)(2)(A). Id. at 494; see also In re Bruner, 43 B.R. 143, 146 (Bankr. E.D. Mo. 1984) (concluding that section 523(a)(2)(A) was inapplicable where there was a state court judgment, but there was no money, property, services, or extension of credit transferred to debtor from plaintiff).

26. As in McCarthy, the District does not claim to have paid any money or transferred any property to the Debtor as a result of alleged fraud or anything else. Indeed, the District's claims are based on strict liability, and the amount as dictated by the statute may increase depending on proof of Exide's intent – not fraud. Simply put, the District has not pled in the California State Action any claims for fraud within the meaning of section 523(a)(2)(A). Thus, the District's claims are dischargeable.

27. Moreover, the five elements that the District agrees it must satisfy to establish a prima facie case for nondischargeability under section 523(a)(2)(A) – i.e., (1) the debtor made the false misrepresentations, false pretenses or perpetuated fraud; (2) the debtor knew at the time that the representations were false; (3) the debtor made the misrepresentations with the intention and purpose of deceiving the creditor; (4) the creditor justifiably relied on such misrepresentations; and (5) the creditor sustained loss and damages as a proximate result of the misrepresentations having been made, see Motion ¶ 48[20] – are not elements that are at issue in the California State Action. Moreover, even if these were elements of one of the District's causes of action (which they are not), the District cannot satisfy the prima facie section 523(a)(2)(A) fraud requirements because there be can be no proximate cause for non-pecuniary

[20] In re Giarratano, 299 B.R. 328, 334 (Bankr. D. Del. 2003) (citing Field v. Mans, 516 U.S. 59, 70-71 (1995)), aff'd, 358 B.R. 106 (D. Del. 2004).

damages where the District has not suffered any actual loss. What the District seeks are regulatory fines and penalties. There cannot be any nexus between an alleged false misrepresentation and damages where there are no damages alleged.

28. Alleging "fraud-like" conduct to prove willful intent and increase noncompensatory statutory penalties is simply not the same as an action for false pretenses, false misrepresentation, or actual fraud within the meaning of section 523(a)(2)(A). Because the California State Action is neither grounded in fraud nor required to prove the five elements necessary to establish nondischargeability under section 523(a)(2)(A), the California state court would not adjudicate these elements in ruling on the Third Amended Complaint.[21] Thus, the litigation contemplated by the Third Amended Complaint has not and never will constitute a prima facie action for false pretenses, false misrepresentation, or fraud and, therefore, the District should not be permitted to proceed with its prosecution.

29. Even if the District seeks to introduce facts that are "fraud-like" in its attempt to prove willful intent, continuation of the action in the California state court would not aid this Court in determining the dischargeability of the District's claims. Whether or not a debt satisfies the elements under section 523(a)(2)(A) is a bankruptcy-specific analysis reserved for the bankruptcy courts. Although in certain cases it may be appropriate for bankruptcy courts to look to the state court's adjudication of the state law claims (e.g., underlying fraud claims), it is squarely within the bankruptcy court's jurisdiction to determine whether a debt is dischargeable. See, e.g., In re Otto, 311 B.R. 43, 46 (Bankr. E.D. Pa. 2004) (Congress intended bankruptcy courts to have exclusive jurisdiction over determinations of dischargeability of debt); In re Diaz,

[21] Additionally, because the California State Action is still in its infancy (see Tr. of Exide Technologies Case No. 13-11482 (KJC), July 7, 2015 at 18 ("No trial date has been set yet in California.")), it is more efficient for this Court to adjudicate the dischargeability issues than the California state court, especially where the elements that would support nondischargeability are not even at issue in California.

120 B.R. 967, 974 (Bankr. N.D. Ind. 1989) (determinations of dischargeability have been committed to bankruptcy courts since 1970 Bankruptcy Code amendments). Indeed, the District admits that the dischargeability issue is for this Court to determine. Motion ¶ 40.

30. Judicial economy and efficiency also dictate that dischargeability be determined here <u>before</u> the District proceeds with a trial on the merits in the state court, which <u>may or may not</u> tangentially determine certain "fraud-like" claims that <u>may or may not</u> have a bearing on dischargeability. If this Court determines the claims to be dischargeable, it makes no sense to proceed with expensive and time-consuming discovery and a trial in California regarding claims that have been discharged and, therefore, are not viable.

III. THE DISTRICT HAS FAILED TO SHOW THAT EXIDE OBTAINED A DEBT FOR MONEY BY FRAUD.

31. In addition, the District cannot satisfy section 523(a)(2)(A)'s explicit requirement that there be a "debt for money, property, services, or . . . credit . . . obtained by false pretenses, a false representation, or actual fraud." In addition to the five elements required to plead a nondischargeability case under section 523(a)(2)(A), this "specific money" requirement itself is necessary to establish a prima facie case for dischargeability.

32. To ostensibly satisfy this statutory requirement, the District posits that: "Exide's operations [at the Vernon facility] produced the amount of lead that they did, and provided the level of financial benefit that they did, only because of Exide's [alleged] fraud." Motion ¶ 46. In other words, the District claims that if it had known of Exide's alleged environmental violations (which it claims not to have known because of Exide's allegedly false representations), it would have shut down Vernon, and consequently Exide would not have made money from Vernon's operations. This attenuated theory does not satisfy the statute.

33. In Cohen v. De La Cruz, the Supreme Court provided clear guidance on how to apply the "debt for money obtained by fraud" requirement in section 523(a)(2)(A). It noted that the section:

> encompasses "any debt . . . for money, property, services, or . . . credit, to the extent [that the money, property, services, or . . . credit is] obtained by" fraud. The phrase thereby makes clear that the share of money, property, etc., that is obtained by fraud gives rise to a nondischargeable debt. Once it is established that specific money or property has been obtained by fraud, however, "any debt" arising therefrom is excepted from discharge.

Cohen v. De La Cruz, 523 U.S. at 218 (alterations in original) (emphasis added).

34. The District's "Exide made money by operating the plant" argument does not satisfy this requirement. The Supreme Court was clear that it is not "any money" or even "any money obtained by fraud" that satisfies the requirement. Rather, it is "any debt for money obtained by fraud." Thus, it is the indebtedness owed for money, property, services, or credit that must be obtained by fraud. Here, there is no such indebtedness incurred by fraud.

35. Undoubtedly, profits obtained by Exide by its operation of Vernon do not give rise to a nondischargeable debt. The District did not contribute to those profits, and Exide did not defraud its customers, who ultimately paid the money generated by Vernon's operation, by allegedly concealing its supposed non-compliance with California state environmental regulations at Vernon. Following the District's flawed logic would mean that Exide incurred a debt for the revenue generated at Vernon – an absurd result.

36. Ignoring the clear mandate of Cohen, the District advocates a construction of section 523(a)(2)(A) that would effectively except from discharge any debt tangentially related to fraud or concealment, as opposed to debts for money or services obtained by fraud. The District twists Cohen's holding, selectively omitting the critical threshold requirement established by the Supreme Court, to support its position that "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." Motion ¶ 45.

37. Indeed, the District skips the first step, jumping straight to the conclusion that there is no limit on the damages that may be included in the exception from discharge. However, Cohen makes clear that a creditor must establish that "specific money or property has been obtained by fraud" from that creditor in the first instance before the door can be opened to additional related damages. Cohen, 523 U.S. at 218.

38. At bottom, Cohen is a case about the quantum of damages – an inquiry that is not relevant unless and until a creditor first establishes that a "share of money [was] obtained by fraud [from the creditor, which] gives rise to a nondischargeable debt." Indeed, "[i]n Cohen the Supreme Court had already determined that the debtor had fraudulently obtained money from his [creditors]; thus, the remaining issue was whether the [tenants'] claim for treble damages was also nondischargeable . . . ." Rountree, 330 B.R. 166, 172 (E.D. Va. 2004), aff'd, 478 F.3d 215 (4th Cir. 2007).

39. The District must first establish a debt owed to it arising from the alleged fraud. The District cannot satisfy this threshold requirement because what it seeks to have held nondischargeable – noncompensatory penalties for violations of environmental regulations – do not trace back to "a debt for money obtained by fraud." Thus, the penalties the District seeks are dischargeable.

40. Even the examples set forth in the block quote from Cohen that the District includes in its Motion drive home the point that the share of money received from fraud first must give rise to a nondischargeable debt. See Motion ¶53.

41. Specifically, the hypotheticals from Cohen that the District relies on to support its extreme proposition that any debt from fraud, no matter how attenuated the connection, is nondischargeable, are as follows: (1) a debtor fraudulently represents that he will use a certain grade of shingles to roof a house and is paid accordingly, but the lower grade shingles fail and water damage results which exceeds the cost of the roofing; and (2) a debtor fraudulently represents to aircraft manufacturers that the steel bolts sold by the debtor are aircraft quality and is paid accordingly, but the lesser-quality bolts fail which causes a multi-million dollar airplane to crash. See Cohen v. De La Cruz, 523 U.S. 213, 222 (1998).

42. Receipt of money from the party that was defrauded which gives rise to a nondischargeable debt to that party is an essential component in both of these hypotheticals. In the first instance, the roofer receives a money payment for a certain grade of shingles as a result of a fraudulent representation regarding the quality of the shingles. Because that money was improperly obtained by fraud, the roofer owes it back to the purchaser. That is the initial nondischargeable debt resulting from fraud. Cohen allows the purchaser to add consequential damages, e.g., water damage caused by the faulty shingles, to its nondischargeable claim. In the second instance, the bolt vendor receives a money payment for the bolts as a result of a fraudulent representation regarding the bolts' quality. The fraud perpetrated in order to receive that money gives rise to a nondischargeable debt – i.e., because that money was improperly obtained by fraud, the bolt manufacturer owes it back to the purchaser. It is that initial fraudulently incurred debt that gives the purchaser the ability to extend section 523(a)(2)(A) to consequential damages resulting from the airplane crash.

43. Following the Supreme Court's guidance in Cohen, courts consistently have held that the "specific money" requirement of section 523(a)(2)(A) prevents the discharge

of debts when the debtor obtains value (e.g., money, property, services) from a creditor through the debtor's fraudulent conduct; not simply when money is obtained by a debtor from someone other than the allegedly defrauded creditor. In In re Rountree, the Fourth Circuit declined to apply the discharge exception to a creditor's claim for emotional loss resulting from a debtor's misrepresentations. Rountree, 478 F.3d at 222. The Fourth Circuit held that a plain reading of section 523(a)(2)(A) demonstrates "that Congress excepted from discharge not simply any debt incurred as a result of fraud but only debts in which the debtor used fraudulent means to obtain money, property, services, or credit. Structurally, the subsection can have no other meaning." Id. at 219 (emphasis added).

44. Moreover, the contrasting language in section 523(a)(4) emphasizes this result. Section 523(a)(4) categorically excepts from discharge "any debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny" without any reference "to money, property, [or] services . . . to the extent obtained by" fraud. As the Fourth Circuit notes in Rountree:

> The additional subsection of § 523(a)(2), which excepts from discharge debts for money, property, services, or credit to the extent obtained by use of a false written statement, § 523(a)(2)(B), makes clear that Congress intended § 523(a)(2) to protect creditors who were tricked by debtors into loaning them money or giving them property, services, or credit through fraudulent means. In [this] case, Rountree's fraud may have injured [the creditor], but Rountree did not commit the fraud in order to obtain anything in the sense contemplated by §523(a)(2).

Id. at 219-20.[22]

[22] In re Bruner, 43 B.R. 143 (Bankr. E.D. Mo. 1984), is also instructive. There, the court held that section 523(a)(2)(A) did not exclude from discharge a state court judgment for seduction and breach of promise to marry. The court focused on the requirement that the debtor "obtain[] money, property, services or an extension, renewal, or refinance of credit." Id. at 147. Since the debtor only received "favors" from the plaintiff, which did not fit the definition of property, the court held that the liability for the state court judgment was dischargeable. Id.; see also In re Bearden, 382 B.R. 911, 921 (Bankr. D.S.C. 2008) (to recover under section 523(a)(2)(A),

(cont'd)

45. The same is true here. Exide's continuing operations and receipt of revenues from its customers do not satisfy the requirement that it used fraudulent means to obtain money from the District. Exide did not obtain money, property or services from the District, as section 523(a)(2)(A) requires, and the District does not claim otherwise.

IV. THE DISTRICT'S NONDISCHARGEABILITY ASSERTION IS TIME BARRED.

46. There is yet another basis on which to dismiss the District's attempt to evade Exide's discharge: the District is time barred from asserting the nondischargeability of its purported claims. To so rule, this Court should adopt the bankruptcy court's ruling in Hawker Beechcraft, 493 B.R. 696 (Bankr. S.D.N.Y. 2013), rev'd, In re Hawker Beechcraft, Inc., 515 B.R. 416, 430 (S.D.N.Y. 2014), over that of the district court in the same case.[23] In particular, this Court should find that, because the District failed to file an adversary complaint by September 16, 2013, as prescribed by section 523(c) and Bankruptcy Rule 4007(c), it is foreclosed from doing

(cont'd from previous page)

creditor still must show that sale price (i.e., proceeds) for the dwelling was obtained through false pretenses, false representation, or actual fraud).

[23] Courts in the Third Circuit are not bound by the decisions of courts in the Second Circuit. See Threadgill v. Armstrong World Indus., Inc., 928 F.2d 1366 (3d Cir.1991). Moreover, on the merits, and with all due respect to the district court in Hawker Beechcraft, the bankruptcy court's ruling is more sound. Like this case, Hawker Beechcraft also involved a chapter 11 corporate reorganization, and the district court held that Bankruptcy Rule 4007(c), which is effectively a statute of limitations for filing actions to challenge dischargeability of a debt under section 523(c), does not apply to such claims in corporate cases involving sections 1141(d)(6) and 523(a)(2)(A). However, Bankruptcy Rule 4007(c), on its face, expressly applies to all "Chapter 11 Reorganization" cases, just like the one in Hawker Beechcraft and here, and without distinguishing between whether such case is an individual or corporate one. Furthermore, the district court's decision relies on a mistaken reading of the Bankruptcy Code, i.e., that the procedural protections of section 523(c) and Bankruptcy Rule 4007(c) apply to chapter 13 cases because "all of section 523 indisputably applies to Chapter 13 debtors, because all Chapter 13 debtors are individuals." Hawker Beechcraft, 515 B.R. at 430 (emphasis added). However, all of section 523 does not apply to chapter 13; the super-discharge in section 1328 specifically carves out numerous provisions in section 523 from chapter 13. The same is true in chapter 11. Moreover, without the limitations period in Bankruptcy Rule 4007(c), nondischargeability claims could be raised in corporate cases at any time, even years after plan confirmation, which would seriously undermine the finality of reorganizations, the goal of providing corporate debtors with a fresh start, and the reasonable expectations of other creditors and parties in interest in such cases. Indeed, this case – in which, post-confirmation, and after all the other creditors' claims have been compromised on the basis of the confirmed plan, the District seeks to collect more than $80 million of claims from reorganized Exide (in effect, out of the pockets of the other creditors) – is the poster child for why such limitless dischargeability claims should not be permitted.

so now. The District received notice on June 24, 2013 that the meeting of creditors was first set for July 16, 2013, and thus had until September 16, 2013 to file its nondischargeability complaint. The District never did so and did not seek an extension of the deadline. Thus, the District's attempt to raise the section 523(a)(2)(A) discharge exception now comes too late.

47. The District first appeared in this case in December 2013, when it filed its original proof of claim. In January 2014, the District filed its Original Complaint in the California State Court; the Original Complaint was never attached to the original proof of claim or filed in the bankruptcy proceeding. And while the District remained active in the California State Action, including repeatedly amending its complaint, it was virtually silent in the bankruptcy case until it raised the potential nondischargeability of its claims for the first time a couple of weeks before confirmation. Rather than postpone confirmation of the plan, which had the overwhelming support of the creditors, as a result of the District's meritless and untimely nondischargeability contentions, Exide agreed to language in the confirmation order that permitted the District to continue to prosecute the California State Action (but only as to the claims included in its timely original proof of claim) pursuant to the stipulation entered in this Court with respect thereto.

48. The District's behavior throughout the bankruptcy case, particularly its last minute attempts to assert nondischargeability, reflects a strategic attempt by the District to "opt out" of the chapter 11 case. The District should be denied carte blanche to hold Exide and its creditors hostage by proceeding with its nondischargeability claims at this post-confirmation

stage of the case, after new investments have been made and the plan has been substantially consummated. Accordingly, this Court should find the District's claims to be time barred.[24]

[24] If this Court does not hold that the District's nondischargeability claims are time barred, the District still should not be permitted to pursue any of the allegedly nondischargeable claims in the California State Action until this Court determines whether such claims are in fact nondischargeable on the merits. Given the early stage of the state court proceedings, this Court's exclusive jurisdiction over the dischargeability issues, and the practical financial impact that the dischargeability determination will have, this is the only sensible way to proceed as a matter of judicial economy.

CONCLUSION

WHEREFORE, the Reorganized Debtor respectfully requests that the Court (a) deny the District's Motion, and (b) enforce the discharge by finding that (i) the District has not pled a prima facie case for avoidance of the discharge by virtue of the Third Amended Complaint or (ii) any discharge avoidance action must first be commenced and tried in this Court prior to continuing litigation in the California State Court.

Dated: Wilmington, Delaware
November 20, 2015

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

/s/ Anthony W. Clark

Anthony W. Clark (I.D. No. 2051)
Dain A. De Souza (I.D. No. 5737)
One Rodney Square
P.O. Box 636
Wilmington, Delaware 19899-0636
Telephone: (302) 651-3000
Fax: (302) 651-3001

- and -

Kenneth S. Ziman
J. Eric Ivester
Four Times Square
New York, New York 10036-6522
Telephone: (212) 735-3000
Fax: (212) 735-2000

- and -

Albert L. Hogan III
James J. Mazza, Jr.
155 N. Wacker Dr.
Chicago, Illinois 60606
Telephone: (312) 407-0700
Fax: (312) 407-0411

Counsel for the Reorganized Debtor

EXHIBIT A

Cause of Action	Rule Allegedly Violated	Description of Alleged Violation
1	District Rule ("D.R.") 1407(d)(5)	Failure to maintain "good operating practices," resulting in arsenic emissions.
2	D.R. 203(b), 3002(c)(1)	Failure to comply with permit conditions by not properly operating equipment and operating equipment that is not connected to an air pollution control device ("APCD") in full use. Exide allowed blockages to form and failed to repair leaks, meaning air pollution control equipment was not in full use.
3	D.R. 203(b), 3002(c)(1)	Failure to comply with permit conditions by not transporting plastic chips in closed containers and storing plastic chips in leaking containers not within an enclosure.
4	D.R. 1420.1(d)(3), 1420.1(e)(1)(B)	Failure to enclose within a total enclosure the materials storage and handling areas where lead-containing plastic chips were stored.
5	D.R. 1420.1(h)(2)	Failure to inspect all total enclosures and facility structures housing lead point source or fugitive lead-dust emissions at least once a month and repair any identified gaps, breaks, separations, lead points, etc. within 72 hours of discovery.
6	D.R. 1420.1(h)(6)	Failure to store materials capable of generating any amount of fugitive lead-dust in sealed, leak-proof containers.
7	D.R. 1420.1(h)(7)	Failure to transport materials capable of generating fugitive lead-dust in closed conveyor systems or in sealed, leak-proof containers.
8	D.R. 203(b), 3002(c)(1)	Failure to enclose within a total enclosure the materials storage and handling areas where lead-containing plastic chips were stored.
9	D.R. 3002(c)(1), 3004(a)(10)(E)	Failure to submit annual compliance certification on time.
10	D.R. 3002(c)(1), 3004(a)(4)(F)	Failure to submit semi-annual monitoring report on time.
11	D.R. 203(b), 3002(c)(1)	Failure to operate equipment with APCD in full use because MAC baghouse filters had burned.
12	D.R. 1420.1(d)(2)	Exceedances of the ambient lead air emissions limits.
13	D.R. 1420.1(g)(4)	Failure to curtail production after an ambient air emissions exceedance.
14	D.R. 3002(c)(1), 3004(a)(4)(F)	Failure to submit semi-annual monitoring report on time.

Cause of Action	Rule Allegedly Violated	Description of Alleged Violation
15	D.R. 3002(c)(1), 3004(a)(10)(E)	Failure to submit semi-annual monitoring report on time.
16	D.R. 3002(c)(1), 3004(a)(10)(E)	Failure to submit annual compliance certification report on time.
17	D.R. 1420.1(i)(1)	Failure to maintain negative air containment enclosure.
18	D.R. 1420.1(d)(2)	Exceedances of 30-day ambient lead air emissions limits.
19	D.R. 203(b), 1407(d)(5), 3002(c)(1); H&S Code § 42402.1(a)	Negligent emission of arsenic caused by failure to properly operate equipment and failure to operate equipment connected to APCD in full use.
20	D.R. 203(b), 1407(d)(5), 3002(c)(1); H&S Code § 42402.2(a)	Exide knew its failure to properly operate equipment and failure to operate equipment connected to an APCD in full use caused arsenic emissions and failed to take corrective action.
21	D.R. 203(b), 1407(d)(5), 3002(c)(1); H&S Code § 42402.3(a)	Exide willfully and intentionally failed to use good operating practices, willfully and intentionally failed to properly operate equipment, and willfully and intentionally failed to operate equipment connected to an APCD, causing arsenic exceedances.
22	D.R. 203(b), 1420.1(d)(3), 1420.1(e)(1)(B), 1420.1(h)(2), 1420.1(h)(6), 1420.1(h)(7), 3002(c)(1); H&S Code § 42402.1(a)	Negligent emission of lead caused by improper storage and transport of lead-containing plastic chips.
23	D.R. 203(b), 1420.1(d)(3), 1420.1(e)(1)(B), 1420.1(h)(2), 1420.1(h)(6), 1420.1(h)(7), 3002(c)(1); H&S Code § 42402.2(a)	Exide knew its improper storage and transport of lead-containing plastic chips caused lead emissions and failed to take corrective action.
24	D.R. 203(b), 1420.1(d)(3), 1420.1(e)(1)(B), 1420.1(h)(2), 1420.1(h)(6), 1420.1(h)(7), 3002(c)(1); H&S Code § 42402.3(a)	Exide willfully and intentionally stored and transported lead-contaminated plastic chips improperly, causing lead exceedances.

Cause of Action	Rule Allegedly Violated	Description of Alleged Violation
25	D.R. 1420.1(d)(2); H&S Code § 42402.1(a)	Negligent emission of lead in violation of 30-day average.
26	D.R. 1420.1(d)(2); H&S Code § 42402.2(a)	Exide knew it was exceeding 30-day average for lead emissions and failed to take corrective action.
27	D.R. 1420.1(d)(2); H&S Code § 42402.3(a)	Exide willfully and intentionally discharged lead into the air in violation of the 30-day average.