IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: EXIDE TECHNOLOGIES, Reorganized Debtor.[1]	**Chapter 11** **Case No. 13-11482 (KJC)** **Hrg. /Status Conf. Date: February 2, 2016, at 10:00 a.m. Eastern Standard Time** **Related Docket Nos.: 4247, 4414, 4505, 4528, 4558, 4561**

REPLY IN FURTHER SUPPORT OF THE DISTRICT'S MOTION FOR A DETERMINATION THAT IT HAS ALLEGED A PRIMA FACIE CASE FOR APPLICATION OF THE 11 U.S.C. § 1141(d)(6) EXCEPTION TO DISCHARGE

Pursuant to and in accordance with that certain *Order Granting Parties' Agreed Schedule* [Docket No. 4528], the South Coast Air Quality Management District (the "District") hereby replies to the response [Docket No. 4561] (the "Objection") of Exide Technologies ("Exide" or the "Reorganized Debtor") to *[The District's] Motion for a Determination that It Has Alleged a Prima Facie Case for Application of the 11 U.S.C. § 1141(d)(6) Exception to Discharge* [Docket No. 4505] (the "Excepted from Discharge Motion" or "Motion"),[2] which seeks a determination by this Court that the District has alleged a prima facie case for application of the exception to discharge contained in section 1141(d)(6) of the Bankruptcy Code as to the District's allegations against Exide in the District's Third Amended Complaint in the California State Court.

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

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

PRELIMINARY STATEMENT

1. Exide engaged in intentional deception and misrepresentation in its dealings with the District and obtained money as a result. The Excepted from Discharge Motion sets out the specific allegations of fraud and fraud-like conduct in great detail, explaining why Exide's annual Certifications were knowingly false and misleading, *see* Mot. ¶¶ 3–8, 26–31; how Exide concealed test results that it had a duty to disclose, *id.* ¶¶ 9, 32–35; and how Exide manipulated testing conditions to deceive the District as to the actual amount of pollutants being emitted, *see id.* ¶¶ 10–11, 36–39. The Motion further demonstrates that the extraordinary level of Exide's pollution (which single-handedly took the District out of compliance with federal air quality standards, *see id.* ¶ 24) was such that "were it not for Exide's repeated misrepresentations and material omissions …, the District would have sought and obtained an Order for Abatement that would have prohibited Exide from continuing to operate the Vernon facility in violation of District Rules and the conditions specified in its Title V Permit, and no further arsenic and lead emissions violations would have occurred." *Id.* ¶ 52.

2. The civil penalties that Exide will owe to the District upon proof of these allegations will be nondischargeable under section 523(a)(2)(A), as authoritatively construed in *Cohen v. de la Cruz*, 523 U.S. 213, 222, 118 S. Ct. 1212, 1218 (1998). *Cohen*'s interpretation of section 523(a)(2)(A) is pertinent here because the section 1141(d)(6) corporate discharge exception renders nondischargeable "any debt … of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit" such as the District. 11 U.S.C. § 1141(d)(6). Section 523(a)(2)(A) reads:

> § 523 - Exceptions to discharge
>
> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> (1) [Omitted]

> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition ….

Read together, sections 1141(d)(6) and 523(a)(2)(A) evidence a Congressional intent that corporations may not use the chapter 11 discharge to insulate themselves from the consequences of fraudulent conduct vis-à-vis a governmental unit.

3. The preceding summarizes the District's prima facie case, which is what the parties agreed the District would show in the Excepted from Discharge Motion. *See Order Resolving the Reorganized Debtor's Motion [to Enforce]* [Docket No. 4414] ¶ 3. The parties agreed to that narrow prima facie inquiry at the hearing on July 7, 2015, following the Court's observation that "normally what happens is the state court action is either concluded or in process far enough along, and then the bankruptcy gets filed, and then the Court's asked to determine [whether the state court action] fall[s] within one of the nondischargeability categories." July 7, 2015 Tr. at 25:21–25. In response to Exide's expressed concern that it did not want undergo the expense of a state court trial before testing the legal viability of the District's claims for nondischargeability, *see id*. at 16:7–17:20, the parties agreed to the Court's suggestion that it may be appropriate to "determine first whether the nature of these claims sound in fraud," *id*. at 26:3–4, so that Exide would not have to await full adjudication in the California State Action. The Court subsequently directed the District to file the Excepted from Discharge Motion "to demonstrate a prima facie case regarding its alleged claims and application of the exception to discharge contained in 11 U.S.C. § 1141(d)(6)." *Order Resolving the Reorganized*

Debtor's Motion [to Enforce] [Docket No. 4414] ¶ 3.[3]

4. Nowhere in the Objection does Exide deny that the District's allegations of knowingly false Certifications, concealed test results, and manipulated testing conditions "sound in fraud," July 7, 2015 Tr. at 26:3–4, and are pled with sufficient particularity, *cf.* Fed. R. Civ. P. 9(b). That is the hurdle that Exide insisted the District jump through, and the District has done so. Exide instead offers four legal arguments in an effort to avoid the consequences of its fraud, none of which has merit:

5. ***Alleged Inapplicability of Section 523(a)(2)***: Exide first contends that the civil penalties at issue in the California State Action cannot come within the section 523(a)(2) discharge exception applicable to debts arising from fraud because they ***also*** come within the section 523(a)(7) discharge exception, which applies to "fine[s], penalt[ies], or forfeiture[s] payable to and for the benefit of a governmental unit, … not [as] compensation for actual pecuniary loss …." *See* Obj. ¶¶ 11–19. That argument fails because section 523(a)'s various exceptions are not mutually exclusive. A debt may be nondischargeable under section 523(a)(7) and ***also*** be nondischargeable under section 523(a)(2). *See infra* ¶¶ 12–14.

6. Congress's decision not to incorporate the section 523(a)(7) exception into section 1141(d)(6) is not equivalent to a Congressional decision to discharge all fines and penalties, even

[3] For this reason, the Objection's assertion that the District "seeks an advisory determination that regulatory claims (if any) on which it may prevail (or not) years from now after trial on the merits in California state court are nondischargeable in, and rode through, Exide's bankruptcy confirmation in 2015[,]" Obj. ¶ 1, is beside the point. The determination the District seeks is precisely the determination that Exide insisted on before the California State Action should be permitted to proceed. If Exide wishes to dispense with what it now calls an "advisory determination," *id.*, the District is agreeable to resuming litigation in the California State Court – after which, as the District has always said, it will return to this Court for a determination of whether any part of the debt evidenced by the state court's judgment "satisfies the elements under section 523(a)(2)(A)," which the parties agree "is a bankruptcy-specific analysis reserved for the bankruptcy courts." Obj. ¶ 29.

those that arise from fraud and are thus independently excepted from discharge by virtue of section 523(a)(2)(A) (as authoritatively construed by *Cohen*). Put another way, Exide's debt to the District is nondischargeable because it is based on Exide's conduct, and the happenstance that the debt could also be nondischargeable in the case of an individual debtor because that conduct also gave rise to a noncompensatory fine owed to a governmental unit is legally irrelevant. *See infra* ¶¶ 15–21.

7. ***No Fraud Claim Denominated as Such***: Next, Exide observes that there is no specific count in the California State Action denominated "Fraud," "False Pretenses," or the like, and argues that section 523(a)(2)(A) cannot apply to the mere emission of pollutants. *See* Obj. ¶¶ 20–30. This argument misidentifies the gravamen of the conduct (the knowingly false Certifications, concealment of test results, and manipulation of testing conditions) that implicates the section 523(a)(2)(A) discharge exception. A lawsuit can give rise to a debt that is nondischargeable under section 523(a) even if the judgment in the lawsuit does not on its face establish the elements of a section 523(a) discharge exception, so long as the discharge exception is ultimately proved to the bankruptcy court. *See infra* ¶¶ 22–26. Thus, for example, a judgment arising out of an automobile accident can give rise to a debt that is nondischargeable under section 523(a)(9) ("for death or personal injury caused by the debtor's operation of motor vehicle … if such operation was unlawful because the debtor was intoxicated …") even if the underlying personal injury complaint pleads only negligence (without ever mentioning intoxication), so long as subsequent proceedings in the bankruptcy court establish that the debtor was, in fact, intoxicated.

8. ***Exide's Misreading of* Cohen**: Exide's third argument rests on a misreading of *Cohen*. *See* Obj. ¶¶ 31–45. The pertinent point heading (Point III of the Objection) asserts that

"the District has failed to show that Exide obtained a debt for money by fraud" (capitalization omitted), and Exide argues that "it is the ***indebtedness*** owed for money, property, services, or credit that must be obtained by fraud. Here, there is no such indebtedness incurred by fraud." Obj. ¶ 34 (emphasis in original). The District does not contend that Exide "obtained a debt." The nondischargeable debt at issue here is the ultimate money judgment that will be entered against Exide if and when the District prevails in the California State Action – just as the debt in *Cohen* was the dishonest debtor's indebtedness to his creditors for punitive damages awarded by a court on account of the debtor's mendacity.[4]

9. Under a proper application of *Cohen* and section 523(a)(2), Exide's liability to the District on account of civil penalties will be excepted from discharge to the extent it "arises from" or is "traceable to" fraud. There is no separate requirement that "some portion of [the District's] claim must have been directly transferred from the [District] to [Exide]." *Pleasants v. Kendrick (In re Pleasants)*, 219 F.3d 372, 375 (4th Cir. 2000). Had Congress wished to draft the statute to apply only to what may be termed "bilateral" frauds, it certainly could have done so. It did not. *See infra* ¶¶ 27–33.

10. ***Timeliness***: Finally, Exide closes with a statute of limitations argument, *see* Obj. ¶¶ 46–48, that is contrary to the text of the statute and rests entirely on a subsequently-reversed bankruptcy court decision. The correct analysis is found in the district court's decision reversing the bankruptcy court in that case. *See infra* ¶¶ 34–36.

---

[4] *See Cohen*, 523 U.S. at 218, 118 S. Ct. at 1216 ("[A]n obligation to pay treble damages satisfies the threshold condition that it constitute a 'debt.' A 'debt' is defined in the Code as 'liability on a claim,' a 'claim' is defined in turn as a 'right to payment,' and a 'right to payment,' we have said, 'is nothing more nor less than an enforceable obligation.' … An award of treble damages is an 'enforceable obligation' of the debtor, and the[creditor has a corresponding 'right to payment.'" (internal citations omitted)).

ARGUMENT

A. Section 523(a)(2) Applies to Noncompensatory Penalties Arising Out of Fraud

11. Exide's primary argument is that "the section 523(a)(2)(A) discharge exception incorporated into section 1141(d)(6) is not available to the District" because noncompensatory penalties owed to a governmental unit are covered by "[a] different statute, section 523(a)(7)." Obj. ¶ 11. This argument fails because the section 523(a) discharge exceptions (many of which can, depending on the facts of a given case, overlap) are not mutually exclusive. *See infra* ¶¶ 12–14. Moreover, Congress's decision not to incorporate the section 523(a)(7) exception into section 1141(d)(6) is not equivalent to a Congressional decision to discharge all fines and penalties, even those that arise from fraud and are independently excepted from discharge by virtue of section 523(a)(2)(A) (as authoritatively construed by *Cohen*). *See infra* ¶¶ 15–21.

1. The Section 523(a) Discharge Exceptions Are Not Mutually Exclusive

12. Nothing in section 523(a) indicates that its 19 enumerated discharge exceptions are mutually exclusive such that a particular debt that is nondischargeable under section 523(a)(7) cannot ***also*** be nondischargeable under section 523(a)(2). *See, e.g., Klause v. Thompson (In re Klause),* 181 B.R. 487, 494 (Bankr. C.D. Cal. 1995) ("[T]here is no statutory prohibition under § 523 that requires a creditor to invoke only *one* of the various exceptions to discharge."); *Casey v. Transport Life Ins. Co. (In re Dorsey),* 162 B.R. 150, 156 (Bankr. N.D. Ill. 1993) ("There is no provision in the statutory text of section 523(a) which effectively allows a creditor to invoke only one of the various exceptions to discharge to the exclusion of all others …."); *see also Printy v. Dean Witter Reynolds, Inc.*, 110 F.3d 853, 857 (1st Cir. 1997) ("There is no indication in § 523 that Congress intended these two sections[, (a)(2)(A) and (a)(6),] to be mutually exclusive, nor does the legislative history of the statute so suggest.").

13. Many cases have held that particular conduct by a debtor may give rise to a debt

that falls within more than one of the section 523(a) exceptions to discharge. *See, e.g.*, *Ferris v. Stokes (In re Stokes)*, 995 F.2d 76, 77 (5th Cir. 1993) (per curiam) ("[T]he same conduct can give rise to a cause of action under both section 523(a)(2)(A) and section 523(a)(6)"); *Williams v. Sato (In re Sato)*, 512 B.R. 241, 254 (Bankr. C.D. Cal. 2014) (debt nondischargeable under § 523(a)(2)(A) and (a)(19)); *Old Republic Nat'l Title Ins. Co. v. Levasseur (In re Levasseur)*, 482 B.R. 15, 30, 32 (Bankr. D. Mass. 2012) (debt nondischargeable under § 523(a)(2)(A) and (a)(6)); *Cardarelli v. Siadatan (In re Siadatan)*, 2012 WL 8143364, at *17, 2012 Bankr. LEXIS 6121, at *45 (Bankr. E.D. Cal. 2012) ("Intentional fraud is actionable under Section 523(a)(6), even when Section 523(a)(2) also applies."); *Cody Farms, Inc. v. Deerman (In re Deerman)*, 482 B.R. 344, 376 (Bankr. D.N.M. 2012) (debt nondischargeable under § 523(a)(4) and (a)(6)); *Lanier v. Futch (In re Futch)*, 2011 WL 576071, at *1, 2011 Bankr. LEXIS 495, at *3 (Bankr. S.D. Miss. 2011) (debt nondischargeable under § 523(a)(2)(A) and (a)(4)); *Waknin v. Teta (In re Teta)*, 2011 WL 2435948, at *17, 2011 Bankr. LEXIS 2347, at *58 (Bankr. D. Colo. 2011) (debt nondischargeable under §§ 523(a)(2)(A), (a)(4), and (a)(6)); *Sierra Inv. Assoc. ex rel. Willow Bend Bancshares, Inc. v. Tomlin (In re Tomlin)*, 2005 WL 6440629, at *15, 2005 Bankr. LEXIS 3220, at *50–51 (Bankr. N.D. Tex. 2005) (debt nondischargeable under § 523(a)(4) and (a)(11)); *KMK Factoring L.L.C. v. McKnew (In re McKnew)*, 270 B.R. 593, 646 (Bankr. E.D. Va. 2001) ("[The] indebtedness constitutes fraud pursuant to § 523(a)(2), embezzlement pursuant to § 523(a)(4) and willful and malicious injury pursuant to § 523(a)(6) ….").

14. The cases cited in the Objection are not to the contrary. Most involve claims that easily fall into two separate subsections of section 523(a), both of which apply and either of which would suffice. Thus, for example, the restitutionary component of the government's claim to recoup overpaid benefits in *United States v. Horras (In re Horras)*, 443 B.R. 159 (8th Cir.

B.A.P. 2011), clearly fell within section 523(a)(2), and the punitive component of the claim clearly fell within section 523(a)(7). That does not mean that the punitive portion of the government's claim did not ***also*** fall within section 523(a)(2) by virtue of *Cohen* – it did, even under Exide's misinterpretation of *Cohen*.[5] But given the clear applicability of section 523(a)(7), there was no reason for the parties to argue the applicability of section 523(a)(2) in light of *Cohen*. The same is true of *People v. Hatcher (In re Hatcher)*, 111 B.R. 696, 700–01 (Bankr. N.D. Ill. 1990), *In re O'Brien*, 110 B.R. 27, 31 (Bankr. D. Colo. 1990), *Winters v. United States (In re Winters)*, 2006 WL 3833921, at *6, 2006 Bankr. LEXIS 3678, at *24–25 (Bankr. W.D. Tenn. 2006), *vacated*, 2007 WL 1149952, 2007 Bankr. LEXIS 1382 (Bankr. W.D. Tenn. 2007), and the dicta in *In re Adamic*, 291 B.R. 175, 180 (Bankr. D. Colo. 2003) (which concerned a stay violation, not dischargeability).[6]

[5] The overpaid beneficiary in *Horras* personally received at least $1 in overpaid benefits from the creditor, which satisfies Exide's unsupported theory that *Cohen* requires "[r]eceipt of money *from the party that was defrauded* which gives rise to a nondischargeable debt *to that party*." Obj. ¶ 42 (some emphasis omitted). *See infra* ¶¶ 27–33.

[6] Exide's reliance on *United States v. WRW Corp.*, 986 F.2d 138, 144 (6th Cir. 1993), is also misplaced, because in that case the debtor merely asserted without elaboration or argument that multiple provisions of section 523(a) applied, without articulating how the fine or penalty in question was traceable to fraud (it was not). Nor does *United States SEC v. Bocchino (In re Bocchino)*, 504 B.R. 403 (Bankr. M.D. Pa. 2013), help Exide's position. *Bocchino* (which involved an individual debtor) does not cite or discuss the Supreme Court's decision in *Cohen*, and its entire analysis consists of two sentences unsupported by any case law. *See* 504 B.R. at 408. Finally, *Michigan Unemployment Insurance Agency v. Andrews (In re Andrews)*, 2015 WL 5813418, 2015 Bankr. LEXIS 3372 (Bankr. E.D. Mich. 2015), which also involved an individual debtor, rests on a misconstruction of dicta in *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 110 S. Ct. 2126 (1990), a case that Congress subsequently overruled by statute. *See* Criminal Victims Protection Act of 1990, Pub. L. 101-581, § 3, 104 Stat. 2865 (superseding *Davenport* with 11 U.S.C. § 1328(a)(3)). *Davenport* concerned whether a restitution obligation was a "debt"; it did not involve overlapping exceptions to discharge. *Davenport*, 495 U.S. at 555, 110 S. Ct. at 2129.

2. Congress's Decision Not to Make a Particular Discharge Exception Applicable in Certain Instances Does Not Mean That All Liabilities That Fall Within the Non-Applicable Exception Are Affirmatively Discharged

15. Exide's argument that the penalties at issue here cannot be excepted from discharge because they fall within the non-applicable section 523(a)(7) exception accords significance to what Congress did ***not*** do (*i.e.*, it did not incorporate the section 523(a)(7) exception into section 1141(d)(6)) at the expense of what Congress ***did*** do when it incorporated the section 523(a)(2) exception into section 1141(d)(6). *Cf. Royal Am. Oil & Gas Co. v. Szafranksi*, 147 B.R. 976, 982 (Bankr. N.D. Okla. 1992) ("Negative inference as a method of statutory interpretation tends to make law out of what the legislature has *not* said. This is risky; such 'interpretation' can easily become interpolation."). At bottom, Exide reads Congress's non-incorporation of a particular discharge exception (here, section 523(a)(7)) as an affirmative command that anything that falls within the non-incorporated exception is affirmatively discharged – even if the same debt also falls within section 523(a)(2)(A), which is applicable to corporate debtors (so long as the debt is to a governmental unit).

16. The effect of Exide's construction would be to impute a Congressional intent that exempts from nondischargeability in a ***corporate chapter 11 case*** any fraud debt that happened to arise under facts that coincidentally also triggered one of the other 18 subsections of section 523 that apply to ***individual chapter 7 debtors***. There is not a shred of evidence that Congress intended such a peculiar and unprincipled outcome. Rejecting such an argument, the Seventh Circuit stated:

> The bankruptcy judge's unstated premise must have been that different parts of the Bankruptcy Code do not address the same subject (or the same economic transactions), so that if a given subsection does not protect a creditor from discharge, then no other subsection does so. That's an implausible view of the legislative process. Different provisions added at different times may intersect, and courts endeavor to prevent overlap from causing accidental destruction. Section 523(a)(13) makes double sure that

> restitution awarded as part of a federal criminal judgment cannot be discharged in bankruptcy but does not imply, for example, that civil fraud judgments that might have been made the object of criminal restitution, but weren't, now may be discharged despite § 523(a)(2)(A). And if § 523(a)(13) does not alter the scope of the fraud exception to discharge, or the larceny exception in § 523(a)(4), it does not contract the scope of § 523(a)(7) either.

In re Towers, 162 F.3d 952, 954 (7th Cir. 1998).

17. Stated slightly differently, Congress's decision not to incorporate a blanket exception in section 1141(d)(6) for noncompensatory penalties owed to a governmental unit does not mean that every noncompensatory penalty owed to a governmental unit is affirmatively discharged. It simply means that the non-incorporated exception is irrelevant to the scope of the discharge. Whether a particular debt comes within the scope of a discharge exception that is inapplicable does not matter. What matters is whether that particular debt comes within the scope of a discharge exception that ***is*** applicable.

18. Consider how the analysis would proceed if section 523(a) did not exist, and instead each Bankruptcy Code chapter's discharge provision (*i.e.*, 11 U.S.C. §§ 727, 1141, 1228, and 1328) separately set out only those discharge exceptions applicable to that particular chapter. Every debt excepted from a chapter 7 discharge would be separately set out in section 727, without cross-reference to chapter 5. The chapter 7 discharge would specifically except debts arising from fraud (what is now section 523(a)(2)(A)) and debts for noncompensatory fines and penalties owed to a governmental unit (what is now section 523(a)(7)), among others. The chapter 11 discharge, by contrast, would specifically except only debts arising from fraud. No court construing such a statute would give dispositive weight to the absence in section 1141 of an exception for noncompensatory fines and penalties owed to a governmental unit. Yet that is the construction Exide seeks, solely on the happenstance of 19 particular discharge exceptions being grouped together in chapter 5 and incorporated by reference into chapters 7, 11, 12, and 13,

rather than specifically set out in only the chapter(s) to which each exception applies.

19. Exide's theory regarding the interplay between section 523(a)(7) and section 523(a)(2) is also inconsistent with the Supreme Court's decision in *Cohen*. The genesis of the dispute in *Cohen* was a regulatory action by a local governmental unit: "In 1989, the Hoboken Rent Control Administrator determined that [Mr. Cohen] had been charging rents above the levels permitted by the [city's rent control] ordinance, and ordered him to refund to the affected tenants, who [would become creditors in Mr. Cohen's bankruptcy case], $31,382.50 in excess rents charged." 523 U.S. at 215, 118 S. Ct. at 1215. After Mr. Cohen filed for bankruptcy, the tenants filed an adversary proceeding and ultimately were awarded treble damages of $94,147.50 (*i.e.*, three times the excess rent ordered refunded by the governmental unit) as a penalty. 523 U.S. at 215–16 , 118 S. Ct. at 1215. At the Supreme Court, there was no question that Mr. Cohen's liability in respect of the $31,382.50 in actual rent overcharges was nondischargeable under section 523(a)(2)(A). The only issue was whether the penalties ($62,765) were also nondischargeable under section 523(a)(2)(A).

20. The statutory construction argument that Exide is making here would have dictated an entirely different outcome in *Cohen*. Using Exide's negative inference analysis, the Supreme Court should have ruled that Congress's decision to draft the section 523(a)(7) exception narrowly, to cover only fines owed ***to a governmental unit***, precluded those fines from being nondischargeable under section 523(a)(2). Accordingly, Exide's argument would go, because the penalties imposed on Mr. Cohen were owed to individual tenants (not to the Hoboken Rent Control Administrator), Mr. Cohen should have been affirmatively entitled to discharge those penalties. But that is not how the Supreme Court analyzed the issue, and nothing in *Cohen* suggests that the Court's expansive interpretation of section 523(a)(2) to include

penalties flowing from fraudulent conduct would not have applied had the tenant creditors of Mr. Cohen been a governmental unit like the Hoboken Rent Control Administrator.

21. At its core, Exide's argument that sections 523(a)(2) and 523(a)(7) are somehow mutually exclusive is less of a legal argument (or at least not a ***good*** legal argument, given the overwhelming weight of authority discussed above, *see supra* ¶¶ 12–14) than a policy argument that Congress made a mistake when it enacted the section 1141(d)(6) corporate discharge exception in 2005. Exide relies heavily on academic commentary critical of the corporate discharge exception, *see, e.g.*, Obj. ¶¶ 14 n.6 (citing Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*, 13 Am. Bankr. Inst. L. Rev. 757 (2005)); 16 nn.12–13 (same); 19 n.18 (citing William Hildbold, *Will Section 1141(d)(6) of the Bankruptcy Code Destroy Corporate Chapter 11 Reorganizations by Rendering SEC Claims Non-Dischargeable?*, 17 Am. Bankr. Inst. L. Rev. 551 (2009)), and litters its Objection with policy arguments properly directed to Congress, *see, e.g.*, Obj. ¶ 18 n.16 (arguing that "Exide could have changed to a sale structure, leaving the corporate discharge exception unavailable to the District"). The fact remains that Congress enacted section 1141(d)(6), and thus clearly intended to render nondischargeable certain debts owed to governmental units like the District. The only question for the Court in connection with this Motion is whether the District has alleged a prima facie case that a future judgment against Exide in the California State Action is included within the exception set out in section 1141(d)(6).

B. Elements of a Nondischargeability Claim Need Not Be Pled in a State Court Complaint for the Resulting Judgment to be Nondischargeable

22. Exide argues that "none of the District's claims sound in false pretenses, false misrepresentation, or fraud, and none of the statutes on which the claims are based require a showing of false pretenses, false misrepresentation, or fraud in order for the District to prevail in

its California State Action." Obj. ¶ 21; *see also id*. ¶ 23 ("Exide's state of mind, even at the highest level of intent (*i.e.*, knowingly, willfully or intentionally emitting lead and arsenic in excess of regulation standards), does not rise to the heightened scienter of specific intent to create false pretenses, make a false representation, or commit fraud.").

23. Exide misunderstands the relationship between the California State Action (which will determine whether Exide violated emissions standards, and if so, how much it owes) and this Court's ultimate determination of nondischargeability (which will decide whether the judgment rendered by the California State Action comes within the section 1141(d)(6) discharge exception). Exide's state of mind in knowingly, willfully, or intentionally emitting lead and arsenic in excess of regulation standards is relevant to the California State Action. The scienter necessary to implicate section 523(a)(2) will be relevant when the District returns to this Court for a determination of dischargeability. The facts marshalled to prove these distinct issues may overlap, but the inquiries are nonetheless distinct.

24. There is no requirement that the Third Amended Complaint include an express cause of action for fraud in order for the District to invoke section 523(a)(2)(A). Indeed, even if "an action may seem to be non-fraud-based for state purposes, this does not foreclose a later determination by the bankruptcy court that what occurred was fraudulent and therefore nondischargeable." *Banks v. Gill Distrib. Ctrs., Inc. (In re Banks)*, 263 F.3d 862, 869 (9th Cir. 2001). *See, e.g.*, *Crowe v. Moran (In re Moran)*, 413 B.R. 168, 182–83 (Bankr. D. Del. 2009) (finding plaintiff-homeowners stated a valid claim for relief under section 523(a)(2)(A) where nondischargeability claim arose from a breach of contract and breach of trust action against debtor-contractor); *Digital Commerce, Ltd. v. Sullivan (In re Sullivan)*, 305 B.R. 809, 824 (Bankr. W.D. Mich. 2004) (concluding a debt arising from the debtor's usurping of a corporate

opportunity was nondischargeable under section 523(a)(2)(A)). *Cf. Hendry v. Hendry (In re Hendry),* 428 B.R. 68, 81 (Bankr. D. Del. 2010) ("[A] debt acquired as a direct result of a debtor's planned deceit is within the ambit of section 523(a)(2)(A), irrespective of whether the debt was incurred by conduct that meets the technical requirements of common law fraud. To find otherwise rewards fraudsters who carry out their misdeeds through indirect, yet equally deceptive, means and does violence to the policy behind section 523(a)(2)(A).").

25. The Third Amended Complaint and the Excepted from Discharge Motion detail how and why "Exide: (i) falsely certified under penalty of law that it was in compliance with its [Title V Permit]; (ii) deliberately concealed test results that would have exposed the scope of the problem; and (iii) manipulated testing conditions to make Exide's pollution appear less extensive than it actually was." Mot. ¶ 2. Nowhere does the Objection contend that these allegations are inadequately specific, *cf.* Fed. R. Civ. P. 9(b), or that they do not describe the kind of "false pretenses, a false representation, or actual fraud," 11 U.S.C. § 523(a)(2)(A), referenced in the statute. Moreover, the parties are in agreement that "[w]hether or not a debt satisfies the elements under section 523(a)(2)(A) is a bankruptcy-specific analysis reserved for the bankruptcy courts." Obj. ¶ 29. That is why the District has always stated that it will return to this Court for a determination of nondischargeability if and when the District prevails in the California State Action. But all that is at issue on this Motion is the narrow question of whether the District has made a prima facie case for application of the discharge exception. It has.

26. Exide's reliance on *Ghomeshi v. Sabban (In re Sabban),* 600 F.3d 1219 (9th Cir. 2010), and *Stewart Title Guaranty Co. v. McCarthy (In re McCarthy),* 473 B.R. 485 (Bankr. D. Mass. 2012), *see* Obj. ¶¶ 24–26, is misplaced. *Sabban* involved a state court judgment that contained a finding that the creditor had suffered no actual damages or injuries traceable to any

deception or misrepresentation; he merely used the services of a non-licensed contractor, which under state law entitled him to a return of all funds paid to the contractor. *See* 600 F.3d at 1221 ("Liability under § 7031(b) requires only that compensation have been paid to an unlicensed contractor. Fraud and actual harm are irrelevant." (citation omitted)). The Ninth Circuit held that the state court finding effectively precluded the creditor from arguing that the damages that were awarded were nonetheless "traceable" to fraud under *Cohen*. *Id.* at 1224. Similarly, in *McCarthy*, the bankruptcy court rejected application of section 523(a)(2)(A) because the debt had nothing to do with the debtor's alleged misrepresentation that he maintained malpractice insurance, but rather was "based on [the debtor's] negligence in issuing the title insurance policy or his obligation to indemnify [the creditor]." 473 B.R. at 493–94 (concluding also that plaintiff failed to show fraudulent intent and reliance). The District, by contrast, has alleged a debt that would not have arisen absent Exide's misrepresentation: had Exide not filed false Certifications, concealed test results that it was obligated to provide, or manipulated testing conditions, the District would have obtained an order for abatement, which would have prevented Exide from unlawfully operating the Vernon facility and thus would have prevented the accrual of civil penalty liability.

C. Exide Misinterprets *Cohen*

27. Exide's third argument rests on a claim that section 523(a)(2)(A) requires "[r]eceipt of money ***from the party that was defrauded*** which gives rise to a nondischargeable debt ***to that party***" (*i.e.*, what might be termed a bilateral fraud). Obj. ¶ 42 (some emphasis omitted). The statute certainly encompasses bilateral frauds, but it is not limited to bilateral frauds. Indeed, the Third Circuit's recent decision in *United States SEC v. Bocchino (In re Bocchino)*, 794 F.3d 376 (3d Cir. 2015), which applied section 523(a)(2)(A) in the context of a stockbroker's liability to investors who followed his reckless advice, is instructive. There is no

indication in *Bocchino* that the defrauded investors directly paid any money to the stockbroker personally; rather, they made investments based on the advice of a stockbroker who was presumably compensated by the brokerage firm that employed him. *See* 794 F.3d at 378–79. Yet a civil judgment in an action brought by the SEC (which had not itself been swindled by the stockbroker) was held nondischargeable in the stockbroker's bankruptcy case. *Id*. at 377.

28. Other cases are in accord, including *Pleasants*, 219 F.3d 372, which rejected the argument "that § 523(a)(2)(A)'s 'obtained by' language requires that some portion of a creditor's claim must have been directly transferred from the creditor to the debtor." *Id*. at 375. The debtor in *Pleasants* (who had misrepresented himself as an architect and caused extensive damage to a home) argued that his debt to the homeowners could not be excepted from discharge under section 523(a)(2)(A) because "none of the [homeowners'] claim was for consideration directly transferred to [the debtor]. Rather, the [homeowners'] claim included only amounts paid by the [homeowners] to third parties, such as payments to the architect and builder hired to correct and complete the project." *Id*. Judge Wilkinson's opinion for the Fourth Circuit relied upon *Cohen* to conclude that the statutory exception to discharge "is broad enough to encompass a situation in which no portion of a creditor's claim was literally transferred to the fraudulent debtor." *Id*. *See also Floyd v. Royster (In re Royster)*, 408 B.R. 449, 452 (Bankr. E.D.N.C. 2009) (following *Pleasants* by holding nondischargeable a fraud verdict against the manager of a car dealership in the manager's personal bankruptcy case, even though the creditor had purchased the car directly from, and paid all consideration directly to, the dealership).[7]

[7] Exide's reliance on *Nunnery v. Rountree (In re Rountree)*, 478 F.3d 215 (4th Cir. 2007), is misplaced. *Rountree* followed *Pleasants*, and the *Rountree* court was careful to emphasize that its holding should not be read as limiting the application of Section 523(a)(2) to bilateral frauds. *See id.* at 223 (Wilkinson, J., concurring) ("As *Pleasants* illustrates, to be

(footnote continued)

29. Exide's crimped reading of section 523(a)(2)(A) (limiting the statute to bilateral fraud) could work only by adding words to the statute that are not there. The statute that Exide envisions would read:

> § 523 - Exceptions to discharge
>
> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> (1) [Omitted]
>
> (2) **to a creditor** for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained **from that creditor** by—
>
> (A) false pretenses, a false representation, or actual fraud **as to that creditor**, other than a statement respecting the debtor's or an insider's financial condition ….

Exide may find a slightly revised statute more to its taste, but "[t]here is no reason to suspect that Congress did not mean what the language of the statute says." *United States v. Ron Pair Enters.*, 489 U.S. 235, 246, 109 S. Ct. 1026, 1033 (1989).

30. *Cohen* explains that a nondischargeable "debt for" money, property, or services obtained by fraud is not limited to the debtor's liability to a creditor for the value of particular money, property, or services that the debtor fraudulently obtained from that particular creditor. *See* 523 U.S. at 220–22, 118 S. Ct. at 1217–18. Rather, "'debt for'" is best read as "'debt as a result of,'" a "'debt with respect to,'" or a "'debt by reason of'" the debtor's fraudulent misconduct. *Id*. Thus, the legal consequence of the *Cohen* landlord's violation of the rent control ordinance – an award of treble damages – was excepted from discharge even though the award of treble damages was not "fraudulently obtained by the debtor," 523 U.S. at 222, 118 S. Ct. at 1218 (it was duly awarded by the bankruptcy court), and even though the quantum of

---

nondischargeable, money need not pass directly to the debtor from the creditor: the statutory language simply does not add that qualification." (citing 11 U.S.C. § 523(a)(2)(A))).

damages far exceeded the amount of any overcharges:

> The most straightforward reading of § 523(a)(2)(A) is that it prevents discharge of "any debt" respecting "money, property, services, or ... credit" that the debtor has fraudulently obtained, including treble damages assessed on account of the fraud.
>
> * * *
>
> If, as petitioner contends, Congress wished to limit the exception to that portion of the debtor's liability representing a restitutionary – as opposed to a compensatory or punitive – recovery for fraud, one would expect Congress to have made unmistakably clear its intent to distinguish among theories of recovery in this manner. *See, e.g.*, § 523(a)(7) (barring discharge of debts "for a fine, penalty, or forfeiture payable to ... a governmental unit," but only if the debt "is not compensation for actual pecuniary loss").

523 U.S. at 218 & 222, 118 S. Ct. at 1212 & 1218 (ellipses in original).

31. The Supreme Court never asked whether each overcharged tenant in *Cohen* personally paid the illegal rent charged by the landlord (as opposed to, for example, payment by a tenant's parents, reimbursement by a corporate tenant's client, etc.). In fact, the fraudulent behavior in *Cohen* was the landlord's years-long willful ignorance of the applicable rent control ordinance – not the mere act of charging more in rent than the law allows (which is illegal but not necessarily fraudulent), or even a direct swindling of the tenants: "[T]he parties stipulated that Cohen made no representations that the rents he charged were the legal rents under the City of Hoboken rent leveling ordinance [and] there were no discussions, at the time the apartments were rented, between [the debtor] and any of the [tenants] about rent control." *De La Cruz v. Cohen (In re Cohen)*, 185 B.R. 171, 176 (Bankr. D.N.J. 1994), *aff'd*, 191 B. R. 599 (D.N.J. 1996), *aff'd*, 106 F.3d 52 (3rd Cir. 1997), *aff'd*, 523 U.S. 213, 118 S. Ct. 1212 (1998). On these facts, there is no reason to believe that privity of payment was an unstated but nonetheless outcome-determinative factor in *Cohen*.

32. Additionally, *Cohen*'s two hypotheticals illustrate why the Court's holding is

inconsistent with Exide's argument. First, "if a debtor fraudulently represents that he will use a certain grade of shingles to roof a house and is paid accordingly, the cost of repairing any resulting water damage to the house" is nondischargeable, even though it is far in excess of (and bears no relation to) the price paid to the debtor for the roof work. 523 U.S. at 222, 118 S. Ct. at 1218. The key is the debtor's deceitful misrepresentation, not whether there is privity of contract between the victim of the water damage and the person who paid the debtor for the roof work. Similarly, "a debtor who fraudulently represents to aircraft manufacturers that his steel bolts are aircraft quality and obtains sales of $5,000 for the bolts" cannot discharge the resulting multi-million-dollar liability if the airplane crashes as a result of the shoddy bolts. *Id*. (internal quotation marks and alterations omitted). Nowhere does the Court suggest that just one creditor (the party that actually paid $5,000 for the bolts) will have a nondischargeable claim arising from the aircraft accident, and that everyone else is out of luck.

33. Exide's attempt to explain away *Cohen*'s illustrative examples is revealing. By Exide's idiosyncratic reading, "the roofer owes [the cost of the shingles] back to the purchaser of the shingles," and "the bolt [seller] owes [the cost of the bolts] back to the purchaser" – and then, merely as an add-on, "*Cohen* allows the purchaser to add consequential damages, *e.g.*, the water damage caused by the faulty shingles … [and] consequential damages resulting from the airplane crash." Obj. ¶ 42. This explanation is creative, but it has no grounding in the text of *Cohen* or in the statute as Congress drafted it. Indeed, when Congress wants to limit nondischargeability to only certain creditors (as opposed to certain debts), it drafts the exception accordingly. *See, e.g.*, 11 U.S.C. §§ 523(a)(7) ("fine, penalty, or forfeiture" is only nondischargeable if "payable to and for the benefit of a governmental unit"); 523(a)(15) (domestic support obligation nondischargeable only if owed "to a spouse, former spouse, or child of the debtor"). Discharge

exceptions that do not turn on the identity of the creditor, by contrast, apply as written; creditor-specific limitations are not read into them by courts.[8]

D. The District is Not Time-Barred

34. Exide's final argument, that the District is time-barred from asserting the nondischargeability of its claims, is easily disposed of. Exide's sole legal authority[9] is *United States ex rel. Minge v. Hawker Beechcraft Corp. (In re Hawker Beechcraft, Inc.)*, 493 B.R. 696 (Bankr. S.D.N.Y. 2013), a bankruptcy court decision that was reversed on appeal in a thorough

[8] Thus, for example, creditors who were not themselves willfully and maliciously injured, *see* 11 U.S.C. § 523(a)(6), and were not themselves involved in an auto accident caused by a drunk driver, *see* 11 U.S.C. § 523(a)(9), may nonetheless hold claims rendered nondischargeable by those sections. *See, e.g.*, *Jendusa-Nicolai v. Larsen*, 677 F.3d 320, 322 (7th Cir. 2012) (holding loss of consortium claims of the victim's husband and children were nondischargeable under section 523(a)(6) and reasoning the nondischargeability of these derivative claims "follows directly not only from the cases dealing with punitive damages but also from cases that hold that debts arising from wrongful death suits are not dischargeable even when the creditor fighting discharge is not the victim of the wrongful death but the victim's estate or the estate's representative"); *Fezler v. Davis (In re Davis)*, 194 F.3d 570, 574 (5th Cir. 1999) (concluding an administratrix of the estate of a deceased victim had standing to bring claim alleging the nondischargeability under section 523(a)(6) of a wrongful death claim); *Smith v. Pitner (In re Pitner)*, 696 F.2d 447, 449 (6th Cir. 1982) (affirming district court's holding that a widow's judgment against the debtor for wrongful death of her late husband was nondischargeable under section 523(a)(6)); *Drewes v. Levin (In re Levin)*, 434 B.R. 910. 914 (Bankr. S.D. Fla. 2010) (concluding battery judgment of plaintiffs, decedent's parents, against debtor was nondischargeable under section 523(a)(6)); *Birdsall v. Tulloch (In re Tulloch)*, 373 B.R. 370, 394 (Bankr. D. N.J. 2007) (concluding judgment in favor of plaintiff, administrator of decedent's estate, on wrongful death claim against debtor was nondischargeable under section 523(a)(9)); *Longhenry v. Wyatt (In re Longhenry)*, 246 B.R. 234, 235 (Bankr. D. Md. 2000) ("The court concludes that a debtor's liability for an award for loss of consortium caused by the debtor's unlawful operation of a motor vehicle while under the influence of drugs or alcohol is nondischargeable."); *Konieczka v. Hodak (In re Hodak)*, 119 B.R. 516, 520 (Bankr. W.D. Pa. 1990) (concluding judgment in favor of plaintiff, administrator of decedent's estate, on wrongful death claim against debtor was nondischargeable under section 523(a)(9)); *Molldrem v. Wagner (In re Wagner)*, 79 B.R. 1016, 1023 (Bankr. W.D. Wis. 1987) (concluding on summary judgment that the wrongful death judgments in favor of plaintiffs, decedent's widow, his estate, and his medical insurer, were nondischargeable under section 523(a)(6)).

[9] Aside from a case cited for the unremarkable notion that courts in the Third Circuit are not bound by decisions of courts in the Second Circuit. *See* Obj. ¶ 46 n.23 (citing *Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366 (3d Cir. 1991)).

and well-reasoned analysis by the district court, *see United States ex rel. Minge v. Hawker Beechcraft Corp. (In re Hawker Beechcraft, Inc.)*, 515 B.R. 416, 420 (S.D.N.Y. 2014) ("[T]his Court reverses and vacates so much of the bankruptcy court's ruling as held that section 523(c)(1) and corresponding Bankruptcy Rule 4007(c) apply to an adversary proceeding seeking a discharge exception under 11 U.S.C. § 1141(d)(6)(A)."). The district court's opinion in *Hawker Beechcraft* is directly on-point and explains why the procedural requirements of section 523(c)(1) and the 60-day time limitation set forth in Bankruptcy Rule 4007(c) "do not apply to creditors seeking a discharge under any portion of section 1141(d)(6)(A)…." *Id.* at 424.

35. As Judge Castel's opinion in *Hawker Beechcraft* cogently explains, section 1141(d)(6) makes nondischargeable any debt "***of a kind*** specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit." *Id*. (emphasis added). By importing only the description used in section 523(a)(2), rather than making section 523(a)(2) applicable of its own force, the "plain language of section 1141(d)(6) neither sets forth nor incorporates by reference any procedural requirement for its exceptions to discharge to take effect. … Nothing in the language of 11 U.S.C. § 1141(d)(6) indicates that Congress sought to import the procedural requirements of 11 U.S.C. § 523(c)(1) to apply to a debtor that is a corporation." *Id.* at 425. Rather, "Congress incorporated by reference two definitional provisions from section 523(a) – and nothing more." *Id.* at 426.[10]

36. Section 523(a) itself applies only to "an individual debtor," not a corporate debtor, and the timing provisions in section 523(c) refer back to "the debtor" – *i.e.*, the individual debtor

[10] *Cf. New Venture P'ship v. JRB Consol., Inc. (In re JRB Consol., Inc.)*, 188 B.R. 373, 374 (Bankr. W.D. Tex. 1995) (concluding in a chapter 12 case that section 1228(a)(2), which excepts from discharge any debt "of the kind specified in section 523(a)" incorporates only those portions of 523(a) that "identify the types of debts which are eligible to be excepted from discharge").

to whom the statute applies. *See Hawker Beechcraft*, 515 B.R. at 428 ("[G]iving effect to Congress's use of the word 'the' rather than 'a' or 'any' compels the conclusion that 'the debtor' in section 523(c)(1) refers to 'an individual debtor' identified in section 523(a)."). Thus there is no basis to apply to a corporate debtor any of the provisions of section 523 that are not incorporated by section 1141(d)(6).

CONCLUSION

WHEREFORE, the District respectfully requests that the Court (i) overrule the Objection, (ii) grant the relief requested in the Excepted from Discharge Motion, and (iii) grant such other relief as may be just and proper.

Dated: December 18, 2015

By: */s/ Jack Shrum*

"J" Jackson Shrum, Esq.
WERB & SULLIVAN
300 Delaware Avenue, Suite 1300
Wilmington, Delaware 19801
Telephone: (302) 652-1100
Facsimile: (302) 652-1111

- and -

Thomas E. Patterson (*Pro Hac Vice*)
Robert J. Pfister (*Pro Hac Vice*)
KLEE, TUCHIN, BOGDANOFF & STERN LLP
1999 Avenue of the Stars, Thirty-Ninth Floor
Los Angeles, California 90067
Telephone: (310) 407-4000
Facsimile: (310) 407-9090

Attorneys for the South Coast Air Quality Management District

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

CERTIFICATE OF SERVICE

The undersigned certifies that on December 18, 2015, I caused a true and correct copy of the foregoing to be served upon all parties via CM/ECF and upon the persons below in the manner indicated.

Date: December 18, 2015

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

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

By Fax:

- **The Debtor, Exide Technologies** Attn: Phillip A. Damaska (fax: 678-566-9188)
- **Office of the U.S. Trustee for the District of Delaware**, Attn: Mark S. Kenney, Esq. (fax: 302-573-6497)

By Email:

- **Counsel to the Reorganized Debtor**, Skadden, Arps, Slate, Meagher & Flom LLP, Attn: Kenneth S. Ziman, Esq., J. Eric Ivester, Esq., Anthony Clark, and James J. Mazza, Jr. (ken.ziman@skadden.com, eric.ivester@skadden.com, anthony.clark@skadden.com, and james.mazza@skadden.com)
- **Counsel to the Agent under the DIP Financing**, Davis, Polk & Wardwell LLP, Attn: Damian S. Schaible, Esq. (damian.schaible@davispolk.com), and Richards, Layton & Finger, P.A., Attn: Mark D. Collins, Esq. (collins@rlf.com)
- **Counsel to the Agent for the Debtor's Prepetition Secured Lenders**, Greenberg Traurig, LLP, Attn: David B. Kurzweil, Esq. and Dennis A. Meloro, Esq. (kurzweild@gtlaw.com and melorod@gtlaw.com)
- **Indenture Trustee for the Debtor's secured bond issuances**, Foley & Lardner LLP, Attn: Mark F. Hebbeln (mhebbeln@foley.com)
- **Indenture Trustee for the Debtor's Unsecured Bond Issuances**, U.S. Bank, N.A., Global Corporate Trust Services, Attn. Cindy Woodward (cindy.woodward@usbank.com), and Arent Fox LLP, Attn: Andrew Silfen, Esq. (andrew.silfen@arentfox.com)
- **Counsel to the Unofficial Committee of Senior Secured Noteholders**, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Attn: Alice Belisle Eaton, Esq. (aeaton@paulweiss.com) and Young Conaway Stargatt & Taylor, LLP, Attn: Pauline K. Morgan, Esq. (pmorgan@ycst.com)
- **Counsel to the Official Committee of Unsecured Creditors**, Lowenstein Sandler LLP, Attn: Kenneth A. Rosen, Esq., Sharon L. Levin, Esq, and Gerald C. Bender, Esq. (krosen@lowenstein.com, slevine@lowenstein.com, gbender@lowenstein.com, and Morris Nichols Arsht & Tunnell LLP, Attn: Robert J. Dehney, Esq. (rdehney@mnat.com)
- **Counsel to the GUC Trust Trustee,** Kelley Drye & Warren LLP, Attn. Dana P. Kane (dkane@kelleydrye.com) and Morris Nichols Arsht & Tunnel, Attn: Erin R. Fay (efay@mnat.com)
- **Fee Examiner,** Robert J. Keach, Esq. (rkeach@bernsteinshur.com)

By Overnight Delivery (FedEx):

- **Indenture Trustee for the Debtor's secured bond issuances**, Wells Fargo Bank, N.A., 150 East 42nd Street, 40th Floor, New York, NY 10017, Attn: James R. Lewis
- **The GUC Trust Trustee,** Peter S. Kravitz, Province, Inc., 9209 Canwood Street, Suite 210, Agoura Hills, CA 91301