

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

EXIDE TECHNOLOGIES,

Reorganized Debtor.

Chapter 11

Case No. 13-11482 (KJC)

Hearing Date: September 28, 2017 at 1:00 p.m. (Eastern)

Responses Due: September 21, 2017 at 4:00 p.m. (Eastern)

Ref. Dkt. No. 4821, 4847

**VERNON TORT CLAIMS TRUSTEE'S OBJECTION TO
REORGANIZED DEBTOR'S MOTION FOR ENTRY OF AN
ORDER (I) ENFORCING THE PLAN INJUNCTION AND VERNON TORT
CLAIMS TERM SHEET AND (II) AWARDING COSTS AND ATTORNEYS FEES**

Craig R. Jalbert, CIRA, solely in his capacity as trustee (the "**Tort Trustee**") of the Vernon Tort Claims Trust (the "**Tort Trust**"), hereby files this objection (the "**Objection**") to the *Reorganized Debtor's Motion for Entry of an Order (I) Enforcing the Plan Injunction and Vernon Tort Claims Term Sheet and (II) Awarding Costs and Attorney's Fees* [Docket No. 4821] (the "**Reorganized Exide Motion**") filed by the reorganized Exide Technologies ("**Reorganized Exide**").¹ In support of this Objection, the Tort Trustee respectfully states as follows:

PRELIMINARY STATEMENT

1. The Reorganized Exide Motion is a jurisdictionally and procedurally infirm attempt to end run a full, merits-based adjudication of Reorganized Exide's post-bankruptcy breach of the confirmed Chapter 11 Plan (the "**Plan**"), Vernon Tort Claims Term Sheet (the "**Term Sheet**"), and Vernon Tort Claims Trust Agreement (collectively, the "**Agreement**") and should be denied. As the Court is aware, the Tort Trustee has initiated a plenary parallel state court action (the "**Parallel California Proceeding**," and the complaint filed therein, the "**Tort**

¹ Capitalized terms used herein but not otherwise defined shall have the meanings ascribed to such terms in the *Fourth Amended Plan of Reorganization of Exide Technologies* [Docket No. 3423-1], the *Vernon Tort Claims Term Sheet* [Docket No. 3406-1], and/or the Motion to Abstain, as applicable.

Trustee California Complaint”) in the Superior Court of California, County of Los Angeles (the “**California State Court**”) (the same court where the Recovery Litigation is pending) to fully adjudicate both the Tort Trustee’s allegations of post-bankruptcy breach of the Agreement, bad faith, and misconduct against Reorganized Exide, and any defenses that Reorganized Exide may raise in connection therewith (presumably including the arguments set forth in the Reorganized Exide Motion). The Parallel California Proceeding, not the summary contested matter initiated by Reorganized Exide, is the proper venue in which to adjudicate the dispute between the parties. Accordingly, on September 7, 2017, the Tort Trustee timely filed its *Motion, Pursuant to 28 U.S.C. § 1334, For Entry of Order Abstaining from Adjudicating Relief Requested in Reorganized Exide’s Motion for Injunctive Relief* [Docket No. 4847] (the “**Motion to Abstain**”), requesting that this Court abstain from adjudicating the relief requested in the Reorganized Exide Motion

2. The Tort Trustee represents the interests of more than 800 victims who have been grievously harmed by Exide’s admittedly criminal conduct in the operation of its Vernon, California facility. Under the Plan, these victims do not participate in any distribution from the Debtor’s estate, but rather have recourse only to applicable insurance. The Recovery Litigation pending in the California State Court is likely the *only* opportunity for these victims to obtain any material recovery on their claims. Reorganized Exide’s post-bankruptcy misconduct has frustrated that opportunity and is, therefore, exceptionally harmful, and the more than 800 victims who have been harmed by such misconduct are entitled to appropriate redress under applicable California law. The Tort Trustee is not seeking to recover against the personal assets of Reorganized Exide through the Parallel California Proceeding (or the Recovery Litigation), but rather is seeking only appropriate, limited relief in respect of Reorganized Exide’s post-

bankruptcy breach of the Agreement to enable the Tort Trustee to realize the benefit of the bargain under the Agreement on behalf of the more than 800 victims – *i.e.*, to proceed with the Recovery Litigation, with recourse only against applicable insurance.

3. The Tort Trustee strongly believes that the Court should abstain here, for all the reasons set forth in the Motion to Abstain. If the Court does not abstain, the Court should nonetheless deny the relief requested in the Reorganized Exide Motion. First, the Court lacks subject matter jurisdiction to adjudicate the dispute between the parties. The Reorganized Exide Motion lacks the requisite “close nexus” for invoking this Court’s limited post-confirmation subject matter jurisdiction. The outcome of this dispute: (i) will not affect the Chapter 11 estate (which no longer exists); (ii) will not affect distributions to other creditors of the Chapter 11 estate (neither the GUC Trust nor recoveries to general unsecured creditors under the Plan will be affected); (iii) will have, at most, only an incidental impact on Reorganized Exide (the Tort Trustee is not seeking recovery against Reorganized Exide’s personal assets); (iv) will not impact the implementation of the Plan (which is substantially consummated); and (v) turns on the application of state contract law, not federal bankruptcy law (and, to the extent that interpretation of the Plan or Term Sheet is required to adjudicate the matter, such interpretation alone is not sufficient to invoke this Court’s subject matter jurisdiction).

4. Reorganized Exide’s purported bases for attempting to invoke this Court’s subject matter jurisdiction more than two-and-a-half years after the Plan effective date fail. The dispute between the Tort Trustee and Reorganized Exide arise solely on account of Reorganized Exide’s post-bankruptcy breach of the Agreement, and is thus fundamentally a breach of contract action governed by applicable state law – not Federal bankruptcy law. Further, the retention of jurisdiction provision in the Plan (and Confirmation Order) cannot create jurisdiction where it

otherwise does not exist. At a minimum, the Reorganized Exide Motion is not a “core proceeding” under the Bankruptcy Code or applicable Third Circuit precedent. Accordingly, the Court does not have the power or authority to enter a final order or judgment on the relief requested in the Reorganized Exide Motion, and the Tort Trustee does not consent to the waiver of its already-asserted right to a trial by jury or entry of any such final order or judgment by the Court.

5. The Reorganized Exide Motion is also procedurally improper. Reorganized Exide is seeking extraordinary injunctive relief to prevent the Tort Trustee from pursuing post-bankruptcy contract claims against Reorganized Exide. The Parallel California Proceeding concerns causes of action that arise solely from Reorganized Exide’s post-bankruptcy conduct and, as such, are independent of and wholly unrelated to the Vernon Tort Claims. Such post-bankruptcy causes of action are not subject to the Plan injunction, discharge, and release provisions (which apply only to pre-effective date claims against the Debtor), and the extraordinary injunctive relief that Reorganized Exide seeks cannot be legally obtained through a contested matter such as the Reorganized Exide Motion.

6. If, however, the Court determines that it does have subject matter jurisdiction and that the Reorganized Exide Motion is procedurally proper, the Court should nonetheless deny the relief requested in the Reorganized Exide Motion. First, as noted above, the Parallel California Proceeding concerns causes of action arising only from Reorganized Exide’s post-bankruptcy misconduct, bad faith, and breach of the Agreement, which causes of action are not subject to the Plan injunction, discharge, or release. Second, the limited, narrow relief sought by the Tort Trustee in the California State Court is not subject to the Plan injunction, as such relief is intended solely to allow the Tort Trustee to obtain the benefit of the bargain under the

Agreement, notwithstanding Reorganized Exide's post-confirmation breach and frustration of the Agreement. Specifically, the relief sought by the Tort Trustee in the Parallel California Proceeding will enable the Tort Trustee to proceed with the Recovery Litigation as against Reorganized Exide's insurers, but, consistent with the Agreement (and the Plan discharge, release and injunction provisions), *not* as against Reorganized Exide's personal assets.

7. Adjudication of the Parallel California Proceeding will not materially prejudice Reorganized Exide. Rather, Reorganized Exide will have a full and fair opportunity to litigate the merits of the Parallel California Proceeding, raise any defenses that it may have in respect thereof (presumably including the arguments raised in the Reorganized Exide Motion), and will be otherwise afforded all of the procedural and substantive protections afforded to any party under California law.

8. Finally, Reorganized Exide's request for sanctions and attorneys' fees should be denied. Sanctions are appropriate only where a party's conduct is frivolous, legally unreasonable, or without factual foundation. Here, the Tort Trustee has alleged facts supporting a finding that Reorganized Exide, through its post-confirmation conduct, has breached its obligations under the Agreement, and has filed a complaint in a court of competent jurisdiction seeking legally appropriate relief.

RELEVANT FACTUAL BACKGROUND

9. The factual background relevant to this Objection is set forth in the Tort Trustee's Motion to Abstain, which the Tort Trustee makes a part of this Objection and fully incorporates herein by reference.

ARGUMENT IN OBJECTION

10. As set forth more fully in the Motion to Abstain, the Court should abstain from adjudicating the relief requested in the Reorganized Exide Motion. To the extent that the Court determines that abstention is neither mandated nor otherwise appropriate, the Court should nonetheless deny the relief requested in the Reorganized Exide Motion for the reasons that follow.

I. The Court Lacks Subject Matter Jurisdiction To Adjudicate The Relief Requested In The Reorganized Exide Motion.

A. The Reorganized Exide Motion Lacks The Requisite “Close Nexus” For Invoking The Bankruptcy Court’s Limited Post-Confirmation Subject Matter Jurisdiction.

11. A bedrock principle of the bankruptcy court’s subject matter jurisdiction is that such jurisdiction “must be confined within appropriate limits and does not extend indefinitely, particularly after the confirmation of a plan and the closing of a case.” *Binder v. Price Waterhouse & Co., LLC (In re Resorts Int’l, Inc.)*, 372 F.3d 154, 164 (3d Cir. 2004) (citation omitted). In the post-confirmation context, the test for whether a bankruptcy court has jurisdiction over a dispute “becomes more stringent,” with the “essential inquiry” being “whether there is a close nexus to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction over the matter.” *See id.* at 166-67 (“At the post-confirmation stage, the claim must affect an integral aspect of the bankruptcy process – there must be a close nexus to the bankruptcy plan or proceeding.”); *CIT Commc’ns Fin. Cor. v. Level 3 Commc’ns, LLC*, 483 F. Supp. 2d 380, 386 (D. Del. 2007) (“‘[T]he essential inquiry’ with regard to post-confirmation causes of action ‘appears to be whether there is a close nexus to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction over the matter.’”); *Triad Guar. Ins. v. Am. Home Mortg. Inv. Corp. (In re Am. Home Mortg. Holding)*, 477 B.R. 517, 530

(Bankr. D. Del. 2012) (“If an action is filed after the confirmation date, the bankruptcy court’s ‘related to’ jurisdiction does not extend beyond those claims or proceedings that possess a ‘close nexus’ to the bankruptcy plan or proceeding.”).

12. Under the “close nexus” test, a bankruptcy court lacks subject matter jurisdiction to adjudicate a post-confirmation action that would not “affect the estate . . . [or] interfere with the implementation of the [r]eorganization [p]lan,” or that would have only an “incidental effect on the reorganized debtor.” *See Resorts Int’l*, 372 F.3d at 169 (holding that bankruptcy court lacked jurisdiction to adjudicate malpractice claims against auditor of litigation trust). Factors that courts in this District have analyzed in determining whether a post-confirmation action satisfies the “close nexus” test include:

- (i) Whether the outcome of the dispute would affect the Chapter 11 estate;
- (ii) Whether the outcome of the dispute would affect the other creditors of the Chapter 11 estate;
- (iii) Whether the outcome of the dispute would impact the Debtors only incidentally;
- (iv) Whether the outcome of the dispute would impact the implementation of the Plan; and
- (v) Whether the outcome of the dispute turned upon the interpretation or construction of a provision of the Plan.

See Am. Mortg. Holding, 477 B.R. at 532.

13. Application of these factors here supports a finding that the Court lacks subject matter jurisdiction over the Reorganized Exide Motion. *First*, the outcome of the dispute between the Tort Trustee and Reorganized Exide will not affect the Chapter 11 estate. As a practical matter, the confirmation of the Plan and the subsequent occurrence of the Plan effective date terminated the Chapter 11 estate. *Am. Mortg. Holding*, 477 B.R. at 532 (“Confirmation of

the Plan terminated the Debtors' estate. As such, there is technically no longer an estate to impact.”). Further, the crux of the dispute involves only Reorganized Exide's post-bankruptcy conduct and any state law rights or remedies that the Tort Trustee may possess in respect thereof. *See Resorts Int'l*, 372 F.3d at 170 (holding that court lacked subject matter jurisdiction to adjudicate claims that arose post-confirmation). As explained further in Section III *infra*, through the Parallel California Proceeding (which Reorganized Exide seeks to enjoin), the Tort Trustee is not seeking to recover against the personal assets of Reorganized Exide, but rather is seeking only appropriate, limited relief in respect of Reorganized Exide's post-bankruptcy breach of the Agreement to enable the Tort Trustee to proceed with the Recovery Litigation as against applicable insurance.

14. **Second**, the outcome of the dispute between the Tort Trustee and Reorganized Exide will not affect the other creditors of the Chapter 11 estate. The claims of the Debtor's general unsecured creditors (as well as certain other claims) were fully administered and discharged under the now fully consummated Plan, with the holders of such claims receiving their pro rata share of beneficial interests in the GUC Trust (subject to the allocation mechanism established under the GUC Trust Agreement). *See* Plan Art. VII. Neither the Reorganized Exide Motion nor the Parallel California Proceeding will have any impact on the GUC Trust, the GUC Trust Assets, or any recovery on account of the beneficial interests in the GUC Trust.

15. **Third**, the outcome of the dispute between the Tort Trustee and Reorganized Exide will have, at most, only an incidental impact on Reorganized Exide. Consistent with Agreement, the Tort Trustee is not seeking to recover against Reorganized Exide's personal assets through the Parallel California Proceeding, but rather seeks only a reasonable means to proceed with the Recovery Litigation as against applicable insurance on account of Reorganized

Exide's post-confirmation breach and frustration of the Agreement. Reorganized Exide's claims of potential "reputational harm" are unsupported by any evidence and are speculative at best, particularly given that Exide has publicly admitted that it engaged in criminal conduct (including committing felony violations) in its operation of the Vernon facility. *See* Non-Prosecution Agreement, dated March 11, 2015, between Exide Technologies and the United States Attorney's Office for the Central District of California [Docket No. 3258-1].

16. ***Fourth***, the outcome of the dispute between the Tort Trustee and Reorganized Exide will not impact the implementation of the Plan. The Plan went effective nearly two-and-a-half years ago and, upon information and belief, has long been substantially consummated. As discussed more fully in Section III(B) *infra*, the narrow, limited relief sought by the Tort Trustee in respect of the Agreement will not affect the essential purpose of the Agreement, but rather will enable the Tort Trustee to realize such essential purpose (*i.e.*, proceeding with the Recovery Litigation, but only against applicable insurance), which Reorganized Exide has frustrated through its post-bankruptcy misconduct.

17. ***Fifth***, the outcome of the dispute between the Tort Trustee and Reorganized Exide will turn upon the straightforward application of state contract law, not any integral issue of Federal bankruptcy law. *See ACandS Asbestos Settlement Trust v. Hartford Accident Indem. Co. (In re ACandS, Inc.)*, Adv. Pro. No. 10-53702, 2011 WL 3471243, at *4-5 (Bankr. D. Del. Aug. 8, 2011) (holding that the court lacked jurisdiction to resolve a dispute over the interpretation of a plan-related document, where the dispute "turn[ed] on the analysis and interpretation of general contract law rather than any integral issue of bankruptcy law"); *see also Gupta v. Quincy Med. Ctr.*, 858 F.3d 657, 665 (1st Cir. 2017) (holding that the bankruptcy court

did not have jurisdiction to adjudicate claims “which may be decided solely under Massachusetts law” and require only a “state law breach of contract analysis”).

18. Even if adjudication of the merits of the Parallel California Proceeding will require interpretation of the Plan or Term Sheet (or if the Plan or Term Sheet provide the factual bases for the Tort Trustee’s causes of action), that alone is insufficient to bestow subject matter jurisdiction upon this Court. *See Am. Mortg. Holding*, 477 B.R. at 532 (“Whether Triad can rescind the contract will not be determined by reference to the Debtors’ plan or incorporated trust agreement. Instead, Triad’s claims arise under state law; although the Plan and Trust agreement might provide the bare context of the rescission action, this bare factual nexus is insufficient to confer bankruptcy jurisdiction.”); *ACandS*, 2011 WL 3471243, at *5 (“The sole fact that the plan or plan documents must be interpreted to resolve a dispute is not enough to create a close nexus to the bankruptcy and thereby confer subject matter jurisdiction over that dispute.”); *see also Gupta*, 858 F.3d at 665 (“[T]he bankruptcy court’s mere approval of Debtors’ sale of assets . . . did not automatically create jurisdiction over all future contract disputes somehow related to the [Asset Purchase Agreement].”).

B. Reorganized Exide’s Purported Bases For Invoking The Bankruptcy Court’s Jurisdiction Are Insufficient.

19. Reorganized Exide offers two purported bases for invoking this Court’s subject matter jurisdiction, but neither is sufficient. First, Reorganized Exide attempts to couch the dispute between the Tort Trustee and Reorganized Exide as implicating the Plan injunction, release, and discharge. Reorganized Exide Motion ¶ 48. However, as set forth more fully in Section III *infra*, the dispute between the Tort Trustee and Reorganized Exide concerns solely Reorganized Exide’s post-bankruptcy breach of the Agreement and the Tort Trustee’s post-

confirmation state law rights in respect thereof, which are not subject to the Plan injunction, release, or discharge.

20. Second, Reorganized Exide cites to the retention of jurisdiction provision in the Plan (and Confirmation Order) as purportedly supporting this Court's jurisdiction over the Reorganized Exide Motion. Reorganized Exide Motion ¶ 50. However, "parties cannot write their own jurisdictional ticket and a confirmation order cannot confer jurisdiction upon a bankruptcy court unless jurisdiction exists pursuant to 28 U.S.C. § 1334 or 28 U.S.C. § 157." *Shandler v. DLJ Merch. Banking, Inc. (In re Insilco Technologies, Inc.)*, 330 B.R. 512, 519 (Bankr. D. Del. 2005), *aff'd*, 394 B.R. 747 (D. Del. 2008). As explained by the Third Circuit in *Resorts International*:

Where a court lacks subject matter jurisdiction over a dispute, the parties cannot create it by agreement even in a plan of reorganization. Similarly, if a court lacks jurisdiction over a dispute, it cannot create that jurisdiction by simply stating it has jurisdiction in a confirmation or other order.

372 F.3d at 161; *see ACandS, Inc.*, 2011 WL 3471243, at *5 (citing *Resorts Int'l*, 372 F.3d at 161) ("[R]etention of jurisdiction provisions do not by themselves confer subject matter jurisdiction, despite the fact that reference to the plan or plan documents might be necessary to determine who is bound by such a provision."). Unless the Court has subject matter jurisdiction over the Reorganized Exide Motion in the first instance (which, as set forth above, the Court does not), "retention of jurisdiction provisions in a plan of reorganization or trust agreement are fundamentally irrelevant." *See Resorts Int'l*, 372 F.3d at 161. It also bears noting that, at the Plan confirmation hearing, the Court explicitly stated that it was not retaining exclusive jurisdiction under the Plan, finding that such provisions "are not appropriate and can lead to mischief that's not anticipated." *See* Mar. 27, 2015 Hr'g Tr. at 171:11-20.

C. Alternatively, The Court Lacks Jurisdiction To Enter A Final Order Or Judgment On The Reorganized Exide Motion.

21. Absent the consent of the parties, a bankruptcy court has jurisdiction to enter final orders only with respect to “core” matters. 28 U.S.C. § 157(c)(1); *Stern v. Marshall*, 564 U.S. 462, 471 (2011) (“In non-core proceedings, the bankruptcy courts instead submit proposed findings of fact and conclusions of law to the district court, for that court’s review and issuance of a final judgment.”). The Reorganized Exide Motion is not a “core” matter, and the Tort Trustee does not consent to entry of a final order or judgment by this Court in respect thereof.

22. “Core” matters include those proceedings listed under 28 U.S.C. § 157(b)(2).² The Reorganized Exide Motion does not fall under any of the categories specified in 28 U.S.C. § 157(b)(2). The Third Circuit has defined a “core” matter as one that “invokes a substantive right provided by title 11 or . . . a proceeding that, by its nature, could arise *only* in the context of a bankruptcy case.” *Torkelsen v. Maggio (In re Guild & Gallery Plus, Inc.)*, 72 F.3d 1171, 1178 (3d Cir. 1996) (emphasis added) (quoting *In re Marcus Hook Dev. Park, Inc.*, 943 F.2d 261, 267

² Under 28 U.S.C. § 157(b)(2), “[c]ore proceedings include, but are not limited to—

- (A) matters concerning the administration of the estate;
- (B) allowance or disallowance of claims or exemptions from property of the estate, and estimation of claims or interests for purposes of confirming a plan . . . ;
- (C) counterclaims by the estate . . . ;
- (D) orders in respect to obtaining credit;
- (E) orders to turn over property of the estate;
- (F) proceedings to determine, avoid, or recover preferences;
- (G) motions to terminate, annul, or modify the automatic stay;
- (H) motions to determine, avoid, or recover fraudulent conveyances;
- (I) determinations as to the dischargeability of particular debts;
- (J) objections to discharges;
- (K) determinations of the validity, extent, or priority of liens;
- (L) confirmations of plans;
- (M) orders approving the use or lease of property . . . ;
- (N) orders approving the sale of property . . . ;
- (O) other proceedings affecting the liquidation of the assets of the estate . . . ; and
- (P) recognition of foreign proceedings”

28 U.S.C. § 157(b)(2)(A)-(P).

(3d Cir. 1991)). By contrast, “[i]f the proceeding does not invoke a substantive right created by federal bankruptcy law and is one that *could* exist outside of bankruptcy, it is not a core proceeding; it may be *related* to the bankruptcy because of its potential effect, but under section 157(c)(1) it is an ‘otherwise related’ or non-core proceeding.” *Id.* (emphasis added) (quoting *Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir. 1987)). Here, the Reorganized Exide Motion (and Parallel California Proceeding) concern state law contract rights arising in connection with Reorganized Exide’s post-bankruptcy conduct and potential causes of action arising therefrom. The Tort Trustee is entitled to a trial by jury on those claims and has demanded the same. Such matters do not invoke a substantive Chapter 11 right and, therefore, are not “core” matters.

II. The Reorganized Exide Motion Is Procedurally Deficient.

23. In addition to being jurisdictionally deficient, the Reorganized Exide Motion is also procedurally infirm. A proceeding to obtain an injunction “must be resolved in an adversary proceeding.” *Baltimore Cnty. v. HIS Liquidating LLC (In re Integrated Health Servs., Inc.)*, No. 00-389-MFW, 03-1057-GMS, 2006 WL 543876, at *3 (D. Del. Mar. 6, 2006) (quoting FED. R. BANKR. P. 7001(7)) (holding that the bankruptcy court erred in concluding that an adversary proceeding was not necessary to adjudicate a party’s request for injunctive relief that was characterized as a request to “interpret the terms of the Plan and entered an order confirming” its interpretation). The procedural distinction between initiating an adversary proceeding and a contested matter is “anything but semantic” because “adversary proceedings offer the litigants more formality and more discovery rights than contested matters.” *Id.* (citing *Nantucket Investors II v. Cal. Fed. Bank (In re Indian Palms Assocs., Ltd.)*, 61 F.3d 197, 204 n.11 (3d Cir. 1995)). Indeed, a party’s failure to initiate an adversary proceeding when seeking an injunction

is “alone sufficient reason for the Bankruptcy Court to deny [the party’s] request for an injunction.” *MFS Telecom, Inc. v. Motorola, Inc. (In re Conxus Commc’ns, Inc.)*, 262 B.R. 893, 899 (D. Del. 2001).

24. Reorganized Exide contends that its motion is “properly brought as a contested matter” because it is purportedly “seeking to enforce the Confirmation Order and Plan.” Reorganized Exide Motion ¶ 9. However, Reorganized Exide is not seeking enforcement of the Plan (or Confirmation Order), but rather to enjoin the Tort Trustee’s ability to seek relief for Reorganized Exide’s post-bankruptcy breach of the Agreement (and breach of the covenant of good faith and fair dealing). Accordingly, Reorganized Exide’s request for an injunction against the Tort Trustee should be denied because it was not sought through the initiation of an adversary proceeding that would afford the Tort Trustee the procedural rights to which he is entitled. *See Integrated Health*, 2006 WL 543876, at *3; *Conxus*, 262 B.R. at 899 (denying party’s request for an injunction for failure to initiate an adversary proceeding).

III. Neither The Causes Of Action Asserted In The Parallel California Proceeding Nor The Relief Sought By The Tort Trustee In Respect Thereof Violates The Plan Injunction.

25. To the extent that the Court determines that it does have subject matter jurisdiction with respect to the relief requested in the Reorganized Exide Motion (and that such Motion is procedurally proper as a contested matter), the Court should nonetheless deny the relief requested therein.

A. The Causes Of Action Asserted In The Parallel California Proceeding Do Not Violate The Plan Injunction.

26. Through the Reorganized Exide Motion, Reorganized Exide seeks in substance to enjoin the Parallel California Proceeding on the purported basis that the merits-based adjudication of the Parallel California Proceeding would violate the Plan injunction. *See*

Reorganized Exide Motion ¶ 51. Reorganized Exide bears the burden of showing that the Tort Trustee's efforts in respect of the Parallel California Proceeding violate the Plan injunction. *See In re SelectBuild Ill., LLC*, No. 09-12085 (KJC), 2015 WL 3452542, at *7 (Bankr. D. Del. May 28, 2015) (Carey, J.) (“The Reorganized Debtors bear the burden of showing that Ryland’s efforts to seek indemnification from ACE violate the permanent injunction.”).

27. Pursuant to the Plan injunction, parties are enjoined from commencing or continuing any actions against Reorganized Exide to recover any claims that were released or discharged under the Plan. Plan § 12.11.³

28. The Plan release provides Reorganized Exide with a general release of claims or interests that arose on or before the Plan effective date (*i.e.*, April 30, 2015). Plan § 12.7. The Plan release provision, however, explicitly provides that, “[n]otwithstanding anything to the contrary in the foregoing, the release . . . does not release any post-Effective Date obligations of any party under the Plan or any document, instrument, or agreement (including those set forth in the Plan Supplement) executed to implement the Plan.” *Id.*

29. Likewise, the Plan discharge provision discharges Reorganized Exide of liability in respect of any claims or interests “that arose before the Effective Date,” and precludes entities from asserting against Reorganized Exide any claims or interests that are based upon any act or omission “that occurred prior to the Effective Date.” Plan § 12.2; *see also* 11 U.S.C. §

³ The Plan injunction provision provides as follows:

Subject to Article 12.10 of this Plan, the satisfaction, release, and discharge pursuant to this Article XII shall act as an injunction against any Entity commencing or continuing any action, employment of process, or act to collect, offset, or recover any Claim, Interest, or Cause of Action satisfied, released or to be released, exculpated or to be exculpated, or discharged under this Plan or pursuant to the Confirmation Order to the fullest extent authorized or provided by the Bankruptcy Code, including, without limitation, to the extent provided for or authorized by sections 524 and 1141 thereof; provided, however, that the Vernon Tort Claims Trustee shall be allowed to commence or continue the Recovery Litigation subject to the terms of the Vernon Tort Claims Term Sheet. (Plan § 12.11).

1141(d)(1)(A) (“the confirmation of a plan . . . discharges the debtor from any debt that arose before the date of such confirmation . . .”).

30. The Tort Trustee asserts two causes of action against Reorganized Exide in the Parallel California Proceeding: (i) breach of contract, and (ii) breach of the covenant of good faith and fair dealing. Tort Trustee California Complaint ¶¶ 24-33. Both of these claims are based exclusively on Reorganized Exide’s post-bankruptcy conduct. Specifically, the Tort Trustee alleges that, after the Plan effective date, Reorganized Exide:

- (i) failed to provide the Tort Trustee with an acceptable assignment in accordance with the Agreement⁴;
- (ii) failed to tender its defense in respect of the Recovery Litigation to its insurers⁵;
- (iii) colluded with its insurers in an attempt to defeat insurance coverage⁶; and
- (iv) otherwise failed to cooperate and provide reasonable assistance to the Tort Trustee as required under the Agreement.

⁴ As set forth in the Motion to Abstain, on July 27, 2017, in an action between the Tort Trustee and certain of Reorganized Exide’s insurers, the United States District Court for the Central District of California (the “**California District Court**”) found that “there has not been an assignment.” See July 27, 2017 Hr’g Tr., 29:21-31:12, *XL Ins. Am., Inc. v. Jalbert*, Case No. 16-cv-08318-GW, a copy of which is attached as **Exhibit 7** to the Motion to Abstain.

⁵ Pursuant to a tentative ruling of the California District Court in the action between the Tort Trustee and certain of Reorganized Exide’s insurers, the California District Court stated that “the insurance companies . . . assert that ‘Exide has never sought coverage for the Vernon Litigation from the Insurers.’” See *XL Ins. Am., Inc. v. Jalbert*, Case No. 16-cv-08318-GW, Dkt. No. 118, a copy of which is attached as **Exhibit 6** to the Motion to Abstain, at 5-6.

⁶ At the July 27, 2017 hearing before the California District Court, counsel for one of Reorganized Exide’s insurers stated that “Exide has taken the position with us that it acknowledged that [the] policies do not cover the claim” July 27, 2017 Hr’g Tr., 6:4-6 (**Exhibit 7** to Motion to Abstain). After the California District Court questioned why Reorganized Exide would not at least make a demand for representation, the insurer replied:

Well, to be kind of blunt about it, your Honor, Exide is continuing business, and they still want to buy insurance policies from us. Now, if they walked in and said, oh, by the way, we think there is a bazillion dollars of coverage that we brought for pollution claims and you got to defend this because this is a pollution claim that is covered, their name would be mud. So they have real incentives not to go chasing after insurance at the behest of a bunch of plaintiff’s lawyers. Believe me.

See July 27, 2017 Hr’g Tr., 21:7-22:1 (**Exhibit 7** to Motion to Abstain).

31. The causes of action asserted against Reorganized Exide in the Parallel California Proceeding each arose after the effective date of the Plan, as the conduct forming the factual bases for these claims all occurred after the Plan effective date. *See Resorts Int'l*, 372 F.3d at 158, 163 (litigation trustee's claims against auditor for malpractice based on post-confirmation conduct arose post-confirmation). Accordingly, because the claims asserted in the Parallel California Proceeding arose after the Plan effective date, they are not subject to the Plan injunction, release, or discharge provisions, which, by their terms, apply only to claims or interests that arose prior to the Plan effective date.

B. The Relief Requested In The Parallel California Proceeding Does Not Violate The Plan Injunction.

32. Through the Parallel California Proceeding, the Tort Trustee seeks, on account of Reorganized Exide's post-confirmation breach of the Agreement, certain narrow, limited relief regarding the Agreement to enable the Tort Trustee to realize the benefit of its bargain, notwithstanding Reorganized Exide's wrongful efforts to frustrate the Agreement. Specifically, the Tort Trustee seeks:

For, on account of [Reorganized Exide's] breach of the Agreement and breach of the covenant of good faith and fair dealing, an order relieving Plaintiffs of the requirement under the Agreement that, in the event that the applicable insurers fail to pay defense fees and costs of [Reorganized Exide], Plaintiffs must then promptly (a) dismiss the Recovery Litigation as to Reorganized Exide, or (b) dismiss or stay such Recovery Litigation (including as to discovery propounded to [Reorganized Exide]) as to [Reorganized Exide] and promptly commence appropriate coverage litigation, and continue to prosecute such coverage litigation until settlement or judgment of such coverage litigation.

Tort Trustee California Complaint at 6-7.

33. The essential purpose of the Agreement vis-à-vis the Tort Trust and Reorganized Exide is to permit the Tort Trustee to proceed with the Recovery Litigation to augment the Tort Trust for the benefit of the Trust beneficiaries (*i.e.*, the victims of the Vernon facility), subject to

the condition that the Tort Trust seek recovery only against applicable insurance and not against Reorganized Exide's personal assets.

34. The Agreement embodies the principle that “a discharge in bankruptcy does not extinguish the debt itself, but merely releases the debtor from personal liability for the debt.” *SelectBuild Ill.*, 2015 WL 3452542 at *8 (quoting *In re Schultz*, 251 B.R. 823, 828 (Bankr. E.D. Tex. 2000)). Thus, courts have observed that a bankruptcy discharge does not preclude a suit brought nominally against the debtor in order to seek relief against the insurer. *Hendrix v. Page* (*In re Hendrix*), 986 F.2d 195, 197 (7th Cir. 1993) (“[A]s to whether such an injunction extends to a suit only nominally against the debtor because the only relief sought is against his insurer, the cases are pretty nearly unanimous that it does not.” (citing cases)); *see also Hawxhurst v. Pettibone Corp.*, 40 F.3d 175, 180 (7th Cir. 1994); *In re Schultz*, 251 B.R. at 829. Such courts have reasoned that:

[A] suit to collect merely the insurance proceeds and not the plaintiff's full damages (should they exceed the insurance coverage) would not create a ‘personal liability of the debtor,’ because only the insurance company would be asked to pay anything, and hence such a suit would not infringe the discharge.

Hendrix, 986 F.2d at 197 (citing 11 U.S.C. § 524(a)(2) and (e) (a discharge “does not affect the liability of any other entity on [the debtor's] debt”)).

35. Consistent with the essential purpose of the Agreement (and the foregoing legal principles), the Agreement provides that the Tort Trustee is permitted “to continue, from and after the Plan Effective Date, to seek civil recoveries from [Reorganized] Exide and Exide Parties on account of the Vernon Tort Claims, with recourse only to applicable insurance, if any, which may provide coverage to [Reorganized] Exide or any Exide Party on account of such actions . . . for the purpose of augmenting the [Tort] Trust for the benefit of the beneficiaries of the [Tort] Trust.” Term Sheet § 4.

36. The Term Sheet further provides that the Recovery Litigation is carved out from the Plan injunction, provided that “the Vernon Tort Claimants and the Vernon Tort Claims Trust shall not seek to satisfy any settlement, judgment or other recovery they may obtain from the personal or other assets of any of the Released Parties” (including Reorganized Exide). Term Sheet § 11.

37. The essential purpose of the Agreement is manifest in several other provisions of the Agreement. For example, the Agreement provides that:

- (a) Reorganized Exide will provide certain initial funding to the Tort Trust, which funding will be used together with all other receipts of the Tort Trust, to, among other things, “engage in Recovery Litigation ... to attempt to augment the funds of such Trust” and “distribute to the beneficiaries of such Trust, in accordance with the Trust Agreement” (Term Sheet § 3);
- (b) Reorganized Exide will irrevocably assign to the Tort Trustee the right to bring insurance coverage litigation if no insurance carrier agrees to provide Reorganized Exide with coverage to defend the Recovery Litigation (Term Sheet § 4);
- (c) Reorganized Exide will deliver to the Tort Trustee copies of all insurance policies and coverage letters, and will instruct its insurance brokers to do the same (Term Sheet § 13); and
- (d) Reorganized Exide and the Tort Trust (and their respective attorneys and other representatives) will “cooperate with each other and take such actions as may be reasonably necessary or appropriate to effectuate the terms set forth in [the Agreement]” (Term Sheet § 13).

38. The essential purpose of the Agreement (*i.e.*, to permit the Recovery Litigation, but with recourse only to insurance) is further incorporated into the Plan, including, specifically, the Plan’s injunction, release, and discharge provisions:

- (a) The Plan injunction provides that parties are enjoined from bringing or commencing any act to recover any claims or interests that were released or discharged under the Plan, except that “the [Tort] Trustee shall be allowed to commence or continue the Recovery Litigation subject to the terms of the Vernon Tort Claims Term Sheet.” Plan § 12.11; Confirmation Order ¶ 55.

- (b) The Plan release provides that, notwithstanding the carve-out to the Plan injunction to permit the Recovery Litigation, the holders of the Vernon Tort Claims release Reorganized Exide (and the other “Released Parties”), and that such holders and the Tort Trust may not seek to satisfy any settlement, judgment or other recovery that they may obtain from the personal or other assets of Reorganized Exide (or any other “Released Parties”). Plan § 12.7; Confirmation Order ¶ 49.
- (c) The Plan discharge provides that the Debtor and the Debtor’s estate are discharged from any liability in respect of the Vernon Tort Claims, which are assumed by the Tort Trust, with the holders of such Vernon Tort Claims entitled to payment from the Tort Trust in accordance with the Term Sheet and the Tort Trust Agreement. Plan § 12.3; Confirmation Order ¶ 46.

39. However, the essential purpose of the Agreement has been frustrated by Reorganized Exide’s post-confirmation breach of the Agreement and collusion with its insurers. As set forth more fully in the complaint filed by the Tort Trustee in the Parallel California Proceeding (and Section III(A) *supra*), Reorganized Exide, among other things, failed to tender its defense in the Recovery Litigation, failed to provide a valid assignment to the Tort Trustee, colluded with its insurers in an effort to defeat coverage, and failed to cooperate with counsel for the Tort Trustee or take such other actions that were reasonably necessary or appropriate to effectuate the terms of the Agreement. Tort Trustee California Complaint ¶¶ 16-23.

40. Notwithstanding Reorganized Exide’s breach of the Agreement (and of the covenant of good faith and fair dealing), the Tort Trustee, consistent with the Agreement and the bankruptcy discharge, is *not* seeking to recover against Reorganized Exide’s personal assets through the Parallel California Proceeding. Rather, the Tort Trustee is seeking certain limited relief in respect of the Tort Trustee’s obligations under the Agreement to enable the Tort Trustee to continue with the Recovery Litigation as against Reorganized Exide’s insurers – notwithstanding Reorganized Exide’s post-confirmation breach of the Agreement and collusion with its insurers – to attempt to augment the Tort Trust for the Trust’s beneficiaries. Other than this narrow relief, the Tort Trustee is not seeking any other relief in respect of the Agreement.

IV. Adjudication Of The Parallel California Proceeding Will Not Prejudice Reorganized Exide.

41. Reorganized Exide contends that adjudication of the merits of the Parallel California Proceeding will prejudice Reorganized Exide. Reorganized Exide Motion ¶¶ 63-64. This contention is misguided. The Tort Trustee filed a complaint against Reorganized Exide in the California State Court (the same court where the Recovery Litigation is pending) to *fully* adjudicate all matters raised in the Tort Trustee’s complaint. Reorganized Exide will have a full and fair opportunity to litigate the merits of the Parallel California Proceeding, and raise any defenses that it may have in respect thereof (presumably including the arguments raised in the Reorganized Exide Motion). Further, Reorganized Exide will be afforded all of the procedural and substantive protections afforded to any defendant in a California state court civil action. The Tort Trustee may well prevail on the merits in the Parallel California Proceeding, but that does not constitute prejudice to Reorganized Exide.

V. Reorganized Exide’s Request For Sanctions And Attorneys’ Fees Should Be Denied.

42. Reorganized Exide’s request for sanctions and attorneys’ fees should be denied. The imposition of sanctions on a party is appropriate only where a party’s conduct is frivolous, legally unreasonable, or without factual foundation. *See Walker v. Sonafi Pasteur (In re Apton Corp.)*, 423 B.R. 76, 97 (Bankr. D. Del. 2010) (declining to grant noteholder’s request for sanctions against trustee for maintaining a complaint because there was no evidence that trustee’s complaint was frivolous, legally unreasonable, or without factual foundation); *In re Vencor, Inc.*, 284 B.R. 79, 87-88 (Bankr. D. Del. 2002) (declining to grant sanctions against a movant whose position, though ultimately unavailing, was “supported . . . with legal arguments that were not facially frivolous”). Absent such finding, there is no basis to depart from the

“American Rule” that parties shall bear their own costs of litigation where a party has a “good faith basis for their actions.” *See Stratton v. Mariner Health Care, Inc. (In re Mariner Post-Acute Network)*, 329 B.R. 481, 490 (Bankr. D. Del. 2005). Indeed, the Agreement explicitly provides that (except for certain pre-confirmation professional fees), “each party will bear the expenses it incurs in connection with all matters in any way related to the Vernon Tort Claims.” Term Sheet § 14. The allegations and claims for relief asserted by the Tort Trustee in the Parallel California Proceeding are based on well-pled facts and are legally reasonable.

[Remainder of page intentionally left blank.]

CONCLUSION

WHEREFORE, the Tort Trustee respectfully requests that the Court: (i) abstain from adjudicating the relief requested in the Reorganized Exide Motion (for the reasons set forth more fully in the Motion to Abstain) or, alternatively, (ii) deny the relief requested in the Reorganized Exide Motion, and (iii) grant such other and further relief to the Tort Trustee as the Court deems just and proper.

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Wilmington, Delaware

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