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

REORGANIZED DEBTOR'S REPLY TO THE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT'S OPPOSITION TO (SUBSTANTIVE) OBJECTION PURSUANT TO BANKRUPTCY CODE SECTION 503(b) AND BANKRUPTCY RULE 3007 TO PROOF OF ADMINISTRATIVE EXPENSE CLAIM FILED BY THE DISTRICT (CLAIM NO. 4123)

Exide[2] hereby replies to the District's opposition (Docket No. 4559) (the "Response") to Exide's Objection to the Administrative Claim filed by the District and respectfully represents as follows:

PRELIMINARY STATEMENT

1. In March 2014, in support of its request for remand of the California State Action from federal to state court, the District emphasized the criminal and punitive nature of the fines and penalties it seeks from Exide here:

> The civil penalties sought here are further unique and substantial to California because they are quasi-criminal and *can preclude California from bringing a criminal prosecution*. Criminal prosecutions based on violations of California law can give California unique and substantial relief that is not available to the general public, namely, incarceration and criminal penalties. When the California Legislature decides that California's interest will be protected by allowing civil

[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] Unless otherwise defined herein, capitalized terms used herein shall have the meanings ascribed to them in the Reorganized Debtor's (Substantive) Objection Pursuant To Bankruptcy Code Section 503(b) And Bankruptcy Rule 3007 To Proof Of Administrative Expense Claim Filed By The South Coast Air Quality Management District (Claim No. 4123) (Docket No. 4507) (the "Objection").

> penalties to substitute for incarceration and criminal penalties, that judgment should be respected[.][3]

2. The federal court agreed with the District's characterization of the criminal nature of its claims and granted remand, finding that the California State Action "is fundamentally a law enforcement action brought on behalf of the general public[.]"[4] But now that the issue is whether the District's penalty/fine claims qualify as administrative expenses that Exide would have to pay in full – and given directly applicable Third Circuit authority (the Tri-State case) "that punitive criminal fines arising from post-petition behavior are not administrative expenses under 11 U.S.C. § 503(b), and therefore, are not accorded priority status pursuant to § 507(a)(1)"[5] – the District wants to change its story to argue that "[t]he California State Action is pending in a civil department of the California State Court, which will resolve the case by rendering a civil judgment – not a criminal conviction or sentence." Response ¶ 47. The District uses this criminal vs. civil distinction to argue that "*Tri-State*'s central holding … is obviously inapplicable here." Id. ¶ 42.

3. The District cannot have it both ways. It convinced the California federal court to remand its lawsuit based on the criminal nature of the penalties it seeks and is estopped from arguing for a fundamentally different characterization now in order to obtain priority treatment under section 503(b) of the Bankruptcy Code. If this Court determines, as it should, that the

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[3] District's Notice Of Motion And Motion To Remand, dated March 14, 2014 and attached hereto as Exhibit A (the "District Remand Motion"), at 19 (italics in original; emphasis added).

[4] Order Granting Plaintiff's Motion To Remand, dated April 9, 2014 and attached hereto as Exhibit B (the "District Remand Order"), at 2, citing "People v. Steelcase, 792 F.Supp. 84, 86 (C.D. Cal. Apr. 30, 1992) ('Civil penalties are not damages recovered for the benefit of private parties; they are more akin to a criminal enforcement action and are brought in the public interest.'): California v. Smartwear Technologies, No. 11-cv-1361 JAH (NLS), 2012 WL 243343, at *3 (S.D. Cal. Jan. 25, 2012) (granting motion to remand and stating that the 'civil penalties [the state] seeks are punitive and serve a public interest in preventing future fraudulent schemes which further demonstrates the state's substantial interest in the action')." (emphasis added).

[5] Pennsylvania Dep't of Envtl. Res. v. Tri-State Clinical Labs., Inc., 178 F.3d 685, 698 (3d Cir. 1999).

penalties at issue are a legislatively mandated "substitute for incarceration and criminal penalties" as the District argued and persuaded the California federal court, then, under Tri-State, the District's claim of administrative priority should be rejected.

4. Exide vigorously disputes the District's claims on substantive grounds. However, as a matter of procedure and timing, it is critically important for this Court to determine whether such penalties are entitled to administrative priority before they are adjudicated on the merits in California state court, so that Exide will not be forced to spend millions of dollars defending against virtually worthless non-priority claims. For the same reason, if this Court applies Tri-State to deny the District's administrative claim, this Court should also continue the stay of the California State Action put in place by ¶ 8 of its July 23, 2015 order (Docket No. 4414) until the order resolving Exide's Objection has become final after all appellate proceedings. This is necessary because the District has indicated that it will appeal any decision by this Court applying Tri-State to deny its administrative expense request. See Response at 30 n.13.

5. In addition to the Tri-State analysis, this Court should deny the District's administrative claim because the District has failed to show that its purported administrative expense claims are based on anything other than a continuation of alleged prepetition regulatory violations.[6] As explained in detail in Exide's Objection (¶¶ 18-20), ever since Exide's predecessor designed, received permits from the District approving, installed, and began operating the smelting furnaces at the Vernon Facility three decades ago, the furnaces have been operated by Exide and its predecessors without a "negative pressure" requirement. Similarly, the

[6] If this Court applies Tri-State to deny the administrative expense request, the District intends, on appeal, to argue that Tri-State was wrongly decided and should be overruled. See Response at 30, n. 13. Therefore, Exide makes this alternative argument as an independent basis to deny the District's administrative expense claim with respect to the vast majority of the District's claims. In any event, if this Court denies the District's administrative claims on either (or both) ground(s), it also should reject the District's suggestion that it be allowed to proceed with the California State Action while the appeals process plays out; that would be an enormous waste of time and resources.

facility's plastic chip handling, storing, and transporting practices were conducted in an "obvious, open, and observable" manner over decades.[7] That exact conduct – which the District claims in hindsight is punishable by fines – continued for the limited period during which the facility operated postpetition. By the time District Rule 1420.1 went into effect in April 2014 to require the facility to operate under continuous negative pressure, Exide already had ceased commercial operations at the Vernon Facility, which it never restarted. Thus, the "violations" alleged by the District arise out of its post hoc re-interpretation of what its rules require in order to argue that longtime practices were suddenly violations. The District cites no controlling legal authority that would elevate the priority of its unsecured claims arising out of alleged prepetition violations of District rules, even if a small portion of those "violations" continued postpetition. Indeed, most case law is contrary.[8]

6. At the end of the day, and notwithstanding the District's constant attempts to muddy the waters,[9] determining the administrative priority question is not complicated and does not require a highly fact-intensive exercise. To the contrary, Exide's Objection can and should be sustained by this Court, which has exclusive jurisdiction over the matter,[10] on a straightforward application of the Third Circuit's rule in Tri-State. Nor is there any reason to

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[7] See Strang Declaration ¶¶ 4-5. As summarized on Exhibit D hereto, the majority of the fines sought by the District relate to Exide's (i) operation of Vernon without negative pressure furnaces and (ii) continued chip handling practices.

[8] See, e.g., In re N.P. Mining Co., Inc., 963 F.2d 1449, 1459 (11th Cir. 1992) ("we exclude from consideration as an administrative expense any penalty assessed postpetition for the failure of the debtor in possession or the trustee to abate a prepetition violation of the statute").

[9] For example, the District asks this Court to take judicial notice of more than 550 pages of highly technical prepetition reports and documents – the truth of which has not been established – that have nothing to do with administrative expense allowance.

[10] The determination of priority of an administrative claim is a core proceeding of the bankruptcy court. 11 U.S.C. § 157(b)(2)(B); see also Freeman v. K-Mart Corp., 2007 U.S. Dist. LEXIS 39156, at *14 (E.D. Pa. 2007) (bankruptcy courts have "exclusive jurisdiction to decide" whether claims are entitled to administrative priority).

permit the District to proceed with its California State Action until the issues of administrative priority, as well as dischargeability and relation-back which are the subject of other pleadings now before this Court, are finally determined here, including any appeals – it makes no sense for the parties or the California courts to waste huge amounts of time, money and resources litigating claims that already have been discharged or will, at best, receive only pennies on the dollar, and only to the extent allowed (which also is at issue on other motions pending before this Court). That is the antithesis of judicial economy. The District's proposal to "litigate everything in state court now and sort it out in bankruptcy court later" should be rejected.

ARGUMENT

I. THE DISTRICT'S CLAIMS FAIL UNDER TRI-STATE.

7. "[P]unitive criminal fines arising from post-petition behavior are not administrative expenses under 11 U.S.C. § 503(b), and therefore, are not accorded priority status pursuant to § 507(a)(1)." Tri-State, 178 F.3d at 698. As a matter of law, the penalties here at issue fall squarely within the criteria articulated by the Third Circuit that require denial of the District's request for administrative priority.

A. The District Is Judicially Estopped From Denying The Admittedly Criminal Nature Of The Penalties It Seeks Against Exide.

8. Before its purported administrative priority claim was challenged by Exide, the District very clearly took the position that the penalties it seeks are effectively criminal in nature because they are meant to punish and are sought as alternatives to penalties available in a criminal prosecution.[11] In seeking to persuade the federal court to remand the California State

[11] See, e.g., District Remand Motion at 1 ("Notably, these penalties are quasi-criminal, because their recovery can preclude California from bringing a criminal prosecution."); see also id. at 19.

Action to state court, the District emphasized the criminal nature of those penalties, including using the words "crime" or "criminal" dozens of times in its remand pleadings.[12]

9. The District ultimately succeeded in securing a remand of the California State Action to the state court by persuading the federal court that, while the District's penalties are nominally civil, they fulfill the same function as criminal enforcement actions. District Remand Order at 2 ("this is fundamentally a law enforcement action") (emphasis added).

10. Yet, now that it is pressing for administrative priority for its claims, the District attempts to differentiate its penalties from those in Tri-State on the basis that they are civil, not criminal, in nature. Given its clearly contrary and successful argument in the California federal court, the District is judicially estopped from now asserting that its penalties are anything other than criminal.[13] And if this Court agrees with the California federal court, as Exide respectfully submits it should, that the penalties are fundamentally criminal in nature, Tri-State squarely applies, the District's claims are not entitled to administrative priority and, therefore, its Administrative Claim should be disallowed and expunged.

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[12] See, e.g., District Remand Motion at 1 ("quasi-criminal," "criminal prosecution"), 10 ("quasi-criminal," "criminal charges," "criminal penalties"), 11 ("criminal complaint," "[criminal] prosecution," "criminal penalties"), 18 ("criminal enforcement action," "criminal actions"), 19 ("quasi-criminal," "criminal prosecution," "criminal penalties"), 20 ("criminal penalties," "criminal prosecution"); see also District's reply in support of District Remand Motion, attached hereto as Exhibit C, at 1 ("quasi-criminal," "criminal prosecution," "criminal penalties"), 12 ("criminal enforcement action," "criminal actions"), 14 ("quasi-criminal," "quasi-criminal," "criminal prosecution," "criminal prosecutions," "criminal penalties," "criminal penalties," "criminal prosecution"). Ironically, in its Response, the District highlights the fact that "[t]he terms "crime" and "criminal" appear at least ***47 times*** in the 13-page *Tri-State* opinion." Response ¶ 44 (emphasis in original).

[13] Judicial estoppel applies when: "(1) a party adopts a position clearly inconsistent with an earlier position and (2) the party had succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled." Carlyle Inv. Mgmt. LLC v. Moonmouth Co. SA, 779 F.3d 214, 221-22 (3d Cir. 2015) (internal quotation marks omitted). It is a judge-made doctrine that prevents a litigant from asserting a position inconsistent with one previously asserted in the same or another proceeding. Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.2d 355, 358 (3d Cir. 1996) ("The basic principle … is that absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.") (internal quotation marks omitted). Clearly, the estoppel elements are satisfied by the District's about-face on the criminal nature of the penalties it seeks.

B. To Receive Administrative Priority, A Claim Must Be For Compensation.

11. Criminal/civil labeling aside, the sine qua non for a claim to be entitled to administrative expense priority in the Third Circuit is the claim's compensatory nature. That is the common thread running throughout Tri-State's analysis – administrative expenses must be compensatory to warrant first priority.

12. As Tri-State noted, section 503(b) "lists several expenditures," such as "wages, salaries, or commissions for services rendered," but only a single type of governmental fine or penalty (i.e., tax penalties), that are explicitly entitled to administrative priority. Tri-State, 178 F.3d at 689. The Third Circuit then concluded that:

> the language of §503(b), read as a whole, suggests a quid pro quo pursuant to which the estate accrues a debt in exchange for some consideration necessary to the operation or rehabilitation of the estate. Priority, therefore, is afforded such expenses to compensate the providers of necessary goods, services or labor.[14]

Id. at 689-90 (emphasis added). The Third Circuit further found that this construction of section 503(b) is supported by the rehabilitative purposes of chapter 11, referencing Reading[15] – a case heavily relied on by the District:

> The [Supreme] Court [in Reading] believed that those who continue to transact business with the debtor during the Chapter 11 case, and who suffer financially as a result, are entitled to priority over other creditors who have not affirmatively assumed such risk.

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[14] Consistent with the plain language of the Bankruptcy Code, the Third Circuit also concluded that "[p]ursuant to well-established canons of construction, the fact that Congress expressly included tax fines and penalties in § 503 implies that had Congress intended to include other types of fines and penalties within the class of administrative expenses, it would have done so expressly." Id. at 690; see also In re Lazar, 207 B.R. 668, 686 (Bankr. C.D. Cal. 1997) ("[t]his appears to be a case where it is appropriate to apply the rule, *inclusio[] unius est exclusio alterius*: 'where law expressly describes [a] particular situation to which it shall apply, an irrefutable inference must be drawn that what is omitted or excluded was intended to be omitted or excluded.' Black's Law Dictionary 763 (6th ed. 1990). For administrative expenses, Congress explicitly specified that fines relating to postpetition taxes qualified, and excluded all others."). Non-compensatory penalties like those sought by the District are notably absent from the statutory list of claims explicitly entitled to administrative priority.

[15] Reading Co. v. Brown, 391 U.S. 471, 477-85 (1968).

Tri State, 178 F.3d at 69. The Third Circuit also discussed its Conroy[16] decision– another case heavily relied on by the District:

> [W]e view Conroy as supporting the distinction we draw between claims for compensatory expenses and those for criminal fines. … By cleaning up the site, the DER provided a service to the debtor – a service that the debtor itself would have had to perform during the course of normal operations – and, therefore, the DER was entitled to compensation for that service.

Tri State, 178 F.3d at 693. Lastly, the Third Circuit reviewed the legislative history surrounding classification of non-compensatory criminal fines and penalties and noted that Congress specifically subordinated those penalties in connection with chapter 7 distributions pursuant to section 726(a)(4).[17] The Third Circuit noted that "prepetition fines were accorded second class status in the distribution scheme." Id. at 695. Meanwhile, Congress made such penalties – designed to punish a wrongdoer – not dischargeable under section 523(a)(7). This was a notable distinction in interpreting section 503(b):

> We do not believe that Congress intended for us to ignore the non-compensatory character of a criminal fine in deciding if it is an administrative expense under §503, while explicitly requiring that consideration under §523(a)(7). Rather, for the reasons previously stated, we conclude that §503's restriction to "expenses of preserving the estate" limits such expenses to those that constitute compensation for expenditures necessary to the operation of the debtor-in-possession's business. As noted above, we will not stretch our policy analysis to include within this category the payment of the criminal fines for Tri-State's conduct here.

Id. at 697.

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[16] Pennsylvania Department of Environmental Resources v. Conroy (In re Conroy), 24 F.3d 568 (3d Cir. 1994).

[17] Id. at 697. Section 726(a)(4) does not distinguish between criminal or civil penalties. Penalties that are subordinated for distribution purposes pursuant thereto are "not compensation for actual pecuniary loss." Thus, if a chapter 11 debtor had sold its assets under section 363 and converted to a chapter 7 case, then none of the variety of claims asserted by the District would have been entitled to priority. There should not be a difference in how the priority scheme applies to a reorganizing chapter 11 debtor and one that liquidates its assets and ultimately converts to chapter 7; otherwise, the reorganizing debtor and its creditors would be punished for carrying out the purpose of chapter 11. Indeed, the Third Circuit specifically remarked in Tri-State that its analysis was not limited to chapter 7. See Tri-State, 178 F.3d at 694 (with respect to priority of governmental unit's fines, arrangement under chapter 11 and chapter 7 is a "distinction without a difference" and "[w]e do not think that the conversion from Chapter 11 to Chapter 7 alters our analysis").

13. Thus, the hallmark for any administrative priority claim is that it compensates the creditor for providing necessary goods, services or labor. The District's claims are not for such compensation. Accordingly, the Administrative Claim should be disallowed and expunged.

C. The District's Arguments For Administrative Priority Are Without Merit.

14. The District offers several arguments for why Tri-State and its requirement that administrative expenses be compensatory are not fatal to its administrative priority claims. None has merit.

(i) Reading and 28 U.S.C § 959(b) do not support per se administrative priority for postpetition violations of the law.

15. The District interprets Reading, coupled with section 959(b) of the Judicial Code, to require per se administrative priority for state regulators' claims based on debtors' alleged postpetition non-compliance with state law. See Response ¶¶ 30-36. That is not correct. As the Third Circuit recognized in Tri-State, the Reading rule simply means that postpetition tort victims (which the District is not) are entitled to administrative priority for their compensable injuries (which the District has none).[18]

16. As for section 959(b) of the Judicial Code, it simply requires that debtors-in-possession comply with state law while operating; it says nothing about the priority of a claim if the debtor violates a state law.[19] That is specifically covered by section 503(b). As interpreted by the Third Circuit in Tri-State, a violation of state law, without more, does not equate to

[18] Tri-State, 178 F.3d at 689-91; accord In re Philadelphia Newspapers, LLC, 690 F.3d 161, 172-73 (3d Cir. 2012) (stating Reading only applies to "postpetition tort claims"); In re SuperMedia, Inc., 2014 WL 7403448, at *19 20 (Bankr. D. Del. Dec. 29, 2014) (same).

[19] The same is true of the "long pedigree" of cases cited by the District requiring bankruptcy trustees to comply with state law. Response ¶ 33. These authorities do not deal with the priority of governmental claims for alleged state law violations, and there is no Congressional mandate that governmental claims for non-compensatory penalties should be afforded administrative priority.

administrative priority allowance.[20] The reasoning in Tri-State that section 503(b) only extends to postpetition compensatory, not punitive, claims, does not diminish debtors' obligations under section 959(b) of the Judicial Code.[21] The District relies solely on its misapplication of Reading (i.e., its claims are entitled to per se administrative expense priority) and has not even attempted to show that each of its claims is (i) a "cost" or "expense" that is (ii) "actual" and "necessary" to (iii) "preserving the estate."[22] The District bears the burden to persuade this Court that it has satisfied the elements section 503(b),[23] and it has failed to even plead the elements, much less satisfy them.

(ii) The District's interpretation of Conroy is wrong.

17. The District also argues that Conroy logically extends the Reading rule "to include civil fines and penalties arising out of violations of health and safety laws within the ambit of allowable administrative expenses." Response ¶ 34. But Conroy was about a government environmental clean-up bill; it did not involve a civil fine, as the District misleadingly suggests. Indeed, Conroy is a quintessential example of Third Circuit law that compensation is the essential element for an administrative priority claim.

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[20] Even the Eleventh Circuit in its N.P. Mining decision, which allowed for administrative expense priority for certain non-compensatory fines, recognized Reading's limitations: "The Reading Court did not hold, however, that in all cases costs normally incident to operation of a business are administrative expenses. Only in 'some cases,' the Court stated, do they merit such status." N.P. Mining, 963 F.2d at 1455 (emphasis in original) (denying administrative expense priority for postpetition fines related to (i) continued prepetition conduct or (ii) conduct not related to continued operations).

[21] Under the District's view, states could effectively "end run" the Bankruptcy Code's priority scheme by enacting a law during a chapter 11 case and then citing the debtor for a postpetition violation of it. This is precisely what would have happened here if Exide had not shut down the Vernon Facility before the "negative pressure" rule became effective.

[22] In re Philadelphia Newspapers, LLC, 690 F.3d at 169.

[23] Id. at 173; see also, In re Allegheny Int'l, Inc., 954 F.2d 167, 173 (3d Cir. 1992) ("[t]he burden of persuasion is always on the claimant.").

(iii) The Third Circuit explicitly rejected the District's "efficient polluter" argument.

18. The District's further argument – that a rule not affording administrative priority to claims for alleged postpetition regulatory violations would create a perverse incentive for debtors to consciously violate the law for the sake of profits[24] – also was considered and rejected by the Tri-State court:

> We refuse to adopt an analysis of administrative expenses that is based upon the assumption that legitimate businesses engage in a "cost-benefit" analysis to determine if they will comply with criminal laws that protect the very public that the owners and operators of those legitimate businesses are part of. It is neither reasonable nor necessary for a commercial enterprise to violate criminal laws and endanger the public to preserve the estate or to conduct legitimate business operations, and we refuse the DER's invitation to hold otherwise. Rather, we believe Congress intended only for those "actual necessary costs and expenses" that arise in the context of, or compensate for, legitimate business activity, or the losses resulting therefrom, to be treated as expenses of preserving the estate, and accorded priority as an administrative expense.

Tri-State, 178 F.3d at 692-93.

19. Factual context is also important here. The District falsely portrays Exide as a callous corporation that consciously violated the law and sacrificed public safety just for a buck. The truth is that the Debtor spent significant capital at the Vernon Facility – tens of millions dollars – to upgrade its equipment with the District's approval and to meet its requirements, only to have the District move the goalposts shortly thereafter. The Vernon Facility did not operate a single day after the District passed its "negative pressure" rule.

20. As explained in Tri-State, administrative priority for punitive fines is "unfair and impractical." Id. at 692. Exide's payment of punitive fines would not compensate for any

[24] In making this argument, the District relies on non-controlling cases explicitly rejected by the Third Circuit on this very point. See Tri-State, 178 F.3d at 698 (rejecting underlying rationale of virtually every non-controlling case that stands for this proposition, including NP Mining, 963 F.2d 1449 (11th Cir. 1992), In re Bill's Coal Company, Inc., 124 B.R. 827 (D. Kan. 1991), In re Charlesbank Laundry, Inc., 755 F.2d 200 (1st Cir. 1985), In re Double B Distributors, Inc., 176 B.R. 271 (Bankr. M.D. Fla. 1994), and In re Motel Investments, Inc., 172 B.R. 105 (Bankr. M.D. Fla. 1994)).

damages resulting from its alleged conduct. It would simply pay money to the District out of the pockets of Exide's "innocent … creditors." Id.

D. The District's Fines Are Non-Compensatory And Not Entitled To Priority.

21. The District does not argue that the penalties it seeks are "compensatory," but it attempts to conflate "compensation" with "what the District decides to spend penalty money on" and blur the line between "compensation" and "penalties" based on what it calls "compensatory principles."[25] Response ¶ 40-41. Specifically, the District argues that (i) it can put its penalties to a variety of uses and therefore *could* decide to do something that is in some way "compensatory," and (ii) Exide, if it loses in California state court, can argue that the penalty should be set by reference to "compensatory principles." Response ¶ 40 (citing the eight penalty factors set forth in Cal. Health & Safety Code § 42403(b)). However, this argument mischaracterizes the statutory factors and purpose of them. The penalties do not compensate anyone. Instead, one factor to be considered in determining how much to punish an entity is "the extent of harm caused by the violation." See Cal. Health & Safety Code § 42403(b)(1). This factor, like most of the other eight, provides for punishing more egregious violations more severely than minor violations. The fact that the District can use penalties as well as numerous other District resources[26] to ameliorate harm caused by others does not make a penalty – which is intended to punish the violator – "compensatory."

22. No matter how the District may use its penalties (Response ¶ 41), its claims are admittedly punitive and non-compensatory. The District's own characterization is that the

[25] The District has not cited any Third Circuit case (and Exide is aware of none) in which non-compensatory fines have received administrative priority. The District's reliance on non-Third Circuit law, where other courts have awarded administrative priority to non-compensatory postpetition fines, must be rejected in light of Tri-State's contrary holding.

[26] E.g., bonds, loan guarantees, credit insurance, state and federal funds, private-sector funds, revenues from district permit, variance, and emission fees, and funds from other sources under the jurisdiction of the District.

penalties are a "substitute for incarceration and criminal penalties." District Remand Motion at 19. The purpose of incarceration and criminal penalties is "deterrence, retribution, and punishment." Tri-State, 178 F.3d at 693. So, too, with the District's penalties.

23. As for the "compensatory principles" in the "eight enumerated factors" that the District says Exide can argue in state court to set the penalty amounts, the District has admitted that these are "the same eight factors … used to determine civil penalties or criminal penalties, which shows that they are intended to vindicate the same interest." District Remand Motion at 20 (emphasis added). Under Tri-State, these criminal penalties do not have administrative priority.

E. The District Fails To Distinguish Tri-State.

24. The District also argues that "*Tri-State* distinguished compensatory fines from criminal fines, but it did not hold that there is any relevant distinction between compensatory and non-compensatory civil fines." Response at 22 n.10. But Tri-State did not say non-compensatory civil fines are allowable as administrative expenses. To the contrary, Tri-State made clear that criminal fines do not qualify for administrative priority because they are punitive. So-called "civil" fines lacking a fundamental compensatory component are conceptually indistinguishable from criminal fines – as the District argued in its remand briefing – and must be disallowed for priority.

25. The District says that the Tri-State decision is based on a *sui generis* crime. See Response ¶¶ 48-52. However, the Third Circuit made no such distinction in broadly holding that punitive criminal fines (whether or not based on discrete acts) "arising from post-petition behavior are not administrative expenses under 11 U.S.C. § 503(b)." Tri-State, 178 F.3d at 698. Arguing subtle factual differences with Tri-State does not establish administrative priority for the

District's claims – it still must satisfy the "strict" and "narrowly" construed requirements of section 503(b). The District has not proved entitlement to administrative priority.

II. APART FROM TRI-STATE, CIVIL PENALTIES FOR FAILURE TO ABATE PREPETITION CONDUCT THAT CONTINUED POSTPETITION DO NOT HAVE ADMINISTRATIVE PRIORITY.

26. Rather than address the discrete issue at hand – whether its non-compensatory penalty claims are entitled to administrative expense priority – the District inundates this Court with mountains of untested (and irrelevant) documents and says that the issues are just too fact-intensive and complex for this Court to decide. See Response ¶¶ 53-60. The District has the burden to prove administrative priority, which it has failed to carry.[27]

27. The District tried to show when the alleged violating conduct first arose with a chart supposedly showing that the "gravamen" of every cause of action in the Third Amended Complaint is based on postpetition conduct. However, as shown on Exhibit D hereto, the majority of the District's claims are based on continuations of prepetition conduct.

28. The District also quotes N.P. Mining to support its argument that its non-compensatory fines are entitled to administrative priority. See Response ¶ 38. However, in the very next sentence following the District's selective quote, the N.P. Mining court was clear that such non-compensatory penalties receive administrative expense priority only if they were on account of new and distinct postpetition operating conduct, as opposed to non-compensatory fines assessed for the continuation of prepetition conduct, failure to abate a prepetition violation,

[27] In re Philadelphia Newspapers, LLC, 690 F.3d at 173 ("The party asserting an administrative expense claim bears the burden of demonstrating that it deserves administrative expense status."). The party asserting administrative expense priority must show that its claim is a "cost" or "expense" that is "actual" and "necessary" to "preserving the estate." In re Phila. Newspapers, LLC, 433 B.R. 164, 169 (Bankr. E.D. Pa. 2010). The District's entire focus has been to return to California state court for all factual determinations; thus, it has ignored its factual and evidentiary burden in this Court.

or other non-operating conduct.[28] If this Court thinks it necessary to decide if and when the Debtor's conduct occurred, and whether it was during the operation of the Vernon Facility, those limited and discrete fact issues can and should be decided exclusively by this Court at this time.

29. The District argues that if Exide's bankruptcy case was in the First, Fourth or Eleventh Circuits there would be "no dispute" that the "District's claim would be entitled to administrative priority." Response ¶ 7. Whether the District's claims would be entitled to administrative priority under non-controlling case law is beside the point. This case is pending in the Third Circuit, and under Tri-State, there is no administrative priority for such claims.[29] Nevertheless, Exide disputes the District's characterization of non-controlling case law, because most of the case law in these circuits (and others) holds that penalties for continuing postpetition acts of prepetition conduct are not entitled to administrative expense priority.[30]

30. Here, according to the District's allegations, Exide's equipment was inadequate to keep the Vernon Facility in compliance before the Petition Date. Operation of the same

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[28] See N.P. Mining, 963 F.2d at 1459 ("we exclude from consideration as an administrative expense any penalty assessed postpetition for the failure of the debtor in possession or the trustee to abate a prepetition violation of the statute").

[29] The District relies heavily on Munce's Superior Petroleum Prods., Inc. v. NH Dep't of Envtl. Servs., 490 B.R. 5, 12 (D.N.H. 2013), aff'd sub nom. In re Munce's Superior Petroleum Prods., Inc., 736 F.3d 567 (1st Cir. 2013), to contend that its claims are entitled to administrative expense priority. However, Munce is not good law in the Third Circuit; the Third Circuit in Tri-State refused to follow the case law heavily relied on by the Munce court. See Tri-State, 178 F.3d at 698 ("[w]e are not persuaded by … In re Charlesbank Laundry, Inc., 755 F.2d 200 (1st Cir. 1985)"). The entire Munce decision rests squarely on Charlesbank Laundry and its progeny.

[30] See In re Chris-Marine, U.S.A., Inc., 321 B.R. 63, 65 (M.D. Fla. 2004) (per diem fines for postpetition conduct that is continuation of prepetition violations are not treated as administrative expense of bankruptcy estate); In re Lazar, 207 B.R. at 686 (failure to conduct postpetition remediation of prepetition environmental contamination does not qualify as postpetition conduct for purpose of determining administrative priority); In re Double B Distributors, Inc., 176 B.R. 271, 274 (Bankr. M.D. Fla. 1994) ("violations which occurred pre-petition and continued unabated post-petition are not expenses ordinarily incident to operating the business"); In re N.P. Mining Co., Inc., 963 F.2d at 1459 ("we exclude from consideration as an administrative expense any penalty assessed postpetition for the failure of the debtor in possession or the trustee to abate a prepetition violation of the statute"); In re Bill's Coal Co., Inc., 124 B.R. 827, 829 (D. Kan. 1991) ("penalties assessed for pre-petition misconduct or the continuing effects of pre-petition misconduct should not be considered an administrative expense.").

allegedly insufficient equipment and chip handling practices (i.e., the prepetition conduct) continued after the Petition Date. Fines resulting from Exide's alleged failure to abate the alleged prepetition violations are not entitled to administrative priority. See N.P. Mining, 963 F.3d at 1459.

31. The District also fails in its attempt to discredit the other key aspect of the N.P. Mining holding – penalties incurred after the cessation of business operations are not entitled to administrative expense priority. Id. at 1461. The District tries to distinguish this aspect of N.P. Mining alleging that Exide did not otherwise go out of business and/or that it did not make the decision to close the Vernon Facility until a year after it actually ceased operations. Response ¶ 58. However, the court in N.P. Mining rejected essentially the same argument. N.P. Mining, 963 F.2d at 1461. In N.P. Mining, the debtor operated its mine for approximately 16 months after the petition date. Id. A chapter 11 trustee remained in possession and idled the mine but operated the debtor for another 10 months. Id. Despite the fact that the chapter 11 trustee was still operating within chapter 11, he was "essentially holding matters in status quo." Id. Based on these facts, the N.P. Mining court put discrete limits on the section 959(b) of the Judicial Code underpinnings of its decision: "the policy of section 959(b) applies only with respect to those fines assessed for mining operations after the petition was filed and before the Chapter 11 trustee took control." Id.

32. Here, like the mining operations in N.P. Mining, the Vernon Facility was idled during much of Exide's chapter 11. The fact that Exide continued operations outside of the District's jurisdiction and/or finally decided to close the Vernon Facility after the facility had been idled are, in substance, indistinguishable from the arguments that the N.P. Mining court brushed aside when proscribing limits on the application of the Reading decision and section 959

of the Judicial Code. As previously stated, Exide disagrees with N.P. Mining and, in any event, it is not controlling law in the Third Circuit; rather Tri-State controls and rejects the N.P. Mining holding in several respects including its interpretation of Reading and section 959 of the Judicial Code. However, a careful reading of N.P. Mining serves to further undermine the District's suggestion that the mere fact that Exide was operating its other plants and business segments after the filing of its chapter 11 petition bestows administrative expense priority status on the District's non-compensatory penalties.

III. THIS COURT SHOULD NOT DELAY ITS DECISION ON THE PRIORITY OF THE DISTRICT'S CLAIMS.

33. Per the foregoing analysis, the District's request for administrative expense priority should be rejected as a matter of law under Tri-State. In addition, the District's plea for administrative expense priority can also be rejected as a matter of law due to its failure to plead and/or satisfy the elements of section 503(b).

34. If, however, this Court believes that the issue of when Exide's alleged conduct occurred, and whether it was in connection with the operation of the Vernon Facility, should be resolved in order to determine whether any of the District's claims should be granted administrative priority, this Court, which has exclusive jurisdiction over section 503(b) administrative priority issues,[31] should decide these limited and discrete fact issues in the first instance. Doing so is in the interest of judicial economy, because it will avoid or substantially mitigate the massive expense of litigating the District's underlying claims – which Exide believes, on the basis of its Objection and the other motions pending before this Court, are worthless or worth very little – on the merits in the California State Action. Given that the

[31] See n.9 above. Contrary to the District's assertion (Response ¶¶ 13-18), the Strang Declaration is appropriate to determine the very limited and discrete facts regarding when the Debtor's conduct began (mostly prepetition) and when the Vernon Facility permanently ceased commercial operations (March 14, 2014).

Vernon Facility has long ceased commercial operations, there is no legitimate countervailing interest to be served by allowing the California State Action – which, after all, is only at the pleading stage – to proceed ahead of this Court's decisions on administrative priority, dischargeability and relation back.

WHEREFORE, the Reorganized Debtor respectfully requests that this Court enter the Proposed Order attached to the Objection (a) disallowing and expunging the Administrative Claim, and (b) granting to the Reorganized Debtor such other and further relief as this Court may deem just and proper.

Dated: Wilmington, Delaware
December 18, 2015

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EXHIBIT A

District Remand Motion

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

PEOPLE OF THE STATE OF CALIFORNIA, ex rel SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, a Public Entity, Plaintiff, v. EXIDE TECHNOLOGIES, INC., and DOES 1 through 50, Defendants.	Case No. CV-14-1169-ABC **THE PEOPLE'S NOTICE OF MOTION AND MOTION TO REMAND; MEMORANDUM OF POINTS AND AUTHORITIES** **Date: April 14, 2014** **Time: 10:00 a.m.** **Judge: Hon. Audrey B. Collins**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 14, 2014 at 10:00 a.m., or as soon thereafter as this matter may be heard, in the courtroom of the Honorable Audrey B. Collins, United States District Judge, Plaintiff, The People of the State of California ex rel South Coast Air Quality Management District, will and hereby does move the Court for an order remanding this action pursuant to 28 U.S.C. §1447(c).

This motion is made on the ground that the Court lacks subject matter jurisdiction over this case because there is no diversity of citizenship between the

parties. This motion is based on the Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, all other pleadings or papers on file in this action, and all further evidence and oral argument that the Court may consider.

Counsel for the People and Exide Technologies met and conferred regarding the filing of this motion on March 7, 2014 pursuant to Local Rule 7-3 and the Standing Order of the Court.

DATED: March 14, 2014

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By: /S/
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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

The People of the State of California ex rel South Coast Air Quality Management District ("People") move to remand the People's Complaint against defendant Exide Technologies ("Exide") because diversity jurisdiction does not exist. The South Coast Air Quality Management District ("SCAQMD") brought this case on behalf of the People of California. When California has a concrete interest in a case and seeks substantial and unique relief, California is considered the real party in interest. Because California is not a citizen of itself for diversity jurisdiction purposes, when California is the real party in interest, diversity jurisdiction is lacking. Such is the case here.

The People's Complaint is brought pursuant to California Health and Safety Code Section 42403, which requires that when an air quality district seeks civil penalties it "shall" bring the civil action "in the name of the people of the State of California." This statutory requirement along with other facts confirm that California is the real party in interest. This case involves a facility whose emissions exposed numerous California residents to increased health risks, and the Complaint seeks at least $40,000,000 in civil penalties that cannot be recovered by the general public. Notably, these penalties are quasi-criminal, because their recovery can preclude California from bringing a criminal prosecution. Finally, the Ninth Circuit has recognized that California has a strong interest in having its courts adjudicate matters arising under California's air quality laws. In remanding back to state court a case brought by the People alleging the same California Health and Safety Code violations related to air pollution at issue here, the Ninth Circuit stated that Congress "belie[ved] that the adjudication of actions arising under state and local air quality laws in state and local courts is of paramount importance to the control and abatement of air pollution." California v. United States, 215 F.3d 1005, 1013 (9th

Cir. 2000). Accordingly, this Court should remand this case back to state court because California is the real party in interest, California is not a citizen of itself, and diversity jurisdiction is therefore lacking.

II.

STATEMENT OF RELEVANT FACTS

In this case, the People are represented by the SCAQMD, which is the air quality district responsible for regulating non-vehicular air pollution and emissions in the parts of Los Angeles, Orange, Riverside, and San Bernardino Counties included in the South Coast Air Basin, as described in California Health and Safety Code Section 40410 ("the Basin"). Defendant Exide owns and operates a large lead-acid battery recycling facility ("facility") located in Los Angeles County, within the Basin. (Compl. ¶ 4.) Exide receives spent lead-containing batteries and then begins the process of recycling them. (Exide's Revised AB2588 Health Risk Assessment at 6, which is attached to the Gilchrist Declaration as Exhibit A.) After the lead is removed from the batteries, the metal is then fed into two separate smelting furnaces, a reverberatory furnace and a blast furnace. (Id.) The reverberatory furnace produces pure lead, and the blast furnace produces a less pure lead. (Id.) Because the facility has furnaces that emit lead and arsenic in the Basin, (Compl. ¶ 4), the SCAQMD is the air quality district responsible for regulating Exide.

The SCAQMD brought this matter on behalf of the People pursuant to express authority under California Health and Safety Code Section 42403, which states that when an air quality district seeks civil penalties it "shall" bring the civil action "in the name of the people of the State of California." Cal. Health & Safety Code § 42403. California's Health and Safety Code provides that any person who negligently or knowingly emits an air contaminant in violation of any rule, regulation, or permit of an air quality district can be subject to civil penalties of up to $25,000 a day for negligent violations or $40,000 a day for knowing violations. Cal. Health & Safety Code §§ 42402.1, 42402.2. California's Health and Safety Code

also provides for strict liability for any person who violates any rule, regulation, or permit of an air quality district, and subjects that person to civil penalties of up to $10,000 a day for such violations.

In this case, the People filed a Complaint against Exide that focuses primarily on violations of SCAQMD rules relating to the emission of arsenic and lead into the atmosphere over several years. Arsenic is a carcinogen that has no exposure threshold level below which adverse health effects are not likely to occur, and also has adverse acute and chronic non-cancer effects. (Compl. at ¶ 8.) Lead can cause damage to the brain and nervous system, cardiovascular problems, decreased kidney function, and other health problems. (Id. at ¶ 9.) The Complaint seeks civil penalties up to $40,000,000. (Id. at p. 12.) The Complaint also seeks the People's costs relating to the investigation of this matter. (Id. at p. 12.)

The Complaint's first cause of action alleges that Exide operated its blast furnace (also called a cupola furnace), it's reverbatory furnace, and it's related air pollution control systems without using good operating practices to maintain air movement and emission control efficiency consistent with the design criteria for the system, and that these failures resulted in arsenic being emitted into Los Angeles's atmosphere for several years. (Compl. ¶ 16.) Specifically, it alleges that, for several years, Exide failed to prevent blockages from forming in its air pollution control system and equipment connected to its air pollution control equipment, failed to maintain the air movement necessary to direct gaseous arsenic emissions into the air pollution control equipment designed to control them, and failed to prevent gaseous arsenic emissions from entering an air pollution control system not designed to control arsenic emissions. (Id.) The second cause of action involves similar allegations related to arsenic. (Compl. ¶¶ 18-21.) The Complaint's seventh cause of action contains violations relating to excessive lead emissions, and the eighth cause of action alleges a failure to properly contain lead-containing dust. (Id. at ¶¶ 33-40.)

The Complaint also contains causes of action involving failures to properly operate equipment, and failure to submit required reports. (Compl. ¶¶ 22-32.)

The Complaint alleges that Exide's emissions, primarily of arsenic, potentially exposed citizens to increased health risks. (Compl. ¶¶ 11-12.) Under California's AB2588 law, Exide conducted a health risk assessment to estimate the risk of cancer as well as non-cancer health effects its facility posed to the public. (Exhibit A at 6-8.) A facility must notify residents if the calculated cancer risk from the exposure to toxic air contaminants from their facility is 10 in a million or more. (Id. at 7.) If the cancer risk is higher than 25 in a million, the facility must develop and implement a risk reduction plan. (Id. at 8.) A risk of 10 in a million means that if 1 million residents are exposed for 70 years, 10 would be expected to get cancer. (Compl. ¶ 10.) A "cancer burden" means the estimated increase in the occurrence of cancer cases in a population subject to an individual cancer risk of greater than or equal to one in a million resulting from exposure to toxic air contaminants. (Compl. ¶ 11.) A facility must develop a risk reduction plan if it has a cancer burden of .5 or more. (Exhibit A at 8.)

The health risk assessment also analyzed chronic health risks. "Chronic risks are non-cancer adverse health impacts, commonly associated with exposure to relatively low concentrations of toxic air contaminants over long periods of time, as in several years." (Exhibit A at 17.) The health risk assessment analyzed the degree of chronic risk posed to various human organs. (Id.) A facility must notify residents if the chronic hazard index from the exposure to toxic air contaminants from their facility is 1 or more. (Exhibit A at 17.) If the chronic hazard index is higher than 3, the facility must develop and implement a risk reduction plan. (Exhibit A at 8.)

Exide's health risk assessment revealed its facility was causing a potential increase in health risks to numerous California residents. (Exhibit A at 13.) Approximately 111,422 residents were exposed to a cancer risk between 10 and 100 in a million. (Exhibit A at 13.) Accordingly, Exide was required to provide notice to

those residents of their heightened cancer risk. In addition, approximately 3,556,896 residents were exposed to a cancer risk between 1 and 10 in a million. (Id.) Thus, in total, approximately 3,668,318 residents were exposed to a cancer risk of 1 in a million or greater, and this resulted in a cancer burden of 10. (Id.) This meant that an additional 10 people could get cancer because of Exide. This cancer burden required that Exide develop and implement a risk reduction plan. (Exhibit A at 8.) Included among those exposed to a higher cancer risk was a local elementary school about 1.9 miles from the facility, and it has an estimated cancer risk of 17 in a million. (Id. at 31.)

In addition to the cancer risks, Exide was also required to provide notice to residents because of heightened chronic hazard index results for residents. Here, some residents had a chronic hazard index of 2.9. (Exhibit A at 13.) The organs potentially affected by that heightened chronic hazard index are in the cardiovascular, central nervous, developmental, and respiratory systems. (Id.)

Exide also posed potentially significant health risks to workers at off-site locations. The cancer risk for workers was 156 in a million, and the chronic hazard index for workers was 63 for the respiratory system. (March 1, 2013 letter to Exide at 1, which is attached to the Gilchrist Declaration as Exhibit B.) These risk levels required that Exide perform a risk reduction plan.

III.

BACKGROUND ON THE AIR POLLUTION REGULATORY FRAMEWORK

A. The Clean Air Act Intends For State and Local Courts To Adjudicate Enforcement Cases Brought By State And Local Air Regulatory Agencies.

Congress enacted the Clean Air Act to protect and to enhance the quality of the nation's air resources and to promote the health, the welfare, and the productive capacity of its population, and designed it to give States primary control over

preventing and controlling air pollution. 42 U.S.C. § 7401. Congress vested the states with the primary responsibility of implementing its provisions. 42 U.S.C. § 7407. The Clean Air Act requires states to adopt and enforce regulatory programs to attain and maintain the federal air quality standards established within their regions. 42 U.S.C. § 7410. "States that fail to satisfy the minimum federal air quality standards risk losing valuable federal funding." California, 215 F.3d at 1007 (citing 42 U.S.C. § 7509).

Under the Clean Air Act, both non-federal facilities and federal facilities must comply with all federal, state, interstate and local requirements regarding the "control and abatement of air pollution in *the same manner, and to the same extent*." 42 U.S.C. § 7418 (emphasis added). The Clean Air Act originally "required federal facilities to cooperate with state and local air pollution agencies only when practicable and only to the extent that cooperation was in the national interest." California, 215 F.3d at 1010. "When it became apparent, however, that federal compliance with air quality laws was laggard, Congress departed from its former policy of voluntary compliance and amended the Clean Air Act to impose an affirmative duty upon federal facilities to comply with all federal, state, interstate, and local requirements respecting the control and abatement of air pollution to the same extent as any other person." Id. (emphasis added).

In particular, Congress emphasized that the Clean Air Act allowed state and local governments to seek and obtain judicial remedies in state and local courts against non-federal facilities and federal facilities. Specifically, Congress added language in Section 7604(e) "to ensure that nothing in the laws of the United States shall 'prohibit, exclude, *or* restrict' any state or local government from 'bringing any enforcement action or obtaining any judicial remedy or sanction [against the federal government] in any state or local court'or from doing the same 'in any state or local administrative agency, department or instrumentality.'" Id. at 1011 (quoting 42 U.S.C. § 7604(e) (emphasis in original)). Notably, section 7604(e) specifically refers

to section 7418, which states that federal facilities shall be regulated "respecting the control and abatement of air pollution in the *same manner*, *and to the same extent as any nongovernmental entity*." 42 U.S.C. §§ 7604(e), 7418(a).

Congress intended section 7604(e)'s language to "prohibit the removal of actions brought by state and local governments pursuant to state and local laws relating to the control and abatement of air pollution." California, 215 F.3d at 1011. In California, the Sacramento Air Quality District had brought a complaint on behalf of the People seeking civil penalties under California's Health and Safety Code against a federal facility that had emitted excessive air pollutants, the facility had removed the case to federal court pursuant to the federal removal statute, 28 U.S.C. § 1442(a)(1), and the district court had entered summary judgment for the federal facility. Id. at 1008. Although the People had not challenged the removal, the Ninth Circuit ordered the parties to address whether the removal was proper because "it appeared to us that it would be impossible to obtain a remedy or a sanction in state court if an action is removed to federal court." Id. at 1009-10.

The Ninth Circuit vacated the district court's judgment and ordered the district court to remand the case back to state court, holding that "the federal removal statute is inapplicable to actions filed by state and local governments in nonfederal fora pursuant to state and local air quality laws, and that this case was improperly removed from the state court." Id. at 1014.[1] "In preventing the removal of actions brought against the federal government pursuant to state and local air quality laws . . . Congress acted upon the specific belief that the adjudication of actions arising under state and local air quality laws in state and local courts is of paramount importance to the control and abatement of air pollution." Id. at 1013.

[1] The Ninth Circuit noted that it could have addressed the merits of the appeal if the district court had federal question jurisdiction, but the case did not involve a federal question. California, 215 F.3d at 1014 n.9.

Accordingly, enforcement actions brought under California's Health and Safety Code against federal facilities in state courts will generally be precluded from removal to federal court because the federal government cannot remove cases based on diversity jurisdiction, and sections 7604(e) and 7418 preclude federal facilities from removing based on the federal removal statute. This is consistent with Congress's "belief that state court adjudication of state law issues was of paramount importance in air pollution control matters." United States v. Puerto Rico,721 F.2d 832, 839 (1st Cir.1983).

Congress's determination that preventing federal facilities from removing enforcement actions was necessary to make them subject to air pollution regulation to the same extent as any other person, confirms that Congress already intended for state courts to adjudicate enforcement actions against non-federal facilities. The Congressional history confirms that Congress intended to have a uniform system of regulatory enforcement, in which state courts adjudicate state air pollution enforcement actions against all facilities. That is what Congress meant in 7604(e) when it referred to section 7418, which stated that federal facilities should be subject to the "control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity." The House stated that section 7604(e) was intended to "authorize enforcement against such facilities and persons by the *same means*, process, sanctions, *and jurisdiction as for any non-Federal source*." 95 Cong. Misc. Docs. 1977; CAA77 Leg. Hist. 37 at *10 (emphasis added).[2]

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[2] Congress did not need to pass a statute precluding non-federal facilities from removing enforcement cases brought by states based on diversity jurisdiction, because "a State is not a 'citizen' for purposes of the diversity jurisdiction," and therefore diversity jurisdiction was not available in those enforcement cases. Moor v. Alameda County, 411 U.S. 693, 717 (1973).

B. The Clean Air Act Grants Special Deference To California Because Of California's Expertise In Battling Air Pollution.

Congress shows a special deference to California under the Clean Air Act. Congress explicitly authorizes California to set emissions standards for new motor vehicles upon U.S. EPA approval. See 42 U.S.C. § 7543(e)(2). When it enacted this law, Congress recognized that California was a leader in regulating air pollution emissions:

> Congress recognized that California was already the "leader in the establishment of standards for regulation of automotive pollutant emissions" at a time when the federal government had yet to promulgate any regulations of its own. California's Senator Murphy convinced his colleagues that the entire country would benefit from his state's continuing its pioneering efforts, California serving as "a kind of laboratory for innovation." This function was enhanced by the 1977 amendments, which permitted other states to "opt in" to the California standards by adopting identical standards as their own. Thus, motor vehicles must be either "federal cars" designed to meet the EPA's standards or "California cars" designed to meet California's standards.

Engine Manufacturers' Association v. EPA, 88 F.3d 1075,1079 (D.C. Cir. 1996)(internal citations omitted). This statute "confers broad discretion on the State of California to weigh the degree of health hazards from various pollutants and the degree of emission reduction achievable for various pollutants with various emission control technologies and standards." 95 Cong. Misc. Docs. 1977; CAA77 Leg. Hist. 37 at *21.

C. California's Health and Safety Code Intends Local Air Quality Districts To Enforce Air Pollution Regulations.

California's Legislature enacted a comprehensive regulatory scheme to regulate air pollution and meet the requirements of the Clean Air Act. It found and declared that the people of the State of California have a primary interest in the quality of the physical environment in which they live, and that this physical environment is being degraded by the waste and refuse of civilization polluting the

atmosphere, thereby creating a situation which is detrimental to the health, safety, welfare, and sense of well-being of the people of California. Cal. Health & Safety Code § 39000. The Legislature declared that this public interest shall be safeguarded by a state, regional, and local effort to protect and enhance the ambient air quality of the state, because air pollution knows no political boundaries. Cal. Health & Safety Code § 39001. The Legislature divided responsibility for implementing and enforcing those standards among the California Air Resources Board and thirty-five local air quality districts. California, 215 F.3d at 1007-08 (citing Cal. Health & Safety Code §§ 39002, 39003). This regulatory scheme is designed, in part, to ensure that California meets the requirements of the Clean Air Act. See e.g., Cal. Health & Safety Code § 40460(d) (state implementation plan designed to meet requirements of the Clean Air Act). The Legislature gave local and regional authorities the primary responsibility for control of air pollution from all sources other than vehicular sources. Cal. Health & Safety Code § 39002.

The Legislature established a specific delineation for times when an air district would act as an enforcement agency as compared to simply a regulatory agency. In most matters, air districts can sue and be sued in their own names under California Health and Safety Code Section 40701(b). See e.g., United States v. South Coast Air Quality Management Dist., 748 F. Supp. 732, 734 (C.D. Cal. 1990) (United States filed case against air quality district in its own name claiming that certain fees were unconstitutional). But the California Legislature carved out a mandatory exception for civil enforcement matters. In those cases, civil penalties "*shall* be assessed and recovered in a civil action brought in the *name of the people of the State of California* by the Attorney General, by any district attorney, or *by the attorney for any [air quality] district*." Cal. Health & Safety Code § 42403 (emphasis added).

Civil penalties for air pollution violations are quasi-criminal and can preclude California from bringing criminal charges. Civil penalties and criminal penalties are addressed together under an Article titled "Penalties." See Cal. Health & Safety

Code §§ 42400-42410. If an air quality district refers a violation to a prosecuting agency that files a criminal complaint, any civil complaint brought by the air quality district for the same offense must be dismissed. Cal. Health & Safety Code § 42400.7. Similarly, the recovery of civil penalties "*precludes [criminal] prosecution*" for the same offense. Id. (emphasis added). In determining the fine amount to impose for criminal penalties or civil penalties, courts must consider the same eight factors in determining the appropriate penalty. Compare Cal. Health & Safety Code § 42400.8 (criminal penalties) with Cal. Health & Safety Code § 42403 (civil penalties).

IV.

ARGUMENT

A. The Ninth Circuit Has A Strong Presumption Against Removing Matters To Federal Court.

The Ninth Circuit has a "strong presumption against removal." Gaus v. Miles, Inc., 980 F.2d 564, 567 (9th Cir. 1992). Courts must "strictly construe the removal statute against removal jurisdiction," and "[f]ederal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." Id. at 566. Further, the strong presumption against removal means that a defendant has the burden of establishing that removal is proper. Id. Courts are "compelled to remand when there is any doubt as to the right of removal." Id. This serves to prevent scenarios in which parties litigate a matter before a federal district court only to have an appellate court subsequently determine that the district court lacked jurisdiction, vacate the district court's judgment, and order the matter remanded to state court. This occurred in an air pollution enforcement case that was improperly removed from state court. See e.g., California, 215 F.3d at 1009 (vacating district court's grant of defendant's summary judgment motion and ordering the district court to remand the case back to the state court because the complaint alleging that

defendant's excessive emissions had violated California's Health and Safety Code had been improperly removed).

B. Exide Cannot Meet Its Burden To Establish That There Is No Doubt About Whether Diversity Jurisdiction Exists Because California Is The Real Party In Interest.

To determine whether diversity jurisdiction exists, courts must examine the citizenship of the real parties to the controversy, and not the citizenship of nominal or formal parties. Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 460-61 (1980). Importantly, and for present purposes, "a State is not a 'citizen' for purposes of the diversity jurisdiction." Moor, 411 U.S. at 717. Therefore, when California is the real party in interest, diversity jurisdiction does not exist because California is not a citizen of itself. People v. Universal Syndications, Inc., No. CV 09-1186, 2009 WL 1689651, 2009 U.S. Dist. LEXIS 64066 at *5 (N.D. Cal. June 16, 2009). As ouitlined below, California is the real party in interest here, diversity jurisdiction does not exist, and this case must therefore be remanded back to state court.

When determining whether California is the real party in interest, and therefore not a citizen of itself for diversity jurisdiction purposes, this Court must consider: (1) California's "concrete interest" in the litigation; and (2) the availability to California of unique and substantial relief. Nevada v. Bank of America Corp., 672 F.3d 661, 670-72 (9th Cir. 2012). This Court must look at the essential nature of the entire proceeding in assessing whether California is the real party in interest. Id. at 670. In Nevada, the Nevada Attorney General brought an action seeking injunctive relief, civil penalties, and restitution against Bank of America under Nevada's Deceptive Trade Practices Act ("DTPA") for misleading consumers about the bank's mortgage modification program. The DTPA specifically authorized the Nevada Attorney General to bring suit in the name of the People. Nevada, 672 F.2d at 669. Bank of America removed the action from state court to federal court. Nevada, 672 F.2d at 664-65.

In reversing the district court and remanding the case back to state court, the Ninth Circuit found that "Nevada has been particularly hardhit by the current mortgage crisis, and has a specific, concrete interest in eliminating any deceptive practices that may have contributed to its cause." Id. at 670. It also found that Nevada sought "substantial relief that is available to it alone," including civil penalties and to recoup the cost of its investigation. Id. at 672. Although Nevada also sought restitution for some private parties who had been harmed, this did "'not negate the State's substantial interest or render the entire action removable.'" Id. at 671 (quoting Arizona ex. rel. Horne v. Countrywide Fin. Corp., No. CV 11-131-PHX-FJM, U.S. Dist LEXIS 35203 at *3 (D. Ariz. Mar. 21, 2011)). In finding that Nevada was the real party in interest, the Ninth Circuit emphasized that the "Nevada Attorney General sued to protect the hundreds of thousands of homeowners in the state allegedly deceived by Bank of America, as well as those affected by the impact of Bank of America's alleged frauds on Nevada's economy." Id. at 670.

In contrast, when an agency brings an action that seeks to only vindicate the rights of private parties, a state is not the real party in interest. Dep't of Fair Employment & Hous. ("DFEH") v. Lucent Techs., 642 F.3d 728, 737 (9th Cir. 2011). For example, in Lucent, the DFEH brought an action on behalf of a specific individual, alleging employment discrimination. Id. at 735-736. The aggrieved individual also attempted to personally intervene in the action. Id. at 736. The Ninth Circuit noted that California Government Code Section 12965(c)(2) expressly provided that the "person claiming to be aggrieved shall be the real party in interest," not the State. Id. at 739 (citing to former Cal Gov't Code § 12965(c)(2). Notably, the current version of this statute states that the DFEH brings such actions "on behalf of the person claiming to be aggrieved," and that "the person claiming to be aggrieved shall be the real party in interest and shall have the right to participate as a party and be represented by his [or] her own counsel." Cal Gov't Code § 12965(a) (reflecting the 2012 amendments of the statute but continuing to regard the

aggrieved person as the real party in interest). Notably, Lucent was not brought in the name of the People, but rather in the name of a state agency, the DFEH, pursuant to California Government Code Section 12920. Lucent, 642 F.3d at 738. For all these reasons, the Ninth Circuit held that DFEH's complaint was brought on behalf of an individual, not California, because it sought to reinstate an individual to his prior employment, pay him damages for emotional distress, and pay him punitive damages. Id. at 740 n.8. Therefore, the individual and not California was the real party in interest. Id.

Similarly, in People v. Northern Trust Corp., 2013 U.S. Dist LEXIS 53155 (C.D. Cal. April 10, 2013), the complaint focused solely on claims stemming from a contractual relationship between the Los Angeles City Employees' Retirement System ("LACERS") and two private financial consulting companies, in which the claims sought $95 million in restitution and treble damages for LACERS. Northern Trust, 2013 LEXIS at *3. As such, LACERS, and not California, was the real party in interest because the complaint focused on the private relationship between LACERS and financial consulting companies, and did not involve harm to the broader public or involve the "State's interest in vindicating any public interest." Id. at *10-11.

District Courts in the Central District of California have remanded cases brought by the Los Angeles County District Attorney's Office or the Los Angeles City Attorney's Office back to state court when the People of the State of California were the real party in interest, because those matters were considered to be brought by California and removal based on diversity jurisdiction was therefore improper. Most recently, in People v. U.S. Bank National Assoc., et. al., CV 12-7567-DMG, the Honorable Judge Gee remanded a case brought by the Los Angeles City Attorney on behalf of the People of the State of California. See Order remanding U.S. Bank case to state court at 1, which is attached to the Gilchrist Declaration as Exhibit C. The complaint alleged that U.S. Bank had acquired "more than 1500 [foreclosed]

residential properties in the City of Los Angeles," "'disregarded virtually every one of its legal duties and responsibilities as owner,'" and that this had resulted in "widespread violation of municipal and state housing and public health laws." Exhibit C at 2. The conditions at the foreclosed properties harmed the residents of those properties, and threatened the health, safety, and local economy of the surrounding communities. Exhibit C at 5.

Judge Gee distinguished both Lucent and her opinion in Northern Trust as involving cases that sought to only vindicate the rights of private parties. Judge Gee wrote that in Lucent the DFEH "sought only to vindicate the rights of a single individual whose harms arose out of an employment relationship," while this case involved "the People's concrete interest in preventing and abating public nuisances and substandard living conditions for a significant portion of the population." Exhibit C at 5. Similarly, Northern Trust "sought $95 million in restitution and treble damages for LACERS" and those claims "focused entirely on the private relationship between LACERS and its advisors." Exhibit C at 8. In contrast, "the Complaint in this case strongly suggests that the restitution is truly secondary to the injunctive relief and civil penalties sought to prevent future harms by U.S. Bank." Exhibit C at 8. "Like the claims for restitution in Nevada, the restitution sought here is incidental and merely 'tacked on' to the more central claims for injunctive relief and civil penalties." Exhibit C at 8 (citing Nevada, 672 F.3d at 671).

Judge Gee's U.S. Bank Order is consistent with prior Central District cases that have remanded actions brought by the Los Angeles County District Attorney's Office or the Los Angeles City Attorney's Office. See e.g., People v. Steelcase, Inc., 792 F. Supp. 84, 86 (C.D. Cal. 1992), overruled on other grounds by California v. Dynegy, Inc., 375 F.3d 831, 849 (9th Cir. 2004) (remanding lawsuit brought by the Los Angeles County District Attorney under California's Unfair Competition Law ("UCL") because the express language of the UCL confers authority upon the district attorney to bring a claim on behalf of the People, and the requested remedies -- civil

penalties and injunctive relief -- were characteristic of a law enforcement action brought on behalf of the general public and matter was therefore brought on behalf of California and not Los Angeles County); People v. Time Warner, Inc., No. CV 08-04446, 2008 WL 42914352008, U.S. Dist. LEXIS 109387 at *6-7 (C.D. Cal. Sept. 17, 2008) (remanding matter brought by the Los Angeles City Attorney's Office on behalf of the State of California because California had some real interest and noting that civil penalties may only be recovered under the UCL when the action is brought on behalf of the People).

1. California Has a Concrete Interest in this Litigation.

California's concrete interest in this matter is demonstrated by the express language of California's Health and Safety Code, Congress's intention that state and local courts adjudicate state and local air pollution enforcement actions, and the Complaint's underlying facts that reveal that numerous California residents were exposed to increased health risks because of Exide's unlawful release of toxic air contaminants. First, California Health and Safety Code § 42403 expressly provides that when an air district brings an action for civil penalties it "shall" be "brought in the name of the people of the State of California." This language mirrors the statutory language in Nevada and U.S. Bank that, respectively, allowed the Nevada Attorney General and the Los Angeles City Attorney's Office to bring matters on behalf of their respective states. In contrast, in Lucent, the statutory language shows that DFEH brought the matter on behalf of a single aggrieved individual, and not the state. Moreover, the California Legislature's mandate that air districts bring civil penalties on behalf of the People, stands in marked contrast to other legal matters involving air districts in which they can sue and be sued in their own names. This conscious decision to give air districts heightened authority to bring air pollution enforcement cases on behalf of the People shows that California has a strong interest in this air pollution enforcement case.

Second, the Clean Air Act's language shows that California has a concrete interest in this litigation, because Congress enacted the Clean Air Act with the "specific belief that the adjudication of actions arising under state and local air quality laws in state and local courts is of paramount importance to the control and abatement of air pollution." California, 215 F.3d at 1013. Congress vested the states with the primary responsibility of implementing its provisions, and "[s]tates that fail to satisfy the minimum federal air quality standards risk losing valuable federal funding." California, 215 F.3d at 1007 (citing 42 U.S.C. §§ 7407, 7409). Indeed, Congress recognized that the states' interest in air pollution regulation is so strong that it drafted a statute specifically precluding the federal government from removing enforcement matters to federal court. When it did so, it acted to ensure uniformity in the regulatory scheme among federal and non-federal facilities, and thereby "authorize enforcement against [federal] facilities and persons by the *same means, process, sanctions, and jurisdiction as for any non-Federal source*." 95 Cong. Misc. Docs. 1977; CAA77 Leg. Hist. 37 at *10 (emphasis added). This confirms that Congress already intended for state courts to adjudicate enforcement actions against non-federal facilities, such as Exide. Interpreting the Clean Air Act otherwise would essentially lead to a two-tiered regulatory scheme whereby non-federal facilities like Exide could litigate enforcement matters in federal court, while federal facilities could not, and this distinction would turn solely on what entity owned the facility. Considering that California receives even greater deference than most other states in air pollution matters, that Congress intended the federal government to litigate enforcement matters brought by state and local governments in state and local courts, and that Congress intended federal facilities to be subject to the same jurisdiction as non-federal sources, Congress has recognized that California has a concrete interest in air pollution enforcement -- an interest so strong that it precludes federal facilities from removing actions from state court.

Third, the facts underlying the People's claims here demonstrate California's concrete interest in the action because millions of California residents were exposed to potentially increased health risks. The Complaint alleges that for several years, Exide's unlawful conduct resulted in the emission of lead and arsenic, two toxic air contaminants, in Los Angeles County. These emissions resulted in approximately 3,668,318 California residents being potentially affected by a cancer burden of 10. This means that an additional 10 people could get cancer because of Exide, and it required that Exide develop a risk reduction plan to lower its cancer burden. Approximately 111,422 residents were exposed to a cancer risk over 10 in a million, and some residents were exposed to a chronic hazard index of 2.9, both of which required that Exide provide those residents with notice of their increased health risks. Moreover, offsite workers were also exposed to potentially increased health risks that required a risk reduction plan. These facts are similar to Nevada, in which Nevada's Attorney General had a concrete interest in suing to protect the hundreds of thousands of Nevada homeowners deceived by Bank of America, and U.S. Bank, in which the People had a concrete interest in suing to address the numerous problems arising from the over 1500 foreclosed properties in the City of Los Angeles. Indeed, considering that Exide's actions exposed numerous California residents to potentially increased health risks, California likely has a more concrete interest here than the state did in either Nevada or U.S. Bank. Accordingly, for the three reasons outlined above, California has a concrete interest in this litigation.

2. California Seeks Unique and Substantial Relief.

"Civil penalties are not damages recovered for the benefit of private parties; they are more akin to a criminal enforcement action and are brought in the public interest." Steelcase, 792 F. Supp. at 86. "All criminal actions are brought in the name of the People." Id. at 86 n.4 (citing Cal. Penal Code § 684). Therefore, actions filed by the People seeking civil penalties are fundamentally "'law enforcement action[s] designed to protect the public and not to benefit private parties.'" State v.

Altus Fin., S.A., 36 Cal. 4th 1284, 1306, 32 Cal. Rptr. 3d 498 (2005) (quoting People v. Pacific Land Research Co., 20 Cal.3d 10, 17, 141 Cal. Rptr. 20 (1977). This remains true regardless of whether the civil penalties will go directly to the state or to a local entity, as long as the penalties are used to address the specific issue for which they were recovered, such as using civil penalties collected under the UCL to help protect consumers. See U.S. Bank, Exhibit C at 7 (citing to Universal Syndications, 2009 U.S. Dist LEXIS 64066 at *11-12 (UCL action brought by district attorney sought a unique remedy for the state notwithstanding that civil penalties would go to local rather than state treasury); and Time-Warner, 2008 WL 4291435, 2008 U.S. Dist. LEXIS 109387 at *6-7 (same)).

The remedies that the People seek in this case are both uniquely available to California and substantial because they can only be sought by designated entities on behalf of the people. The People seek no less than $40,000,000 in civil penalties, which can only be recovered by the Attorney General, a district attorney, or an air quality district, and not recovered by individual citizens. The People also seek costs related to its investigation. The civil penalties sought will help further California's interest in protecting and enhancing the ambient air quality of the state, as required by California Health and Safety Code Section 39001.

The civil penalties sought here are further unique and substantial to California because they are quasi-criminal and can *preclude California from bringing a criminal prosecution*. Criminal prosecutions based on violations of California law can give California unique and substantial relief that is not available to the general public, namely, incarceration and criminal penalties. When the California Legislature decides that California's interest will be protected by allowing civil penalties to substitute for incarceration and criminal penalties, that judgment should be respected, and should be recognized to constitute unique and substantial relief. The statutory language regarding the interplay between civil penalties and criminal prosecution compels the conclusion that the California Legislature intended that

either could vindicate California's interest in air pollution matters. Indeed, the Health and Safety Code explicitly requires that the same eight factors be used to determine civil penalties or criminal penalties, which shows that they are intended to vindicate the same interest. This statutory scheme shows that California will receive unique and substantial relief from the civil penalties sought here, in contrast to Lucent and Northern Trust, in which the relief would primarily benefit either a single individual or a group of private individuals. Moreover, the People do not seek restitution for private individuals, as in Nevada and U.S. Bank, and those cases found the relief sought to be substantial and unique despite the restitution claims. Here, the People seek civil penalties that can preclude California from bringing a criminal prosecution, and the People's costs related to investigation, both of which Nevada recognized to be "substantial relief that is available" to the state alone.

Accordingly, the Complaint in this case seeks relief that is unique and substantial to California. Because California is the real party in interest here, and California is not a citizen of itself, diversity jurisdiction is lacking.

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V.

CONCLUSION

California is the real party in interest here because California has a concrete interest in this litigation, and the People's Complaint seeks relief that is unique and substantial to California. Because California is the real party in interest, and California is not a citizen of itself, diversity jurisdiction is lacking. Accordingly, because Exide cannot meet its burden to show that there is no doubt that jurisdiction is proper, this Court should remand this case back to state court.

DATED: March 14, 2014

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MEGAN LORENZ,
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By: _____/S/_____
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EXHIBIT B

District Remand Order

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 14-1169 ABC (MANx)	Date	April 9, 2014
Title	People of the State of California v. Exide Technologies Inc., et al.		

JS - 6

Present: The Honorable	Audrey B. Collins	
Angela Bridges	Not Present	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
None	None	

Proceedings: ORDER **GRANTING** Plaintiff's Motion to Remand (In Chambers)

Pending before the Court is Plaintiff People of the State of California, ex rel South Coast Air Quality Management District's Motion to Remand, filed on March 14, 2014. (Docket No. 22.) Defendant Exide Technologies opposed on March 24 and Plaintiff replied on March 31. (Docket Nos. 26, 28.) The Court finds the matter appropriate for resolution without oral argument and **VACATES** the April 14, 2014 hearing date. Fed. R. Civ. P. 78; Local Rule 7-15. For the reasons below, Plaintiff's motion to remand is **GRANTED**.

DISCUSSION

In a Complaint filed in Los Angeles Superior Court on January 16, 2014, the South Coast Air Quality Management District ("SCAQMD"), in the name of the People of the State of California, assert twelve causes of action against Defendant, whose facility produced emissions that allegedly exposed numerous California residents to increased health risks in violation of various District Rules and the California Health and Safety Code. (Docket No. 1.) The Complaint seeks costs of suit, including inspection, investigation, attorneys' fees, enforcement, and prosecution, and at least $40,000,000 in civil penalties. Id. Defendant removed the action from state court based upon diversity jurisdiction. Id.

A defendant may remove a state court action to federal court only if the federal court has original jurisdiction over the subject matter. 28 U.S.C. § 1441(a), (b). Federal courts have original jurisdiction only where there is federal question jurisdiction, 28 U.S.C. § 1331, or if the parties to the action are citizens of different states and the amount in controversy exceeds $75,000. 28 U.S.C. § 1332. This case does not involve a federal question, and Defendant removed this action based solely on diversity jurisdiction. Whether this case was properly removed turns on who is the real party in interest on the plaintiff's side of the case.

For a suit to be between "citizens of different states," 28 U.S.C. § 1332(a)(1), "each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in federal courts." Strawbridge v. Curtiss, 7 U.S. 267 (1806). Thus, if one party to an action is not a citizen of any

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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state, a district court cannot exercise diversity jurisdiction over the action. Maryland Stadium Authority v. Ellerbe Becket Inc., 407 F.3d 255, 260 (4th Cir. 2005). States are not "citizens of a state" for diversity purposes. Moor v. Alameda County, 411 U.S. 693, 717 (1973). "[W]hether the respective state is itself the real party in interest is a question to be determined from the 'essential nature and effect of the proceeding.'" Nuclear Eng'g Co. v. Scott, 660 F.2d 241, 250 (7th Cir. 1981), quoting Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945). Where a state is found to be the real party in interest, the requirements of § 1332 are not satisfied and removal is improper.

The Court finds that the State of California is the real party in interest. Paragraph 3 of the Complaint states, "Pursuant to Health and Safety Code Section 42403, the District may bring a civil suit in the name of the People for civil penalties under Health and Safety Code Section 42402, 42402.1, and 42402.2 for violation of District Rules." Health and Safety Code Section 42403(a) provides, "The civil penalties prescribed in Sections [42402, 42402.1, and 42402.2] shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, or ***by the attorney for any district in which the violation occurs in any court of competent jurisdiction***." (Emphasis added.)

The plain language of Health and Safety Code Section 42403 authorizes the attorney for SCAQMD to bring an action "in the name of the people of the State of California[.]" See, e.g., County of Santa Clara ex rel. Marquez v. Bristol Myers Squibb Co., No. 5:12-cv-03256-EJD, 2012 WL 4189126, at *4 (N.D. Cal. Sept. 17, 2012) (granting motion to remand in False Advertising Law case because under "the plain language in FAL, the County of Santa Clara is only a nominal or formal party to the proceeding. It is the conduit upon which the real party is tied to this suit—namely the State of California."); People v. Universal Syndications, Inc., No. C 09-1186 JF (PVT), 2009 WL 1689651, at *2 (N.D. Cal. June 16, 2009) (granting motion to remand because "[t]he People are the same party as the State of California" and "for diversity purposes, a state is not a citizen of itself").

In addition, the People's requested remedy of civil penalties further supports the view that this is fundamentally a law enforcement action brought on behalf of the general public; such actions are not for the benefit of private parties. People v. Steelcase, 792 F.Supp. 84, 86 (C.D. Cal. Apr. 30, 1992) ("Civil penalties are not damages recovered for the benefit of private parties; they are more akin to a criminal enforcement action and are brought in the public interest."); California v. Smartwear Technologies, No. 11-cv-1361 JAH (NLS), 2012 WL 243343, at *3 (S.D. Cal. Jan. 25, 2012) (granting motion to remand and stating that the "civil penalties [the state] seeks are punitive and serve a public interest in preventing future fraudulent schemes which further demonstrates the state's substantial interest in the action").

The cases relied upon by Defendant are distinguishable because individuals, rather than the state, were the direct beneficiaries of a favorable resolution. See Dep't of Fair Employment & Housing v. Lucent Technologies, 642 F.3d 728, 739 n.8 (9th Cir. 2011) (DFEH was not the real party in interest for purposes of diversity where it sought reinstatement, "back pay, front pay, and other benefits of employment," damages for "emotional distress, nervous pain, and suffering," and "punitive damages" for the benefit of the single aggrieved employee); People v. Northern Trust Corp., No. CV 12-01813

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 14-1169 ABC (MANx)	Date	April 9, 2014
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DMG (FMOx), 2013 U.S. Dist. LEXIS 53155, at *10-11 (C.D. Cal. Dec. 19, 2012) (finding private entity, the Los Angeles County Employment Retirement System ("LACERS"), was the real party in interest because the complaint stemmed from the contractual relationship between LACERS and financial consulting companies); compare Nevada v. Bank of America Corp., 672 F.3d 661, 670 (9th Cir. 2012) (finding Nevada was the real party in interest because it "sued to protect the hundreds of thousands of homeowners in the state allegedly deceived by Bank of America, as well as those affected by the impact of Bank of America's alleged frauds on Nevada's economy").

Here, the People seek costs of suit and at least $40,000,000 in civil penalties from Defendants for violations of the District Rules and the California Health and Safety Code as a result of emissions that allegedly exposed numerous California residents to increased health risks. The State of California has a strong sovereign interest in the outcome of this lawsuit: to protect its citizens' ambient air quality from emissions that know no borders. This interest is clearly paramount to any other interest that may be gleaned from the nature of the claims.

For the foregoing reasons, the State of California is the real party in interest in this case. Because states are not "citizens of a state" for diversity purposes, the Court cannot have diversity jurisdiction over this case. As such, the Court lacks subject matter jurisdiction and the case must be remanded.[1]

CONCLUSION

Accordingly, the Court **GRANTS** the Motion to Remand. The case is hereby **REMANDED** to Los Angeles County Superior Court.

IT IS SO ORDERED.

_____ : _____

Initials of Preparer AB

[1] The Court finds it unnecessary to resolve Defendant's objections to the People's evidence and the People's responses thereto. (Docket Nos. 27, 29.)

EXHIBIT C

District's Reply in Support of District Remand Motion

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

PEOPLE OF THE STATE OF CALIFORNIA, ex rel SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, a Public Entity, Plaintiff, v. EXIDE TECHNOLOGIES, INC., and DOES 1 through 50, Defendants.	Case No. CV-14-1169-ABC **THE PEOPLE'S REPLY IN SUPPORT OF THE PEOPLE'S NOTICE OF MOTION AND MOTION TO REMAND; MEMORANDUM OF POINTS AND AUTHORITIES** **Date: April 14, 2014** **Time: 10:00 a.m.** **Judge: Hon. Audrey B. Collins**

People of the State of California ex rel South Coast Air Quality Management District hereby files the People's Reply in support of the People's Motion to Remand this action pursuant to 28 U.S.C. § 1447(c).

The Motion is made on the ground that the Court lacks subject matter jurisdiction over this case because there is no diversity of citizenship between the parties. The Motion is based on this Reply, the Notice of Motion and Motion, the accompanying Memorandums of Points and Authorities, all other pleadings or papers

on file in this action, and all further evidence and oral argument that the Court may consider.

DATED: March 31, 2014

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Defendant Exide Technologies ("Exide") asks this Court to accept an argument that numerous courts have considered and uniformly rejected. Namely, Exide argues that the state-created agency that brought this civil penalties complaint on behalf of California's People should be considered the real party in interest, and not California. Exide cites to no case accepting this argument, and the People's research has found none. Rather, courts have uniformly rejected it. Accordingly, the People of the State of California ex rel South Coast Air Quality Management District ("People") hereby files this Reply in Support of the People's Motion to Remand the People's Complaint against defendant Exide to reiterate why diversity jurisdiction does not exist.

The South Coast Air Quality Management District ("SCAQMD") brought this case on behalf of the People pursuant to specific statutory authority in California Health and Safety Code Section 42403. California has a concrete interest in this case because it involves a facility whose emissions exposed numerous California residents to increased health risks, and the Complaint seeks at least $40,000,000 in civil penalties that cannot be recovered by the general public. Any civil penalties recovered in this case will go to adopt and enforce rules and regulations designed to help California achieve and maintain state and federal air quality standards. California therefore has an additional concrete interest in this case because these civil penalties will help California meet these air quality standards, and failure to meet the federal air quality standards could result in California losing some valuable federal funding. Notably, these penalties are quasi-criminal, because their recovery can preclude California from bringing a criminal prosecution. When the California Legislature decides that California's interest will be protected by allowing civil penalties to substitute for incarceration and criminal penalties, then that judgment

should be respected, and should be recognized to constitute unique and substantial relief. Accordingly, this Court should remand this case back to state court because California is the real party in interest, California is not a citizen of itself, and diversity jurisdiction is therefore lacking.

II.

ARGUMENT

A. California Has a Concrete Interest in this Litigation.

Exide relies on an argument that numerous courts have considered and uniformly rejected. This confirms that Exide cannot meet its burden to establish that there is no doubt about whether diversity jurisdiction exists.[1] Namely, Exide argues that the SCAQMD, the state-created agency that brought this civil penalties complaint on behalf of California's People should be considered the real party in interest, and not California -- even though the California Legislature created the SCAQMD and expressly gave it authority to bring these types of action on the People's behalf. Exide cites to no case accepting this argument, and the People's research has found none. Rather, courts have considered this argument in various

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[1] Courts remanding civil penalties cases brought on behalf of the People recognize that the Ninth Circuit has a "'strong presumption against removal.'" County of Santa Clara v. Bristol Myers Squibb Co., CV 12-03256, 2012 WL 4189126, 2012 U.S. Dist LEXIS 133405 at *6 (N.D. Cal. Sept. 17, 2012) (quoting Gaus v. Miles, Inc., 980 F.2d 564, 566-67 (9th Cir. 1992); People v. Universal Syndications, Inc., No. CV 09-1186, 2009 WL 1689651, 2009 U.S. Dist. LEXIS 64066 at *4 (N.D. Cal. June 16, 2009) (also quoting Gaus). Courts must "'strictly construe the removal statute against removal jurisdiction,'" and "'[f]ederal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.'" Universal Syndications, Inc., No. CV 09-1186, 2009 WL 1689651, 2009 U.S. Dist. LEXIS 64066 at *4 (quoting Gaus, 980 F.2d at 566). This strong presumption against removal means that Exide has the burden of establishing that removal is proper. Gaus, 980 F.2d at 566. Courts are "compelled to remand when there is any doubt as to the right of removal." Id.

different areas of law, and uniformly rejected it. See People v. U.S. Bank National Assoc., et. al., CV 12-7567-DMG, which is Exhibit C to the Gilchrist Declaration in Support of the People's Motion to Remand at 42, 43 (granting motion to remand case brought under California's Unfair Competition Law ("UCL") and rejecting the argument that "the City of Los Angeles, and not the People, is the real party in interest"); Bristol Myers Squibb Co., CV 12-03256, 2012 WL 4189126, 2012 U.S. Dist LEXIS 133405 at*6 (granting motion to remand in False Advertising Law ("FAL") case and rejecting argument that Santa Clara County and not California was the real party in interest); People v. Smartwear Technologies, CV 11-01361, 2012 WL 243343, 2012 U.S. Dist LEXIS 8342 at *6-*8 (S.D. Cal. Jan. 25, 2012) (granting motion to remand in case alleging violations of the California Corporations Code and rejecting argument that "the California Department of Corporations, not the state, is the real party in interest for purposes of diversity"); Universal Syndications, No. CV 09-1186, 2009 WL 1689651, 2009 U.S. Dist. LEXIS 64066 at *3 (granting motion to remand UCL and FAL case and rejecting argument that "the real party in interest is the County of Santa Cruz," and not the state); People v. Check'N Go of California, Inc., No. CV 07-02789, 2007 U.S. Dist. LEXIS 65650 at *15, *25 (granting motion to remand in UCL case, and deciding question whether the "real party in interest [] is the State or the City of San Francisco," by finding that California was the real party in interest); People v. Steelcase, Inc., 792 F. Supp. 84, 86 (C.D. Cal. 1992), overruled on other grounds by California v. Dynegy, Inc., 375 F.3d 831, 849 (9th Cir. 2004) (granting motion to remand UCL lawsuit brought by the Los Angeles County District Attorney and rejecting argument that "diversity jurisdiction exists because the real party in interest is [Los Angeles] County," and not the state).

Exide's reliance on Dep't of Fair Employment & Hous. ("DFEH") v. Lucent Techs., 642 F.3d 728, 737 (9th Cir. 2011), and People v. Northern Trust Corp., No. CV 12-1813-DMG, 2013 U.S. Dist LEXIS 53155 (C.D. Cal. April 10, 2013), is misplaced because neither case found that a state-created agency was the real party in

interest. Rather, they found that the real parties in interest were the private parties who would personally receive financial compensation. Lucent, 642 F.3d at 740 n.8 (private individual and not the DFEH or California was the real party in interest because the complaint sought to reinstate him to his prior employment, pay him damages for emotional distress, and pay him punitive damages); Northern Trust, 2013 U.S. Dist LEXIS 53155 at *10-11 (a private entity, the Los Angeles County Employment Retirement System ("LACERS"), and not the Los Angeles City Attorney or California, was the real party in interest because the complaint focused on the private relationship between LACERS and financial consulting companies, and did not involve harm to the broader public or involve the "State's interest in vindicating any public interest").

A subsequent Ninth Circuit case explicitly recognized that Lucent determined whether the DFEH or the individual who would receive financial compensation was the real party in interest. Nevada v. Bank of America Corp., 672 F.3d 661, 670 (9th Cir. 2012), recognized that Lucent "considered whether the district court had diversity jurisdiction over an action filed by the [DFEH] *on behalf of a single aggrieved employee*." Nevada, 672 F.3d at 670 (emphasis added). In determining whether diversity jurisdiction existed, the "question turned on *whether DFEH or the employee was the real party in interest*[.]" Id. (emphasis added). The facts "could not render DFEH a real party in interest" because the "relief sought included reinstatement and payment of compensatory and punitive damages to the aggrieved individual," and therefore the relief sought for the individual predominated. Id. Similarly, in Nevada the court had to determine whether the "'gravamen of the action is *protection of the public welfare*'" or to compensate the "*individual consumers*" who would benefit from the "restitution, declarative and injunctive claims for relief." Id. at 669-70 (each emphasis added).

Moreover, Lucent is further distinguishable from the People's case here because the DFEH lacked express statutory authority to bring that case in the name

of the People, and the statute expressly provided that the state was not the real party in interest. California Government Code Section 12965(c)(2) expressly provided that the "person claiming to be aggrieved shall be the real party in interest," not the State. Lucent, 642 F.3d at 738-39 (citing to former Cal. Gov't Code § 12965(c)(2). Because the DFEH lacked statutory authority to bring this case in the name of the People, the DFEH attempted to rely on some generic statutory language to show that California had a real interest in the matter:

> "it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination" because "the practice of denying employment opportunity and discriminating in the terms of employment . . . foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interest of employees, employers, and the public in general," and is "against public policy."

Id. at 738 (citing Cal. Gov't Code § 12920). The court found that "this language fails to render it a real party in the controversy" because this language merely expressed a "'general governmental interest.'"[2] Id. Accordingly, "the statutory scheme does not support a finding *that DFEH is a real party* in the controversy for the purposes of diversity jurisdiction."

Exide relies on similar general government interest language in California's Health and Safety Code to argue that California only has a general governmental

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[2] The dissenting opinion in Lucent strongly implied that the general governmental interest language stemmed from a Supreme Court opinion in which a state was neither mentioned in the caption nor a party of record, Mo., Kan. & Tex. Ry. Co. v. Hickman ("Missouri Railway"), 183 U.S. 53, 54, 22 S. Ct. 18, 46 L. Ed. 78 (1901). The dissent stated "that case addressed a different issue: whether the state of Missouri was a real party in interest despite not being a party of record.'" Lucent, 642 F.3d at 750 (dissenting opinion) (citing Missouri Railway, 183 U.S. at 59).

interest in this case. This general language appears in other California statutes, but public agencies do not rely on this general language to bring cases on behalf of California's People. Rather, public agencies rely on specific statutory authorization. This specific statutory authority was missing in Lucent because the California Government Code did not give the DFEH the specific right to bring an action on behalf of the People.

Accordingly, cases have routinely found California to be the real party in interest when a state agency brings a civil penalties complaint pursuant to express statutory authority and the remedies will not primarily benefit a private entity. Nevada, 672 F.3d at 670-72 (noting that "Nevada brought this suit pursuant to its statutory authority" and finding Nevada to be the real party in interest even though "individual consumers may also benefit from this lawsuit"); U.S. Bank, CV 12-7567-DMG attached as Exhibit C to the Gilchrist Declaration at 45, 49 (noting that the Los Angles City Attorney had express statutory authorization to bring suit in name of the People and "concluding that the People are the real party in interest"); Bristol Myers Squibb Co., CV 12-03256, 2012 WL 4189126, 2012 U.S. Dist LEXIS 133405 at *13 (noting that the California's False Advertising Law's "plain language authorizes the State attorney general (plus any *county counsel*) to pursue actions on *behalf* of the People" and concluding that California is the real party in interest)(emphasis in original); Smartwear Technologies, CV 11-01361, 2012 WL 243343, 2012 U.S. Dist LEXIS 8342 at *6, *8 (S.D. Cal. Jan. 25, 2012) (noting that the "California Corporations Commissioner is authorized to bring an action under California's Corporate Securities law in the name of the People of the State of California" and finding that California is the real party in interest); Universal Syndications, No. CV 09-1186, 2009 WL 1689651, 2009 U.S. Dist. LEXIS 64066 at *6 (noting that the "UCL expressly confers authority upon . . . 'a district attorney'" to bring in action "'in the name of the people of the State of California," and finding that California was the real party in interest in the UCL brought by Santa Cruz's District Attorney);

Check'N Go, No. CV 07-02789, 2007 U.S. Dist. LEXIS 65650 at *16 (noting that "pursuant to California Business and Professions Code §§ 17204 and 17206(2), Dennis Herrera, City Attorney for the City of San Francisco brought this action in the name of the People of the State of California" and finding that California was the real party in interest); Steelcase, 792 F. Supp. at 85-86 (noting that the UCL "expressly authorizes this action to be prosecuted in the name of the People," and finding that California was real party in interest in case brought by Los Angeles District Attorney"); c.f. Northern Trust, No. CV 12-1813-DMG, 2013 U.S. Dist LEXIS 53155 at *7, *11 (noting that although the "UCL authorizes the Los Angeles City Attorney to bring this action 'in the name' of the State," LACERS was the real party in interest because the complaint sought treble damages and $95 million in restitution for LACERS, a private entity).

1. Any Civil Penalties Recovered Will Help California Comply With State And Federal Air Quality Standards.

California has a concrete interest in this matter because any civil penalties recovered will go towards helping California achieve and maintain state and federal air quality standards. Notably, "[s]tates that fail to satisfy the minimum federal air quality standards risk losing valuable federal funding." California v. United States, 215 F.3d 1005, 1007 (9th Cir. 2000) (citing 42 U.S.C. § 7509). California's Legislature recognized it's air pollution problems vary depending upon the region, and created specific air districts to "adopt and enforce rules and regulations to achieve and maintain the state and federal ambient air quality standards in all areas affected by emission sources under their jurisdiction." Cal. Health & Safety Code § 40001(a). In this case, the People are represented by the SCAQMD, which is the air quality district responsible for regulating non-vehicular air pollution and emissions in the parts of Los Angeles, Orange, Riverside, and San Bernardino Counties included in the South Coast Air Basin, as described in California Health and Safety Code Section 40410 ("the Basin"). The Legislature found that the Basin

had "critical air pollution problems caused by the operation of millions of motor vehicles in the basin, stationary sources of pollution," and other issues that "transforms vehicular and nonvehicular emissions into a variety if deleterious chemicals." Cal. Health & Safety Code § 40402(b). The Legislature therefore required that the SCAQMD develop and implement "a comprehensive basinwide air quality management plan" for the "rapid abatement of existing emission levels to levels which will result in the achievement and maintenance of the state and federal ambient air quality standards." Cal. Health & Safety Code § 40402(e).

The California Legislature gave air districts, like the SCAQMD, the power to enforce civil violations of California's Health and Safety Code, and this helps California in its quest to achieve and maintain the state and federal ambient air quality standards. In enforcement cases, the California Legislature mandated that civil penalties "*shall* be assessed and recovered in a civil action brought in the *name of the people of the State of California* by the Attorney General, by any district attorney, or *by the attorney for any [air] district*." Cal. Health & Safety Code § 42403 (emphasis added). This language mirrors the statutory language in numerous cases in which courts found that the State was the real party in interest. Specifically, in Nevada, U.S. Bank, Smartwear Technologies, Bristol Myers, Universal Syndications, Check'N Go and Steelcase, courts found that such language allowed, respectively, the Nevada Attorney General, the Los Angeles City Attorney's Office, the California Corporations Commission, the Santa Clara County Counsel's Office, the Santa Cruz District Attorney's Office, the San Francisco City Attorney's Office, and the Los Angeles District Attorney's Office to bring matters on behalf of their respective states. In contrast, in Lucent, the statutory language shows that DFEH brought the matter on behalf of a single aggrieved individual, and lacked statutory authority to bring the matter on behalf of the state. Also unlike Lucent and Northern Trust, this case is brought purely to protect the public welfare and does not seek restitution for private parties. Moreover, any civil penalties recovered in this

case will go to adopt and enforce rules and regulations to achieve and maintain the state and federal ambient air quality standards. Accordingly, this Court should join the other courts that have considered this issue and reject Exide's argument that a state-created agency that brought a civil penalties complaint on behalf of California's People is the real party in interest, and not California. Rather, this Court should recognize that California's Legislature specifically created the SCAQMD and gave it authority to bring these types of actions, which confirms that California has a concrete interest in this case.

2. The California Health And Safety Code Requires That The Extent of Harm Caused By Exide's Violations Be Considered in Assessing Civil Penalties.

California's Legislature has expressly stated that in determining civil penalties, the "extent of harm caused by the violation" shall be considered. Cal. Health & Safety Code § 42403(b)(1). Indeed, the "extent of harm" is the very first mandatory consideration that must be addressed, and shows that California has a concrete interest here in addressing any harms caused by Exide's violations. Exide's argument that this Court should not consider the information in the Health Risk Assessment ("HRA") fails to recognize that the extent of harm must be considered.[3] The more specific numbers in the HRA simply give background about the harms caused by the violations alleged in the Complaint, and discuss facts that must be considered in this case in assessing civil penalties.

[3] Notably, the tests that disclosed the issues in the HRA were all conducted pursuant to a California law, and the People intend to use those tests to help establish the violations in the first two Causes of Action. Accordingly, those facts are inextricably intertwined with the first two Causes of Action. In addition, the People intend to file an Amended Complaint that will include specific allegations relating to those test results and their interplay with the health issues, making these issues further inextricably intertwined.

Therefore, in assessing civil penalties, it must be considered that the unlawful emissions resulted in approximately 3,668,318 California residents being potentially affected by a cancer burden of 10. Exhibit A to Gilchrist Declaration at 15. This means that an additional 10 people could get cancer because of Exide, and it required that Exide develop a risk reduction plan to lower its cancer burden. Id. at 10. Moreover, it must also be considered that approximately 111,422 residents were exposed to a cancer risk over 10 in a million, and some residents were exposed to a chronic hazard index of 2.9, both of which required that Exide provide those residents with notice of their increased health risks. Id. at 9, 15. These facts are similar to Nevada, in which Nevada's Attorney General had a concrete interest in suing to protect the hundreds of thousands of Nevada homeowners deceived by Bank of America, and U.S. Bank, in which the People had a concrete interest in suing to address the numerous problems arising from the over 1500 foreclosed properties in the City of Los Angeles. Accordingly, California has a concrete interest in this litigation for this reason as well.

3. The Clean Air Act's Language Shows That California Has A Concrete Interest In This Case.

The Clean Air Act's language shows that California has a concrete interest in this litigation, because Congress enacted the Clean Air Act with the "specific belief that the adjudication of actions arising under state and local air quality laws in state and local courts is of paramount importance to the control and abatement of air pollution." California, 215 F.3d at 1013. In California, the Ninth Circuit recognized that the Clean Air Act imposed a burden on states to adopt and enforce regulatory programs to achieve and maintain the federal air quality standards. California, 215 F.3d at 1007 (citing 42 U.S.C. § 7410). The Clean Air Act also gave states a strong incentive to meet those standards, because failure to do so could mean "losing valuable federal funding." California, 215 F.3d at 1007 (citing 42 U.S.C. § 7509). One problem hindering states from meeting that standard was that "federal

compliance with air quality laws was laggard." Id. Congress recognized that the states' interest in air pollution regulation is so strong that it drafted a statute specifically precluding the federal government from removing enforcement matters to federal court. California, 215 F.3d at 1011. In combination with the California's burden to meet the federal standard, and California's financial incentive to meet this burden, Congress's preventing federal facilities from removing matters from California's state courts shows that Congress recognized California, like all states, have a strong interest in meeting the federal air quality standards and in having enforcement matters involving state air quality laws adjudicated in state courts.

The First Circuit has also recognized that states have a strong interest in adjudicating air quality enforcement matters. The First Circuit compared the Clean Air Act's language to the Clean Water Act's language in determining whether state court adjudication was necessary to promote compliance under the Clean Water Act. United States v. Puerto Rico,721 F.2d 832, 837 (1st Cir. 1983). It determined that state court adjudication was not necessary for Clean Water Act enforcement, but found that state court adjudication was key under the Clean Air Act:

> In passing the C[lean] A[ir] A[ct], Congress apparently acted upon the belief that state court adjudication of state law issues was of paramount importance in air pollution control matters; elsewise, Congress would not have consciously foreclosed, at least part-way, the availability of a federal forum. . . . But [] for the C[lean] W[ater] A[ct], however, Congress signaled precisely the opposite intent.

Id. at 839. Notably, when the Ninth and First Circuits found that Congress believed that state court adjudication of state law issues was of paramount importance in air pollution control matters, neither stated that this "paramount importance" only pertained to federal facilities. Indeed, the Congressional history confirms that Congress intended to create a uniform system of enforcement, as shown when the House stated that section 7604(e) was intended to "authorize enforcement against [federal] facilities and persons by the *same means,* process, sanctions*, and*

jurisdiction as for any non-Federal source." 95 Cong. Misc. Docs. 1977; CAA77 Leg. Hist. 37 at *10 (emphasis added). As such, the Ninth and First Circuits have both recognized that having state courts, in this case California courts, adjudicate state law air pollution enforcement issues is of paramount importance, and thereby recognized that California has a concrete interest in this case.

B. California Seeks Unique and Substantial Relief.

Cases under a variety of California statutes recognize that civil penalties reflect a state's interest in the case. "Civil penalties are not damages recovered for the benefit of private parties; they are more akin to a criminal enforcement action and are brought in the public interest." Steelcase, 792 F. Supp. at 86. "All criminal actions are brought in the name of the People." Id. at 86 n.4 (citing Cal. Penal Code § 684). Therefore, actions filed by the People seeking civil penalties are fundamentally "'law enforcement action[s] designed to protect the public and not to benefit private parties.'" State v. Altus Fin., S.A., 36 Cal. 4th 1284, 1306, 32 Cal. Rptr. 3d 498 (2005) (quoting People v. Pacific Land Research Co., 20 Cal.3d 10, 17, 141 Cal. Rptr. 20 (1977). Lucent "did not—and indeed, could not—disturb the longstanding rule that civil penalties reserved for law enforcement are for the benefit of the State regardless of where they are deposited. U.S. Bank, CV 12-7567-DMG, attached as Exhibit C to People's Motion at 48.

Accordingly, courts have routinely rejected the argument that civil penalties that go to a local or specific governmental agency, rather than directly to California's Treasury, make that agency the real party in interest and not California. Id. ("Courts analyzing the UCL's civil penalties scheme have uniformly concluded that such funds benefit the State even where they are deposited in a local rather than a state treasury because the funds are "for the exclusive use . . . for the enforcement of consumer protection laws" and citing two UCL cases reaching the same conclusion); Smartwear Technologies, CV 11-01361, 2012 WL 243343, 2012 U.S. Dist LEXIS 8342 at *7 (S.D. Cal. Jan. 25, 2012) (stating that "civil penalties [for violations of the

California Corporations Code] are punitive and serve a public interest in preventing future fraudulent schemes which further demonstrates the state's substantial interest in the action," and remanding matter back to state court); Bristol Myers, CV 12-03256, 2012 WL 4189126, 2012 U.S. Dist LEXIS 133405 at *10 (N.D. Cal. Sept. 17, 2012)(rejecting claim in case brought under California's False Advertising Law that Santa Clara County was the real party in interest because "the County stands to derive actual benefit from the instant action," and remanding matter to state court). Similarly, here the civil penalties will benefit California because they will go to adopt and enforce rules and regulations to achieve and maintain the state and federal ambient air quality standards.

Exide's argument regarding the availability of civil penalties in a federal forum for citizen suits under 42 U.S.C. § 7604(a) fails to recognize that any civil penalties recovered go to the United States, not the private citizens. While private citizens can bring a citizen suit under 42 U.S.C. § 7604(a), any "[p]enalties received under subsection (a) shall be deposited in a special fund in the United States Treasury for licensing and other services." 42 U.S.C. § 7604(g). These funds are then used to "finance air compliance and enforcement activities." Id. The recovered penalties do not go to the private citizens, rather they go to the United States. Federal civil penalties can be used to address air issues any place throughout the country. In contrast, the civil penalties sought here will go to enforce California's air pollution laws, which shows that this relief will be substantial and unique to California.

The citizen suit structure is similar to California's Unfair Competition Law which allows several public entities to bring a complaint on the People's behalf, but also allows a private person to bring a suit in that person's own name. See Cal. Bus & Prof. Code § 17204. Notably, although private suits can be brought "by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition," they cannot personally recover civil penalties because only

public entities can recover civil penalties under Cal. Bus & Prof. Code § 17206. Compare Cal. Bus & Prof. Code § 17204 with Cal. Bus & Prof. Code § 17206. That these civil penalties are reserved solely for governmental use highlights that civil penalties are quasi-criminal.

Exide failed to address that the civil penalties sought here are unique and substantial to California because they are quasi-criminal and can *preclude California from bringing a criminal prosecution*. Cal. Health & Safety Code § 42400.7. Criminal prosecutions based on violations of California law can give California unique and substantial relief that is not available to the general public, namely, incarceration and criminal penalties. When the California Legislature decides that California's interest will be protected by allowing civil penalties to substitute for incarceration and criminal penalties, then that judgment should be respected, and should be recognized to constitute unique and substantial relief. Here, similar to U.S Bank, Smartwear, and Bristol Myers, the People seek $40,000,000 in civil penalties that will be used to adopt and enforce rules and regulations to achieve and maintain the state and federal ambient air quality standards. These civil penalties can only be sought by designated public entities on behalf of the People. In short, the People seek $40,000,000 in civil penalties that can preclude California from bringing a criminal prosecution, and the People's costs related to investigation, both of which Nevada recognized to be "substantial relief that is available" to the state alone. Nevada, 672 F.3d at 672.

Accordingly, the Complaint in this case seeks relief that is unique and substantial to California. Because California is the real party in interest here, and California is not a citizen of itself, diversity jurisdiction is lacking.

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III.

CONCLUSION

California is the real party in interest here because California has a concrete interest in this litigation, and the People's Complaint seeks relief that is unique and substantial to California. Because California is the real party in interest, and California is not a citizen of itself, diversity jurisdiction is lacking. Accordingly, because Exide cannot meet its burden to show that there is no doubt that jurisdiction is proper, this Court should remand this case back to state court.

DATED: March 31, 2014

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By: /s/
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EXHIBIT D

Causes of Action in Third Amended Complaint

Causes of Action in Third Amended Complaint for
Which Administrative Priority is Sought, In Whole or In Part

Cause of Action	Gravamen	Independent Reason For Disallowance[1]
1st Cause of Action	Operation of equipment without using good operating practices, including from the Petition Date until March 14, 2014	Continuation of pre-petition conduct related to manner of operation of equipment and failure to maintain "negative pressure."
2nd Cause of Action	Operation of equipment without using good operating practices, including from the Petition Date until March 14, 2014	Continuation of pre-petition conduct related to manner of operation of equipment and failure to maintain "negative pressure."
3rd Cause of Action	Improper storage and transportation of lead-contaminated materials, including from the Petition Date and continuing thereafter; submission of false Report for Annual Compliance Certification on April 1, 2014	Continuation of pre-petition conduct related to storage and transportation of chips. New post-petition conduct related solely to reports only relevant if Tri-State rejected.
4th Cause of Action	Failure to properly enclose materials storage and handling areas, including from the Petition Date and continuing thereafter; submission of false Report for Annual Compliance Certification on April 1, 2014; failure to properly enclose battery breaking area from January 18, 2014 until January 20, 2014	Continuation of pre-petition conduct related to storage and transportation of chips. New post-petition conduct related solely to reports only relevant if Tri-State rejected.
5th Cause of Action	Failure to repair materials storage and handling areas, including from the Petition Date and continuing thereafter; submission of false Report for Annual Compliance Certification on April 1, 2014	Continuation of pre-petition conduct related to storage and transportation of chips. New post-petition conduct related solely to reports only relevant if Tri-State rejected.

[1] All causes of action listed here are disallowed under Tri-State as non-compensatory, punitive penalties which are not entitled to administrative expense priority. Pennsylvania Dep't of Envtl. Res. v. Tri-State Clinical Labs., Inc.178 F.3d 685, 698 (3d Cir. 1999).

Cause of Action	Gravamen	Independent Reason For Disallowance[1]
6th Cause of Action	Improper storage of lead-contaminated materials, including from the Petition Date and continuing thereafter; submission of false Report for Annual Compliance Certification on April 1, 2014; improper storage of lead-contaminated materials from September 16, 2013 until September 23, 2013	Continuation of pre-petition conduct related to storage and transportation of chips. New post-petition conduct related solely to reports only relevant if Tri-State rejected.
7th Cause of Action	Improper transportation of lead-contaminated materials, including from the Petition Date and continuing thereafter; submission of false Report for Annual Compliance Certification on April 1, 2014	Continuation of pre-petition conduct related to storage and transportation of chips. New post-petition conduct related solely to reports only relevant if Tri-State rejected.
8th Cause of Action	Failure to properly enclose materials storage and handling areas, including from the Petition Date and continuing thereafter; submission of false Report for Annual Compliance Certification on April 1, 2014	Continuation of pre-petition conduct related to storage and transportation of chips. New post-petition conduct related solely to reports only relevant if Tri-State rejected.
11th Cause of Action	Operation of equipment connected to less-than-fully-operational air pollution control equipment, from July 8, 2013 until July 9, 2013	New post-petition conduct only relevant if Tri-State rejected.
12th Cause of Action	Discharge of lead emissions from September 9, 2013 until September 20, 2013; lead discharges in December 2013; lead discharges from January 2, 2014 until January 9, 2014	New post-petition conduct only relevant if Tri-State rejected.
13th Cause of Action	Failure to reduce amount charged to reverberatory furnace on a number of days in September and October 2013	New post-petition conduct only relevant if Tri-State rejected.
14th Cause of Action	Failure to submit Semi-Annual Monitoring Report from September 1, 2013 until April 1, 2014	New post-petition conduct only relevant if Tri-State rejected.
15th Cause of Action	Failure to submit Semi-Annual Monitoring Report from March 1, 2014 until April 1, 2014	New post-petition conduct only relevant if Tri-State rejected.

Cause of Action	Gravamen	Independent Reason For Disallowance[1]
16th Cause of Action	Failure to submit Annual Compliance Certification Report from March 2, 2014 until April 1, 2014	New post-petition conduct only relevant if Tri-State rejected.
17th Cause of Action	Failure to properly conduct maintenance activity and enclose area where fugitive lead-dust generation potential exists from March 21, 2014 until March 22, 2014	New post-petition conduct only relevant if Tri-State rejected.
18th Cause of Action	Discharge of lead emissions from March 21, 2014 until April 19, 2014	New post-petition conduct only relevant if Tri-State rejected.
19th Cause of Action	Negligent emissions of arsenic, including from the Petition Date and continuing thereafter	Continuation of pre-petition conduct related to manner of operation of equipment and failure to maintain "negative pressure."
20th Cause of Action	Knowing emissions of arsenic, including from the Petition Date and continuing thereafter	Continuation of pre-petition conduct related to manner of operation of equipment and failure to maintain "negative pressure."
21st Cause of Action	Willful emissions of arsenic, including from the Petition Date and continuing thereafter	Continuation of pre-petition conduct related to manner of operation of equipment and failure to maintain "negative pressure."
22nd Cause of Action	Negligent emission of lead from storage and transportation of lead-contaminated plastic chips in leaking van trailers, including from the Petition Date and continuing thereafter	Continuation of pre-petition conduct related to storage and transportation of chips.
23rd Cause of Action	Knowing emission of lead from storage and transportation of lead-contaminated plastic chips in leaking van trailers, including from the Petition Date and continuing thereafter	Continuation of pre-petition conduct related to storage and transportation of chips.
24th Cause of Action	Willful emission of lead from storage and transportation of lead-contaminated plastic chips in leaking van trailers,	Continuation of pre-petition conduct related to storage and transportation of chips.

Cause of Action	Gravamen	Independent Reason For Disallowance[1]
	including from the Petition Date and continuing thereafter	
25th Cause of Action	Negligent emission of lead in violation of ambient air standard from September 9, 2013 until September 20, 2013; in December 2013; from January 2, 2014 until January 9, 2014; and from March 21, 2014 until April 19, 2014	New post-petition conduct only relevant if Tri-State rejected.
26th Cause of Action	Knowing emission of lead in violation of ambient air standard from September 9, 2013 until September 20, 2013; in December 2013; from January 2, 2014 until January 9, 2014; and from March 21, 2014 until April 19, 2014	New post-petition conduct only relevant if Tri-State rejected.
27th Cause of Action	Willful emission of lead in violation of ambient air standard from September 9, 2013 until September 20, 2013; in December 2013; from January 2, 2014 until January 9, 2014; and from March 21, 2014 until April 19, 2014	New post-petition conduct only relevant if Tri-State rejected.