

1 UNITED STATES BANKRUPTCY COURT

2 DISTRICT OF DELAWARE

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4 In the Matter of:

5	EXIDE TECHNOLOGIES,	Case No.
6	Debtor.	13-11482(KJC)

7 - - - - -x

8	WEST SALEM STORAGE, LLC,	Adv. Proc. No.
9	Plaintiff,	17-51826(KJC)

10 - against -

11	EXIDE TECHNOLOGIES,
12	Defendant.

13 - - - - -x

14 United States Bankruptcy Court  
 15 824 North Market Street  
 16 Wilmington, Delaware

17  
18 January 31, 2018

19 10:01 AM

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21 B E F O R E:

22 HON. KEVIN J. CAREY

23 U.S. BANKRUPTCY JUDGE

24

25 ECR OPERATOR: MICHAEL MILLER

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DEBTOR'S ADMINISTRATIVE CLAIMS OBJECTION: Reorganized Debtor's (Substantive) Objection Pursuant To Bankruptcy Code Section 503(b) And Bankruptcy Rule 3007 To Proof Of Administrative Expense Claim Filed By The South Coast Air Quality Management District (Claim No. 4123) (Docket No. 4507) (Date Filed: 9/30/15)

PRIMA FACIE DISCHARGE EXCEPTION MOTION: The South Coast Air Quality Management District's Motion For A Determination That It Has Alleged A Prima Facie Case For Application Of The 11 U.S.C. Section 1141(d)(6) Exception To Discharge (Docket No. 4505) (Date Filed: 9/30/15)

GUC CLAIMS MOTION: The South Coast Air Quality Management District's Motion For Entry Of An Order Concerning The Timeliness Of Its General Unsecured Claims Against Exide (Docket No. 4503) (Date Filed: 9/30/15)

JUDICIAL NOTICE REQUESTS: The South Coast Air Quality Management District's Request For Judicial Notice (Docket No. 4504) (Date Filed: 9/30/15) and The South Coast Air Quality Management District's Second Request For Judicial Notice (Docket No. 4563) (Date Filed: 11/20/15)

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RELATED DOCUMENTS WITH RESPECT TO MATTERS 1-4: Each of the following documents are related to all matters scheduled to be heard at the January 31, 2018 hearing between the Reorganized Debtor and the South Coast Air Quality Management District.

WEST SALEM STORAGE, LLC AGAINST EXIDE TECHNOLOGIES, Adv. No. 17-51826: Complaint for Declaratory Judgment against Exide Technologies [Adv. Docket No. 1] (Date Filed: 10/26/17)

Transcribed by: Sharona Shapiro

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EXIDE TECHNOLOGIES

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1 P R O C E E D I N G S

2 THE CLERK: All rise.

3 Be seated, please.

4 THE COURT: Good morning, everyone.

5 IN UNISON: Good morning, Your Honor.

6 MR. CLARK: Good to be here on a balmy day in  
7 Wilmington. All right. Tony Clark for Exide Technologies, the  
8 reorganized debtor.

9 Your Honor, we've got six items on the agenda today,  
10 all contested matters. The first five all relate to  
11 issues -- matters of issue between Exide and the South Coast  
12 Air Quality Management District. We propose to proceed with  
13 those basically in the order set forth on the agenda.

14 And then the last item, item 6, is unrelated to the  
15 other five. It is Exide's motion to dismiss the adversary  
16 complaint filed by West Salem Storage. And we'll deal with  
17 that as the last matter.

18 THE COURT: But the thought I had was we might deal  
19 with West Salem first.

20 MR. CLARK: I'm happy to do that, Your Honor.

21 THE COURT: Not that those parties wouldn't love to  
22 learn what counsel had to say in connection with the other  
23 matter, but I thought that might be a shorter one.

24 MR. CLARK: Very good, Your Honor. I'll deal with  
25 that for the debtors. It's the debtor's motion to dismiss for

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1 failure to state a claim, under Rule 12(b)(6), the complaint  
2 filed by West Salem seeking a declaratory judgment, that is  
3 claims for compensation related to environmental investigation,  
4 remediation, and related costs, under CERCLA and the Oregon  
5 statutory equivalent, concerning the property in West  
6 Salem -- or in Salem, Oregon, which once upon a time was owned  
7 and operated by Exide and its predecessors.

8           The complaint seeks a declaration that those  
9 claims -- that claim has not been discharged under the  
10 confirmed plans of Exide in the cases that were filed -- the  
11 first cases that were filed in 2002 and then the most recent  
12 case that was confirmed in 2015.

13           THE COURT: So let me ask you this. According to the  
14 submissions, the debtor, in its present case, was -- I think  
15 present case, one of the cases -- was asked to list every  
16 property that was subject to some environmental problem.

17           MR. CLARK: That's correct.

18           THE COURT: And it did list this property.

19           MR. CLARK: That's correct.

20           THE COURT: How many properties were listed?

21           MR. CLARK: I don't know, Your Honor. I could  
22 certainly find out and then report back to the Court. It was  
23 in the schedules.

24           THE COURT: And here's why I ask. And I find these  
25 due process conundrums particularly challenging. The cases

## EXIDE TECHNOLOGIES

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1 suggest that the debtor need not undertake title searches on  
2 all the properties. But in this case, if this were the only  
3 property listed, I would say maybe that investigation should  
4 have been undertaken to find out who the current owner was,  
5 although I know notice was sent to the prior owner, which that  
6 was all that was reflected on Exide's books and records, at  
7 least according to the submissions.

8 But if there were a hundred properties, it seems to me  
9 it would be unreasonable to expect the debtor to conduct that  
10 search with respect to each property.

11 MR. CLARK: I'm confident there was more than one, but  
12 I don't know the number, Your Honor, and I will find out and  
13 report back to the Court.

14 THE COURT: Okay.

15 MR. CLARK: Unless Your Honor has a different view of  
16 what you want to talk about this morning on this, there are two  
17 main issues to be determined that I plan to focus on. The  
18 first is whether West Salem's claim arose pre-petition, such  
19 that it could be discharged in Exide's most recent case,  
20 Chapter 11 case. And the answer to that question is yes.

21 Now, there is the issue of whether the claim was  
22 effectively extinguished in the 2002 Chapter 11 case. On that  
23 I'm happy to rest on what we've said in our briefs, unless Your  
24 Honor has questions about it.

25 THE COURT: I do not.

## EXIDE TECHNOLOGIES

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1 MR. CLARK: If the Court agrees with Exide that West  
2 Salem's claim is pre-petition, the second issue, which Your  
3 Honor touched upon, is whether the publication notice that  
4 Exide provided satisfied due process and therefore West Salem's  
5 pre-petition claim was discharged and is enjoined under the  
6 2015 confirmed plan.

7 And the crux of that issue is whether West Salem was a  
8 known or an unknown creditor. If the latter, we contend, and  
9 the cases, I think, pretty clearly hold that publication notice  
10 like Exide admittedly provided here, in several national  
11 newspapers, The New York Times, Wall Street Journal, L.A.  
12 Times, as well as 130 or so local and regional newspapers  
13 throughout the U.S. and Canada, including newspapers in the  
14 Portland, Oregon region where the property is located, whether  
15 that satisfied due process.

16 For the purposes of this motion, Your Honor, the  
17 relevant facts, taken from West Salem's complaint, the  
18 documents attached to the complaint or referenced in it, and  
19 matters of public record are undisputed. And those facts show  
20 the following. West Salem acquired that property on November  
21 30, 2011, nineteen months before Exide filed its most recent  
22 Chapter 11 case in June 2013, and almost three-and-a-half years  
23 before Exide confirmed and went effective with its  
24 reorganization plan. That's in the complaint at paragraph 16  
25 and 27.

## EXIDE TECHNOLOGIES

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1           The bar date for filing proofs of claim for  
2 liabilities, such as those alleged by West Salem here, was  
3 October 31st, 2013. That's in the bar date order, docket item  
4 number 696. That's almost two years after West Salem acquired  
5 the property. West Salem didn't file a proof of claim.

6           Now, before West Salem bought the property, it knew  
7 the following facts. First, that for more than fifty years,  
8 from 1945 until at least into the late 1990s, the property was  
9 owned by manufacturers of lead-acid automotive batteries,  
10 including National Battery company, GNB batteries, and Exide,  
11 the largest producer of automotive batteries in the world, and  
12 that the building on the property was used in battery  
13 manufacturing operations. That's in the complaint at  
14 paragraphs 8 through 12 and Exhibits A through D.

15           In the early 1990s, the Oregon Department of  
16 Environmental Quality, the DEQ, learned about spills of lead at  
17 the property and required that the worst of the contaminated  
18 soil be removed. That's complaint paragraph 29 and Exhibit M.

19           In November of 1999, as a result, the DEQ required  
20 that an easement and equitable servitude, the EES, be placed on  
21 public record of the deed for the properties, limiting its use  
22 to industrial operations only. That's in the complaint,  
23 paragraph 30, Exhibits M and N.

24           Now, obviously, the EES is a critically important  
25 document here, and it is worth noting that while West Salem's

## EXIDE TECHNOLOGIES

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1 complaint, at paragraph 30, acknowledges the existence of the  
2 EES, and the complaint attached numerous other voluminous  
3 exhibits, West Salem chose not to include the EES itself. But  
4 it is a matter of public record, so we have provided a copy of  
5 that with our opening dismissal brief.

6 Now, the EES states that it was required by the DEQ in  
7 order to "provide potential future owners or lessees" like West  
8 Salem "with knowledge of site conditions" including "the  
9 presence of elevated concentrations of lead in shallow onsite  
10 soils" and the "investigation and cleanup" activities at the  
11 site including the "removal of contaminated soil".

12 The EES also stated that "the DEQ review and approval  
13 of site activities" was required "if current site usage  
14 changes". And the EES stated that it was "intended to protect  
15 human health in the environment" and that any residential,  
16 agricultural, commercial, or residential uses of the property  
17 specifically were "prohibited". That's pages 1 to 3 of the  
18 EES.

19 Now, Exide acquired GNB, the then owner of the  
20 property, by merger in January of 2001. That's complaint  
21 paragraph 11. Exide sold the property to Fair East Salem (ph.)  
22 in June 2002. That's paragraph 13 of the complaint.

23 Fair East Salem sold the property to Patterson  
24 Business Park (ph.) in June 2007. That's paragraph 14 of the  
25 complaint. And Patterson sold the property to Evergreen

## EXIDE TECHNOLOGIES

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1 Environmental (ph.) in March 2011, which sold it to West Salem  
2 nine months later in November 2011. That's paragraphs 15 and  
3 16.

4 Now, West Salem alleges that, shortly before it bought  
5 the property, it got a letter from the DEQ saying that  
6 "commercial and recreational uses of the property were  
7 acceptable so long as there wasn't any contact with the  
8 contaminated soil". That's paragraph 32.

9 Now, how you do that without touching the soil I don't  
10 know, but the same letter, which is Exhibit O to the complaint,  
11 also noted the prohibitions under the EES, in emphasized text,  
12 and warned that any attempt to change those prohibitions "would  
13 require that the site be reopened under the Voluntary Cleanup  
14 Program for possible reevaluation or additional investigation  
15 and/or remediation".

16 Now, while the complaint doesn't explain why or how,  
17 apparently that is precisely what happened. It appears, from a  
18 February 2nd, 2017 letter from the DEQ to West Salem, Exhibit P  
19 to the complaint, that in late 2016, or early 2017, West Salem  
20 "requested for the EES to be removed from the property". That  
21 letter notes that "there is still no lead contamination in some  
22 also presents a hazard to workers at the site" since "the  
23 building was used to manufacture batteries for years, and the  
24 DEQ has no documentation that the building was properly cleaned

25

1 before allowing occupational use of the property."

2 Now, that letter also noted that, notwithstanding the  
3 DEQ's November 2011 letter, Exhibit O, "the EES is a legally  
4 binding document and prohibits the commercial and recreational  
5 use of the property". That same letter, the February 2017  
6 letter, goes on to say that in order to continue to use the  
7 building as West Salem had been doing "in violation of the EES"  
8 for "a gym, batting cages, roller rink and cafe", the building  
9 would have to be tested for lead contamination, obviously.

10 And when it was, when that testing was done, lo and  
11 behold, the building was found to contain high levels of lead,  
12 and therefore the DEQ and other Oregon health regulators  
13 required that it be closed for cleaning and further assessment  
14 to be completed. That's paragraphs 35 and 36 of the complaint.

15 Now, as I said, Your Honor, every one of those facts  
16 is admitted or acknowledged by West Salem. So West Salem's  
17 assertion in the complaint that it "did not know nor did it  
18 have reason to know that lead was present in the building at  
19 the property at levels that would require it to vacate tenants  
20 and conduct substantial investigation, remediation, and  
21 restoration work at the property" -- that's paragraph 28 of the  
22 complaint -- that is a legal conclusion, Your Honor, that is  
23 unsupported and indeed contradicted by the detailed facts that  
24 are alleged.

25 Under *Ashcroft v. Iqbal*, 556 U.S. 662 and *Golod v.*

1 Bank of America Corp., 403 Fed. App'x 699 (3d Cir. 2010), those  
2 conclusory allegations must be ignored on this motion, which  
3 only makes sense. After all, where else would the lead  
4 contamination in the soil, which West Salem admittedly knew  
5 about when it bought the property, where would that lead have  
6 come from if not the building on the property in which, for  
7 more than five decades, lead-acid battery manufacturing  
8 operations were continuously conducted?

9 Now, as Your Honor knows from the briefs, the parties  
10 dispute the proper standard to be applied to determine when  
11 West Salem's claim arose and therefore whether it was a  
12 pre-petition claim discharged under and enjoined by Exide's  
13 2015 reorganization plan and this Court's order confirming the  
14 plan. But frankly, the argument over the controlling legal  
15 standard here really doesn't matter because, under either of  
16 the standards argued by the parties, West Salem's claim clearly  
17 arose before Exide filed its Chapter 11 petition in June.

18 THE COURT: I will tell you I tend to agree. For me  
19 the sticking point is what, if anything, else should Exide have  
20 done with respect to the due process notice issue?

21 MR. CLARK: All right. Your Honor, I think under the  
22 decided case -- I heard Your Honor's question earlier, and we  
23 will answer that question promptly after the hearing. It's  
24 just a matter of taking a look at what the schedules say. And  
25 they say whatever they say. I'm confident that there will be

1 more than one, probably less than 10,000 properties listed.

2 But I don't know, and I'll get back to Your Honor on it.

3 I will say this. The cases don't seem to speak -- the  
4 answer came to me in a flash of brilliance.

5 THE COURT: In a miraculous revelation, yes.

6 MR. CLARK: More than -- that's the actual amount?  
7 237 properties, Your Honor. And I think that answers Your  
8 Honor's inquiry, but it also, I think, answers the obvious  
9 question what would be reasonable under the circumstances. For  
10 a debtor such as Exide to have to go out and do title searches  
11 on 237 properties and reach out to all subsequent owners of  
12 those properties to give them actual notice would go far beyond  
13 anything any court in any case I'm aware of has ever required  
14 to meet the dictates of due process.

15 Clearly, West Salem was on sufficient notice of the  
16 existence of -- possible existence of lead throughout the  
17 property, including in that building, when they bought the  
18 property and when the Chapter 11 case -- prior to the Chapter  
19 11 case being filed in 2013. And I think under the cases that  
20 we've cited it's pretty clear that, in those circumstances,  
21 publication notice is all that was required under due process.  
22 And if Your Honor agrees with that, then West Salem was an  
23 unknown creditor, publication notice was sufficient for due  
24 process, and the claim was discharged.

25 May I have a moment?

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1 THE COURT: Yes.

2 MR. CLARK: Right. The 237 number, Your Honor, was  
3 the number of properties that we listed with potential  
4 environmental claims only. There may have been other  
5 properties listed with other claims. But the same analysis  
6 would apply.

7 THE COURT: That was the answer I was looking for  
8 because the papers reflected that Exide was required to list --

9 MR. CLARK: So --

10 THE COURT: -- the properties with potential  
11 environmental claims.

12 MR. CLARK: So whereas here, Your Honor, the debtor  
13 has had no contact with and never transacted any business with  
14 the creditor, the creditor is clearly unknown and publication  
15 notice satisfies due process.

16 I have more to say, but I think Your Honor probably  
17 has had his questions answered. If you have others, I'd be  
18 happy to address them.

19 THE COURT: Time to sit down.

20 MR. CLARK: Thank you, Your Honor.

21 MR. KOSMOWSKI: Good morning, Your Honor. For the  
22 record, may it please the Court, Ed Kosmowski of Clark Hill on  
23 behalf of the plaintiff in this matter, West Salem Storage,  
24 LLC. Your Honor, in the courtroom I have Patrick Rowe with  
25 Sussman Shank, who is my cocounsel and who will be presenting

1 today. He has been admitted pro hac vice, and we thank the  
2 Court for entering his order this morning.

3 THE COURT: Very well.

4 MR. ROWE: Thank you, Your Honor. We appreciate your  
5 taking this matter first. First I'd like to just clarify the  
6 factual history of this matter with regard to the issue as to  
7 West Salem Storage's knowledge of what had occurred and what  
8 the conditions of that property were.

9 When West Salem Storage -- prior to its purchasing the  
10 property, it knew that the Oregon DEQ had investigated the  
11 property for lead contamination. It knew that DEQ had issued a  
12 no-further-action determination concluding that no additional  
13 remedial actions needed to be taken at that property subject to  
14 the easement of equitable servitude.

15 The easement of equitable servitude, Your Honor,  
16 stated that restricted uses and restricted use of -- it said  
17 the property needed to be used for industrial purposes,  
18 restricted commercial and recreational purposes. The EES also  
19 expressly stated "restricted uses may be modified or allowed  
20 provided prior written approval is requested of and received of  
21 DEQ." That's on page 3 of the easement of equitable servitude.  
22 That's exactly what West Salem Storage did. It went to DEQ  
23 before it bought the property.

24 And actually, Your Honor, I should step back. By the  
25 time West Salem Storage was considering purchasing the

1 property, it was being used for commercial purposes. There  
2 were three intervening owners between Exide and when West Salem  
3 went to buy it. West Salem saw that it was being used for  
4 commercial purposes. It was aware that there was the easement  
5 of equitable servitude, so it wanted to find out why are  
6 commercial uses being allowed in spite of them being prohibited  
7 under the easement of equitable servitude.

8 It approached DEQ. It made that inquiry. DEQ  
9 responded in writing stating that in fact commercial -- the  
10 property of the building could be used for commercial purposes  
11 as long as there was not contact with the soil. That has been  
12 attached as an exhibit. It's Exhibit O to the complaint.

13 Opposing counsel just read another passage from that  
14 letter from DEQ, but they kind of ran over the fact that DEQ  
15 was talking about if someone wanted to use it for residential  
16 purposes then there are additional steps that might need to be  
17 taken. That's not what West Salem intended; it's not what West  
18 Salem has ever done. They were expressly authorized by DEQ to  
19 use the building for commercial and recreational purposes.

20 THE COURT: Did West Salem ever conduct its own  
21 environmental survey of the property?

22 MR. ROWE: Yes, they did.

23 THE COURT: Prior to buying it?

24 MR. ROWE: They conducted it, I think, probably two  
25 weeks after closing.

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1 THE COURT: After closing? And what was the depth or  
2 breadth of the report, phase one, phase two?

3 MR. ROWE: It was a phase one, Your Honor --

4 THE COURT: All right. Thank --

5 MR. ROWE: -- concluded that the property is fine.

6 THE COURT: Thank you.

7 MR. ROWE: So then they proceeded to purchase the  
8 property. At the time that the second bankruptcy -- Exide's  
9 second bankruptcy petition is submitted, they're operating  
10 under the knowledge that I just described to you. DEQ has  
11 issued an NFA, they have express authorization from DEQ to use  
12 the building for commercial purposes. The prior owners had  
13 used the building for commercial purposes. They believe  
14 everything is fine. There's no reason for them, at the time,  
15 even if they had become aware of the bankruptcy, which they  
16 were not aware of, given that they weren't given actual notice,  
17 they had no reason to file a claim. It wasn't until, not even  
18 a year ago now, February of 2017, that DEQ informed them in  
19 fact the building needs to be tested.

20 With regard to the known versus unknown creditor, Your  
21 Honor, we believe that they certainly were a known creditor.  
22 Exide listed this property as a known environmental liability.  
23 They had the property address. Even if the Court is  
24 disinclined to require them to conduct a title search because  
25 of the number of properties with environmental liabilities,

1 they did have this property's address, and it would not have  
2 posed any burden on them to issue the creditor notice just to  
3 the owner or occupant of that property. That at least would  
4 have put them on adequate notice that there might be an issue  
5 here and perhaps we should consider submitting a claim. But  
6 they did not even take that step, Your Honor. And we would  
7 still maintain that, given that they have the address and  
8 they've listed it as a known environmental liability, that they  
9 should have conducted the title search. Again, at a minimum,  
10 they should have addressed it to the owner or the occupant of  
11 that building.

12 THE COURT: I know that I asked this question just  
13 today. If you'd like, I'll give you a few days to confirm  
14 whether the information is -- not to cast any dispersions, but  
15 to satisfy yourself that the number of properties listed were  
16 as the debtor has represented today. I'll give you the chance  
17 to check that independently, if you'd like.

18 MR. ROWE: I would appreciate that.

19 THE COURT: Certainly.

20 MR. ROWE: Would the Court like to discuss at all the  
21 standard, the fair contemplation test versus the Grossman's  
22 test?

23 THE COURT: So why would I apply a test other than  
24 what the Third Circuit provided? I know the parties have  
25 discussed it, but I thought I'd ask that question.

1 MR. ROWE: Because Grossman's is the leading case on  
2 this followed by the Wright case, but Grossman's expressly  
3 called out and stated that it was not saying -- deciding when a  
4 claim arises in the context of an environmental cleanup case.  
5 None of the cases cited by Exide since Grossman's involve  
6 environmental cleanup cases. The court was recognizing that  
7 there is a conflict between bankruptcy law and environmental  
8 law, and in that instance it was saying that subsequent courts  
9 should look at the particular facts of each of these types of  
10 cases and decide what standard should be applied.

11 THE COURT: Understood. The answer is no. The papers  
12 were, I think, very complete in their discussions, and I need  
13 nothing further on that.

14 MR. ROWE: Okay. Thank you, Your Honor.

15 THE COURT: Thank you.

16 MR. CLARK: Your Honor, just one brief comment.  
17 Counsel said that none of the cases that Exide cited applying  
18 the Grossman's standard involved environmental-damage claims.  
19 That's not accurate. The -- Judge Gross' decision in W.R.  
20 Grace, 563 B.R. 150, which we did cite, 1960 -- a 2016 decision  
21 -- Judge Gross did apply the Grossman's case there in  
22 determining that there was a pre-petition claim that was  
23 subject to discharge.

24 If you have any other questions, I'd be happy to  
25 answer.

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1 THE COURT: I don't.

2 MR. CLARK: Thank you, Your Honor.

3 THE COURT: All right --

4 MR. CLARK: That is matter number 6. I don't know if  
5 Your Honor wanted to speak to that before we move on, or move  
6 on.

7 THE COURT: No. Just to say that I'll take the matter  
8 under advisement and issue a written decision in due course.  
9 The parties involved in that are free to be excused at this  
10 point if they prefer, but if you'd like to stay around for the  
11 exciting conclusion of the next set of arguments, you're  
12 welcome to do that as well.

13 MR. KOSMOWSKI: Thank you, Your Honor.

14 MR. ROWE: Thank you, Your Honor.

15 THE COURT: Certainly.

16 MR. CLARK: Your Honor, with that we'll turn to agenda  
17 items 1 through 5 and I'm going to turn the podium over, at  
18 least initially, to my partner, Mr. Eric Ivester.

19 THE COURT: All right.

20 MR. IVESTER: Good morning, Your Honor.

21 THE COURT: Good morning.

22 (Pause)

23 MR. IVESTER: Your Honor, this hearing began -- or had  
24 its genesis at a hearing we had before you only July 7th, 2015  
25 where we reached a resolution of the debtor's motion to enforce

1 the plan injunction against the District, which was filed not  
2 long after the third amended complaint was filed in state --  
3 California state court.

4 That agreement was later memorialized in an order  
5 entered by Your Honor on July 23rd, 2015. Your Honor had noted  
6 at the prior hearing that the state-court action was in its  
7 infancy. Thus Your Honor suggested, and the parties agreed,  
8 that from a judicial-economy standpoint, certain threshold  
9 issues such as whether the District has administrative claims  
10 or whether certain claims were untimely should be decided prior  
11 to sending the parties to state court for determination.

12 THE COURT: And I've lived to regret that decision.

13 MR. IVESTER: Well, maybe we can by the end of the day  
14 make things easier to (sic) Your Honor.

15 We also agreed, as a part of that stipulation, to  
16 include in the determination whether the District has stated a  
17 claim that its debts were not dischargeable. Your Honor, we  
18 briefed these issues and attempted to resolve through mediation  
19 this matter with the aid of Judge Clarkson, but regrettably  
20 those efforts did not succeed and we're here today.

21 Your Honor, before launching into a presentation, may  
22 I make a suggestion about how we could proceed in the most  
23 efficient way?

24 THE COURT: Go ahead.

25 MR. IVESTER: Your Honor, I have a brief preliminary

1 statement that will be brief. I don't delve into each of the  
2 underlying underpinnings, but I would like to give -- I assume  
3 Mr. Patterson and others for the District would also like to  
4 give a preliminary statement.

5 Your Honor, thereafter, while the burden of proof is  
6 on the District on each of these motions, we agreed in that  
7 earlier scheduling order about who would go first. In other  
8 words, we, the debtors, agreed to file the first brief on the  
9 administrative-expense-priority issue. The District filed  
10 first briefs on dischargeability and timeliness. Thus I would  
11 propose that I would go first, after the close of preliminary  
12 statements, with respect to the administrative-claim issue.  
13 Then the District can respond. And then thereafter the  
14 District can go first on the dischargeability issue; we could  
15 respond. And then lastly, on the timeliness issue, the  
16 District can go forward; we can respond. In each case,  
17 rebuttal would be permitted but limited to issues raised in the  
18 response.

19 So that's how I would suggest we go forward, Your  
20 Honor, if that's acceptable to you.

21 THE COURT: That's fine with me. I'd just like to  
22 reiterate that we have read the submissions; they're extensive.  
23 I don't think there's any need for everybody to cover every  
24 point. Just hit me with the stuff you think is most important.

25 MR. IVESTER: That's what we're going to try to do,

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25

1 Your Honor.

2 THE COURT: All right. Thank you.

3 MR. IVESTER: Your Honor, as you will recall and as I  
4 do, Exide commenced its Chapter 11 case on June 10, 2013. The  
5 instant proceedings with the District regarding Exide's lead-  
6 recycling facility in Vernon, California had their genesis,  
7 really, Your Honor, on October 8th, 2013 at a rally not far  
8 from the facility, attended by regulators, including the AQMD,  
9 politicians and their constituents. The primary purpose of  
10 this gathering was to find a way to force the closure of the  
11 facility. Indeed, the rallying ended with the rhythmic chant  
12 joined in by those in attendance, including politicians, of  
13 "Shut it down. Shut it down." And shut it down they did.

14 A mere ten days later on October 18th, 2013, the  
15 District filed a petition for order of abatement seeking to  
16 enforce -- force Exide to seek -- cease operations at the  
17 Vernon facility, notwithstanding that many of the alleged  
18 deficiencies that are the subject of these proceedings are  
19 alleged to existed (sic) for years prior to the time by which  
20 the District was goaded to action.

21 As stated, the District succeeded in its objection.  
22 The Vernon facility shut down for repairs on March 14, 2014,  
23 fifty-seven days after the District filed its original  
24 complaint on January 16, seeking noncompensatory penalties from  
25 Exide. The facility never again operated, due in large part to

1 regulation requiring the facility to operate under continuous  
2 negative pressure that the District proposed six days before it  
3 fixed -- it filed the original complaint. The new regulation  
4 became effective in April 2014, one month after the facility  
5 was shut down.

6 Your Honor, as a demonstrative aid, we put together a  
7 time line; it kind of shows how these issues have played out.  
8 If I may approach?

9 THE COURT: You may.

10 Let me have a look. Thank you.

11 MR. IVESTER: Your Honor, we -- I both seek praise and  
12 apologize for the size of this. So my eyesight's pretty bad,  
13 so I thought it would be better --

14 Oh, I'm sorry.

15 THE COURT: Much easier to read than a DIP budget,  
16 I'll tell you that.

17 UNIDENTIFIED SPEAKER: We have one. Thanks, sir.  
18 We're good.

19 MR. IVESTER: Now, while I think this is helpful to go  
20 along --

21 UNIDENTIFIED SPEAKER: But I have no hope of seeing  
22 the one on the board.

23 MR. IVESTER: So the -- we were shut down in March of  
24 2014 and never reopened. Notwithstanding that there was never  
25 any regulation requiring negative pressure until the facility

1 was shut down, Exide's failure to operate under continuous  
2 negative pressure is a major premise for the violations alleged  
3 in the original complaint. We guess, Your Honor, just by way  
4 of magnitude, they're at least eighty percent of the damages  
5 claimed and the overwhelming majority of alleged penalties  
6 being claimed by the District in these proceedings.

7           The District's campaign against Exide did not stop  
8 with shutting down Vernon. Rather, since then, the District  
9 has filed three amended complaints, each time increasing the  
10 noncompensatory penalties that it seeks from Exide. Along the  
11 way, the District has flooded the bankruptcy-court process.  
12 Indeed, it has never sought leave of this Court for anything  
13 unless Exide brought the District's conduct to Your Honor's  
14 attention.

15           Your Honor, there is no deference to the District in  
16 this case, particularly at the expense of Exide's other  
17 creditors, who, unlike the District, played by the rules.  
18 Indeed, there's no police or regulatory policies at stake here.  
19 Vernon is no longer operating, and other government regulators  
20 are responsible for overseeing any cleanup that may be required  
21 of Exide.

22           THE COURT: What is occurring in the way of  
23 remediation at the property as we speak? Do you know?

24           MR. IVESTER: Your Honor, I should have mentioned my  
25 co-counsel from the Sheppard Mullin firm, Jeff Parker, is here.

1           Maybe, Jeff, if you could give His Honor a brief  
2 rundown.

3           MR. PARKER: Yes.

4           Thank you, Your Honor. Exide is working with the  
5 California Department of Toxic Substance Control, which is  
6 known as the DTSC, on the closure plan and implementing that.  
7 So it's in the midst of several submissions to get that plan --  
8 get the work underway. It needs to undergo approval by the  
9 DTSC and public-comment periods.

10           So we're well along the way of doing that process, the  
11 next steps, including submitting a specific plan as to exactly  
12 what work will be done and the requirements -- specific  
13 requirements for cleanup under that. So --

14           THE COURT: Okay, so the short answer would be  
15 nothing --

16           MR. PARKER: No, that's --

17           THE COURT: -- other than study and getting ready to  
18 decide what has to be done?

19           MR. PARKER: Actually, that's not correct, Your Honor.

20           THE COURT: Okay.

21           MR. PARKER: First, the facility itself would have --  
22 which had several massive buildings on it -- there has been a  
23 lot of work to take that -- all those facilities out, all the  
24 equipment, and that's all done under conditions that don't  
25 allow the spread of lead anywhere, and cleaned. So it's -- the

1 process is complicated because it involves above-ground work,  
2 taking down facilities, below-ground work, which is to  
3 determine what needs to be done with the soils and whether  
4 there're any groundwater issues to be addressed.

5 So there's been a lot of work that's been done, but  
6 there's still a significant amount of work to be done before  
7 the onsite-facility closure is done.

8 THE COURT: Okay, so do I remember that -- either  
9 before or in concert with confirmation of the plan, that Exide  
10 made some agreement with respect to this authority, in terms of  
11 what it would commit dollarwise or effortwise with respect to  
12 cleanup?

13 MR. PARKER: Correct. There was a time limitation of  
14 five years during which there was a specific amount of money  
15 set aside that Exide had funded. There were also financial  
16 assurances and commitments that went well beyond that, to  
17 assure the ability to do the other work.

18 THE COURT: Okay. Thank you.

19 MR. PARKER: You're welcome.

20 MR. IVESTER: And one add-on to that, Your Honor: We  
21 have engaged, since the hearing before you -- you have a good  
22 memory -- on March 27th, 2015 at confirmation where we also  
23 heard both approval of those agreements and closure, we had --

24 THE COURT: I just don't remember what I had for lunch  
25 yesterday; that's the difference.

## EXIDE TECHNOLOGIES

30

1 MR. IVESTER: -- we had -- we have done a lot of  
2 offsite work as well.

3 If you remember, Your Honor, at least as far as the  
4 offsite work, not the onsite work but at least the offsite  
5 work, the amount we required to spend in the first five years  
6 after confirmation -- or roughly five years, was nine million  
7 dollars. That has been spent.

8 And as Your Honor just mentioned, Your Honor, we have  
9 expended and will expend, in remediation of the Vernon  
10 facility, millions of dollars, tens of millions of dollars.  
11 Thus, while the District claims that this is all about letting  
12 a dishonest debtor off the hook, this really is quite the  
13 opposite. Indeed, if the District's claims were allowed to,  
14 quote, "pass through the bankruptcy", which is what they're  
15 trying to do, Your Honor, both from their administrative side  
16 and from the dischargeability arguments they're making, that  
17 would -- it would make it more difficult to address some of the  
18 remediation efforts being pursued in California. And that  
19 would do nothing to advance the public's interest.

20 The District is not thrilled with the prospect of  
21 owning an unsecured claim payable in the small fraction of the  
22 eighty-million-plus it has announced to the public and the  
23 boisterous community activists that it is owed if it is able to  
24 prove its allegations. Its every effort is to avoid that  
25 result, and it's no wonder since it would surely be viewed

1 unfavorably by politicians and the public, who want Exide to be  
2 punished.

3           But, Your Honor, politics do not justify the  
4 District's efforts to elevate its claims over those of Exide's  
5 other similarly situated creditors who honor the bankruptcy  
6 process and were likely equally disappointed with their  
7 recoveries. Here the District is merely a government agency  
8 acting as a creditor to collect penalties that are  
9 noncompensation for any actual harm suffered by the District.  
10 Rather, as the District admits, these penalties are criminal in  
11 nature and intend to punish Exide.

12           The District's disdain for the bankruptcy process  
13 continues to this day. Indeed, it urges convoluted and  
14 unsupported theories to avoid the priority and discharge  
15 provisions of the Bankruptcy Code. The efforts to deny Exide  
16 the benefit of its discharge and elevate the priority of its  
17 claims are contrary to controlling case law in this circuit and  
18 seriously detrimental to other constituents in Exide's Chapter  
19 11 case, who, unlike the District, follow the rules, did not  
20 try to avoid the process, and did not engage in gotcha tactics  
21 after Exide emerged from Chapter 11.

22           Your Honor, in that vein, you have to wonder why  
23 they'd go to such great lengths to avoid making a showing of  
24 excusable neglect as mandated by the Supreme Court in Pioneer.  
25 And I think they don't want to expose the fact that these

1 claims were known way before they were ever brought, and were  
2 brought after the petition -- the effective date, when other  
3 parties-in-interest were helpless to (sic) making decisions  
4 based on those claims.

5           Your Honor, I think, as a policy reason, the  
6 District's invitation to the Court to broadly expand the narrow  
7 corporate-discharge exception to noncompensatory penalties  
8 would mean that mere government allegations of fraud, without  
9 harm to the government, would grant such enforcement --  
10 governmental entities an unfettered ability to singlehandedly  
11 disrupt the corporate bankruptcy case. Indeed, all they would  
12 have to do is mention the word "fraud" in Section 1141(b)(6),  
13 thereby creating the specter of nondschargeability, whether the  
14 government has been fleeced by the alleged fraud or not, and  
15 other parties-in-interest would be reticent to invest in the  
16 debtor on a post-petition basis or give any concession or  
17 receive any benefits that may later be impacted by the broad  
18 nondschargeability claim, whether or not it was warranted in  
19 the first place.

20           Your Honor, in each instance, be it administrative  
21 claim, dischargeability, or timeliness, the District tries to  
22 squeeze square pegs into round holes, all for the purpose of  
23 forcing years of litigation back into its home-state court,  
24 only to come back to this Court in the distant future to have  
25 its claims administered.

1           As a matter of judicial economy that makes no sense,  
2 our briefs explain and, as we will discuss further this  
3 morning, the law clearly supports putting an end to the  
4 District's tactics and ruling that, one, the debtor is not  
5 entitled to an administrative-expense claim; two, the  
6 noncompensatory-penalty claims the District asserts are not the  
7 type that can survive discharge; and three, most of the  
8 District's claims are untimely.

9           Your Honor, with that I'll cede the podium.

10           MR. PATTERSON: Your Honor, we're really here for the  
11 three motions and so I won't take very much time. But the  
12 District certainly disagrees with the characterization of  
13 itself as a rogue bankruptcy participant. It filed a complaint  
14 that was not barred by the automatic stay under 362(b)(4), and  
15 the debtor quickly stipulated to that. The stipulation  
16 provided that the action would be allowed to proceed. It was  
17 not confined to the complaint that was on file --

18           THE COURT: I don't --

19           MR. PATTERSON: -- at that time.

20           THE COURT: -- recall that the stipulation provided  
21 any admission about whether (b)(4) exception applied.

22           MR. PATTERSON: It did not admit it one way or the  
23 other, Your Honor.

24           THE COURT: Yeah.

25           MR. PATTERSON: But the -- and I'm -- certainly the

1 action provided for that.

2 We filed an admin claim by the applicable deadline.  
3 We were concerned that the debtor be aware of the excepted-to  
4 (sic)-discharge claim and, as a result, we advised them, prior  
5 to confirmation, that the District believed it had one. And we  
6 negotiated consensually, amicably, even affably, a carveout  
7 from the confirmation order that preserved the excepted-from-  
8 discharge claim to the extent applicable. The confirmation  
9 order also provided that the California action would be  
10 permitted to proceed post-confirmation.

11 So we're going to argue these three motions and we're  
12 happy to do it, but I certainly disagree with the  
13 characterization that the District has acted in a rogue way.  
14 We have been respectful of the Court's deadlines. We've been  
15 respectful of the Court's process. When we came in July, we  
16 quickly negotiated an arrangement with the debtor that would  
17 allow this Court to test the theories that we were advancing,  
18 so that we wouldn't burden the debtor with a noneconomical  
19 piece of litigation in the state court if it didn't make sense.  
20 And we acknowledge and have always acknowledged and we  
21 acknowledge today that, whatever the outcome in the state-court  
22 action to the extent it's allowed to go forward, we would have  
23 to come back to Your Honor before enforcing any judgment,  
24 whether for administrative expense or whether for an excepted-  
25 from-discharge claim.

1           We've tried to be very respectful of this Court's role  
2 and we are being respectful of that Court's role today.

3           That's all I want to say right now, Your Honor.

4           THE COURT: Thank you.

5           MR. IVESTER: Your Honor, if we may now move to the  
6 administrative-claim objection. I think Your Honor, on the --  
7 at the July 7th, 2015 hearing, said something to the effect  
8 that if -- they first need to determine in this court why they  
9 have them, and those could be liquidated if they do have those  
10 out in California state court. And so in that vein, we filed  
11 an objection describing basically that as a matter of law they  
12 don't have them, they're not entitled to administrative-expense  
13 treatment. And, Your Honor, factually they haven't pled to --  
14 sufficiently to show Your Honor that they in fact do have  
15 administrative-expense claims.

16           Briefly, Your Honor. As you well know, the Third  
17 Circuit has held that claims to be -- for claims to be entitled  
18 to administrative expense, it must rise from a post-petition  
19 transaction with the debtor and be beneficial to the debtor-in-  
20 possession in the operation of the business. That's the  
21 Calpine v. O'Brien case. The Third Circuit further articulated  
22 the language of 503(b) suggests a quid pro quo where the estate  
23 accrues a debt in exchange for consideration necessary to  
24 operate or rehabilitate the estate. Priority is afforded to  
25 such expenses to compensate the providers of those necessary

1 goods, services, or labor. That's the Tri-State case, Your  
2 Honor.

3 In -- we are going forward on this motion, which we  
4 agreed to do on this objection. The party asserting the  
5 administrative-expense claims bears the burden of demonstrating  
6 that it deserves administrative-expense status. That's O'Brien  
7 at page 533.

8 In order to hold administrative expenses to a minimum  
9 and maximize the value of the bankruptcy estate, 503(b) is to  
10 be narrowly construed. The applicant bears a heavy burden in  
11 demonstrating that the cost and fees for which it seeks payment  
12 provided an actual benefit to the estate and such cost and  
13 expenses were necessary to preserve the value of the estate's  
14 assets. Your Honor, this is also found in the O'Brien case, at  
15 532 and 533, as well as Bernard Technical (sic), Inc., which is  
16 342 B.R. 177.

17 Your Honor, here we allege that the debtor has not  
18 proven as a matter of law that it's entitled to an  
19 administrative claim, based upon the applicable case law in  
20 this district, and that's Tri-State and Conroy. Moreover, they  
21 have made no serious attempt to show that their claim is an  
22 actual, necessary expense, benefit to the estate, or any other  
23 hallmark of administrative-expense entitlement --

24 THE COURT: Okay, so let's pause there for a moment  
25 and, for the moment, build a framework along the lines of the

1 case law which talks about, okay, so when we're talking about  
2 an operating business, we're -- the case -- some of the cases  
3 discuss the fact that it's not really the typical classic  
4 implementation of the "necessary for preservation of the  
5 estate". As a consequence of there being an operating  
6 business, there're certain parties that need to rely on the  
7 fact that the business will do the things it's supposed to do,  
8 so that maybe if someone gets hurt -- my words, not how the  
9 cases say it exactly, but -- as a result of the operating  
10 business, that's something legitimately that could be  
11 considered an administrative expense.

12 Now, the plant closed permanently, you tell me, on  
13 March 14th of 2014. So at that point the business, I guess,  
14 was no longer operating. So of the claims that the District is  
15 making, which arise from operations prior to, I guess -- you  
16 could say after December 12th of '13 when the original proof of  
17 claim was filed, and before March 14, 2014 --

18 MR. IVESTER: Your Honor --

19 THE COURT: -- if any?

20 MR. IVESTER: Your Honor, it's -- that's an awesome  
21 question, and that was the last thing I was going to get to,  
22 but I'll move it up to the first thing.

23 If I can get -- we have a marked version of the third  
24 amended complaint and I'd like to just briefly walk you through  
25 that --

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1 THE COURT: All right.

2 MR. IVESTER: -- because the problem is you can't  
3 tell. And it's their burden to show you.

4 THE COURT: Okay, so I want to go through that  
5 exercise but, if you can't tell, isn't that something I should  
6 leave for the California court to decide?

7 MR. IVESTER: We're going to -- what -- let me give  
8 you an example, Your Honor. Let's say there's a monitor  
9 exceedance and we got flagged for that violation post-petition.  
10 A monitor went off because they measured too much dust in the  
11 air. The complaint won't tell you, and that court in  
12 California won't tell you, when that -- was that lead dust  
13 deposited as a result of our post -- seven and a half months of  
14 post-petition operation, or was it latent and it'd been there  
15 for years. They don't plead that, they don't show that. And  
16 that's the type of thing that we need to decide here first,  
17 whether they're entitled to the admin claim, and the constructs  
18 in which they would be entitled to an admin claim, before we  
19 spend two years litigating that issue in California --

20 THE COURT: And I --

21 MR. IVESTER: -- state court.

22 THE COURT: And I don't disagree with that. I think  
23 the best, since no factual record is being made here, is going  
24 to have to be, it seems to me, maybe to build a construct.

25 MR. IVESTER: I -- we're happy to do that, but I think

1 it becomes very difficult when you walk through the third  
2 amended complaint. There are other issues that, as a matter of  
3 law, they're just not entitled to those types of things. I'd  
4 like to walk you through that, Your Honor.

5 THE COURT: All right.

6 MR. IVESTER: Your Honor, I've handed you the -- a  
7 copy of the third amended complaint. Now, as far as unsecured  
8 claims are concerned, we allege many of these allegations are  
9 untimely. It's their position, though, as far the admin  
10 claim's concerned, this was timely filed as an admin claim, so  
11 to the extent it morphs over in post-petition, there's not a  
12 time-bar issue.

13 So let's look at the third amended complaint. What  
14 we've done here, Your Honor, is -- backing up for a minute. I  
15 want to walk through why Tri-State and the criminal nature of  
16 these penalties allow you to rule, as a matter of law, that  
17 they're not entitled to these. I'll get to that in a minute.  
18 But as a fallback position, even under their case law, N.P.  
19 Mining and its prodigy (sic), the Eleventh Circuit said, okay,  
20 fine, we're going to let noncompensatory civil penalties  
21 qualify as administrative expenses. They expanded the Redding  
22 (ph.) case in 959 (ph.) beyond what any court has done,  
23 including Your Honor, in the Third Circuit, from torts to other  
24 things. But they said, but if it is continuation of an  
25 unabated pre-petition conduct, it's not entitled to

1 administrative-expense priority. And there's a footnote in our  
2 brief; we note the other decisions cited favorably by the  
3 District that also so hold.

4 And so, Your Honor, as I walk through this, I want to  
5 focus on a couple of things, Your Honor: What is an unabated  
6 pre-petition conduct? Because if you find that as part of this  
7 construct, then we shouldn't have to, at least as far as the  
8 administrative-expense part of it is concerned, litigate that  
9 in California. Or if you so rule, it may make it less crucial  
10 what we do litigate in California, if all we're talking about  
11 on those allegations are pre-petition unsecured dollars.

12 Your Honor, turn to page 2, and we highlight things  
13 where they allege -- and there's more than what we've  
14 highlighted, if you go through the complaint. We've  
15 highlighted various paragraphs where they allege that our  
16 conduct has occurred for many years.

17 And so let's -- the prefatory facts are highlighted; I  
18 won't go through those. Let's go to the first cause of action,  
19 at page 7. Now, Your Honor, this is the biggie. This is  
20 the -- it's morphed into something else, but this started out  
21 as the alleged failure to do operating practices, a/k/a no  
22 negative pressure. And -- which is the bulk of their claim.

23 Now, if you just go through paragraphs 35, 36, 37,  
24 38 -- there're other paragraphs in here, but they all are  
25 talking about our pre-petition conduct, Your Honor. Paragraphs

1 41, 42 -- I won't read them all, but they're all describing  
2 what we were doing on this alleged negative pressure and -- or  
3 failure therefor, throughout that time.

4 They also, in this -- in these factual sections, in --  
5 I don't know why they're not in the general part of the  
6 complaint, but they're in this section -- they bring up the  
7 alleged source-test manipulation. This is the only real  
8 wrongdoing that we're alleged to have done. Right? We may  
9 have not -- on the chip issue, we may have not stored them  
10 properly and they may have emitted dust but, other than filing  
11 some certifications, they don't allege that we were willful and  
12 intentional in a fraud-like way for the chip stuff. It's only  
13 for the source-test manipulation where the paragraphs come in  
14 about the -- that we were somehow deceitful, fraud-like, or  
15 whatever, although they never use the word "fraud".

16 And those all occurred pre-petition, Your Honor.  
17 Every one of these petition -- paragraphs -- and it's in 51,  
18 52, 53, 54, 55; we've highlighted them in the third amended  
19 complaint -- these are all pre-petition acts, Your Honor: the  
20 alleged source-test manipulation, the -- and the negative  
21 pressure.

22 You have to get, Your Honor -- you have to get to  
23 paragraph -- with one exception, you have to get to paragraph  
24 139, which we've highlighted in pink, before you get  
25 allegations regarding pre -- or post-filing conduct. Now,

1 there is that one exception I mentioned, Your Honor, and  
2 there -- it's replete to (sic) the document. It's the  
3 paragraph right before 139, which is 138. 138, April 1st,  
4 2014, was a post-petition act. But it is just an annual  
5 certificate. We thought we were in compliance; they say we  
6 weren't. We signed it. It's relating to what -- this is a  
7 fact that is pled not for a violation purpose but as a penalty  
8 enhancer.

9           Your Honor, in its basic form -- and that's described  
10 in the introduction paragraphs of this -- of the complaint --  
11 the penalties are -- can be strict liability. That's 10,000  
12 dollars. Then for negligent and then knowing and then willful  
13 and intelligent -- and intentional, the penalties increase.  
14 But the underlying transgression doesn't change. And so they  
15 plead more facts to try to get more penalties. That's why we  
16 say they're not trying to plead a fraud action.

17           And so the -- if you look at paragraph 138, they're  
18 not alleging a violation of a statute; they're alleging that  
19 that was a bad act and, therefore, all this penalties for this  
20 continuing pre-petition conduct should be -- we should be  
21 sanctioned for that.

22           So the first one you get to is, again, that on three  
23 days in January we failed to enclose a battery-breaking area  
24 with a total enclosure. Your Honor, that may be something that  
25 we can decide in California or we may stipulate to, depending

1 on the amount of the penalty.

2           Your Honor, we -- continuing on the -- the second  
3 cause of action is a derivation of the negative pressure and  
4 good operating practices. The third, fourth, and fifth causes  
5 of action -- let's see -- and the sixth cause of action,  
6 seventh cause of action, eighth cause of action, all deal with  
7 the chipped -- chip-handling, Your Honor, or the leaky trailers  
8 that were the subject of the MPA. Again, this is conduct that  
9 was open and notorious both to their inspectors -- they allege  
10 in here that we've been doing it for years. They even knew  
11 about it. We could bring tons of newspapers articles and --  
12 publishing the DTC (sic) reports that show it, were published  
13 in the Los Angeles Times. And -- but they waited to jump on  
14 that until after we become effective. But anyway, those all  
15 deal, as we've shaded in yellow, with continuing pre-petition  
16 conduct.

17           Here's -- 156, Your Honor. When we were dealing with  
18 a -- the earlier January reference I made in the earlier  
19 paragraph, they allege we didn't properly enclose something.  
20 Maybe or maybe not. That's a violation. But paragraph 156  
21 says that we disturbed fugitive dust when we were doing some  
22 maintenance work and that somehow that caused -- and it was --  
23 by the way, it was a seven-day occurrence -- that caused  
24 fugitive dust. I don't know, was that -- how long was that  
25 dust there? Was it pre-petition dust or was it -- we don't

1 even operate in September of 2013. We don't even operate for  
2 two months post-petition. Was it a post-petition -- due to a  
3 post-petition emergence? You don't know that from the  
4 allegations, and we shouldn't have to be sent out to California  
5 to decide that -- figure out that two years later. That  
6 California court may never decide that; it may decide strict  
7 liability, X is X, you're liable. It may never decide when the  
8 dust that caused that problem occurred.

9 I'll try to wrap it up on this one, Your Honor. But  
10 we have highlighted throughout the rest of it -- and there are  
11 some more -- there are more vi -- there aren't that many more,  
12 Your Honor, that occurred post-petition. There's -- in the  
13 eleven causes of action, there's a two-day violation. Most of  
14 the stuff is kind of penny-ante stuff, Your Honor, that  
15 occurred post-petition. It's the continuing conduct that  
16 really is where they seek to gain the most from an admin-claim  
17 status.

18 So I think you get the gist of what I'm saying. We've  
19 tried to highlight the issues that could be post-petition but  
20 you don't know it because there's been no allegation about  
21 whether that was -- the actual contamination that caused that  
22 accrued pre-petition or was caused by the operations post-  
23 petition, which at most happened seven and half months, on some  
24 of these, as I indicated -- maybe there're two months of  
25 operation -- before we were cited.

1           Maybe if I could back up, Your Honor, and tell you  
2 briefly why we think under Tri-State they're not entitled to  
3 administrative-claim penalties at all, as a matter of law. You  
4 know, Your Honor, they even concede that -- or they allege that  
5 we would be liable for admin claims in any other district but  
6 the Third Circuit. They -- respectfully, they forget to look  
7 at their own cases that go to the analysis that I just went  
8 through on continuing pre-petition unabated contract.

9           Your Honor, I just realized there's one more document  
10 I'd like to hand up to you on that last subject, the abatement.  
11 It's what happens when you go out of order. Sorry about that.

12           (Pause)

13           MR. IVESTER: One more thing. May I approach on --

14           THE COURT: Yes.

15           MR. IVESTER: -- on this issue, Your Honor?

16           Your Honor, the first items I handed you were the  
17 petition for order of abatement filed by the District against  
18 us, and the memorandum in support, in the -- in California.  
19 And if you read the petition, it's all about the negative-  
20 pressure issue I mentioned, the failure to use good operating  
21 practices by negative pressure.

22           So this ties off with the complaint, Your Honor.  
23 Those numerous paragraphs describe this continuing pre-petition  
24 conduct. They did not move to abate that until ten days after  
25 the town-hall meeting when they filed this on October 18th,

1 2013. So it's continuing pre-petition conduct, continued post-  
2 petition. They didn't even move to abate it until October 13,  
3 20 -- I'm sorry -- October 18, 2013. And this makes clear that  
4 they're focusing on the negative-pressure issue.

5 To further emphasize that point, Your Honor, the  
6 original proofs of claim -- what we allege is the only  
7 operative proof of claim -- if you -- that's the second -- or  
8 third thing I handed you. If you look at footnote 4, Your  
9 Honor -- and this is -- the footnote talks about the failure to  
10 use negative -- consistent negati -- sufficient and consistent  
11 negative pressure. And they, there in that proof of claim, say  
12 dust (ph.)-infractions violation which began on September 17th  
13 and ended on -- 2010 and continued until June 10th, 2013. Then  
14 they say in the footnote, "This violation's ongoing but, for  
15 the purposes of this proof of claim, we cut off at June 10th."

16 So this is clearly an unabated pre-petition conduct  
17 they knew about, and they finally took action. But as we've  
18 said in our papers, that wasn't a rule during the process of  
19 this abatement proceeding. They -- and it's on the time line,  
20 Your Honor. They propose, enacted, and a rule became effective  
21 that codified what they said we were doing wrong. And once  
22 they did that, we never reopened and violated that rule.

23 Your Honor, I'm going to try to make this brief. I  
24 know you know what Tri-State says and that it deals with the  
25 proposition that criminal noncompensatory penalties should --

1 are not entitled, as a matter of law, to administrative  
2 expense. That's the law in the Third Circuit.

3 (Pause)

4 MR. IVESTER: May I approach, Your Honor?

5 THE COURT: Yes.

6 (Pause)

7 THE COURT: Okay, now, am I to anticipate you're going  
8 to get into the judicial-estoppel argument?

9 MR. IVESTER: Yes, Your Honor.

10 THE COURT: You have the better part of that argument.  
11 I don't think you need to tell me anything farther -- further  
12 on it, and I'll let the District try to disabuse me of that  
13 notion when it's their turn.

14 MR. IVESTER: Thank you, Your Honor. I'll, just for  
15 the record, note that we have handed to you exhibits that were  
16 attached to our pleading, but they were pleadings from the  
17 federal district court, the remand proceedings, and we've  
18 highlighted the -- what we think to be the crucial distinctions  
19 that -- representations and findings regarding the true nature  
20 of these penalties.

21 (Pause)

22 MR. IVESTER: Your Honor, with that admonition, maybe  
23 I'll sit down and save a few comments for reply as needed.

24 THE COURT: Thank you.

25 MR. PFISTER: Good morning, Your Honor. Rob Pfister.

1 I'm Mr. Patterson's partner. I'll be handling the  
2 administrative-claim-objection response and the GUC-claims  
3 motion. Mr. Patterson will be handling the excepted-from-  
4 discharge motion.

5 THE COURT: All right.

6 MR. PFISTER: On the administrative objection, I think  
7 it's important to start with one set of key facts, which is,  
8 Exide's business was making lead-acid batteries. A key cost in  
9 that business was lead. Exide had a choice while it was  
10 operating as a debtor-in-possession: It could source the lead  
11 that it needed from third parties, or it could source the lead  
12 from its own facilities, including the Vernon facility.

13 Exide's pleadings in this court, in connection with  
14 the Vernon-closure motion, state that, by sourcing the lead  
15 internally, that is, by keeping the Vernon facility open and  
16 not buying the corresponding amount of lead on the third --  
17 from a third party, Exide saved between fifteen million dollars  
18 a year and thirty-eight million dollars a year.

19 THE COURT: Okay, they're the architects of their own  
20 problem. I get the point.

21 MR. PFISTER: Well, I -- the point I wanted to make  
22 was a little bit beyond that, which is, this was a business  
23 decision, and any other business that made that decision and  
24 that continued to operate --

25 THE COURT: All right, is it -- okay, so we're

1 morphing to the cost-benefit analysis. They made -- as an  
2 actor, they made the decision that they'd run whatever risk  
3 they had to run, because it cost less to recycle rather than to  
4 purchase from another party.

5 MR. PFISTER: Right.

6 THE COURT: You know, let's get on -- away from the  
7 good guy/bad guy thing.

8 MR. PFISTER: Okay. I completely understand.

9 THE COURT: I don't view you as a rogue bankruptcy  
10 participant.

11 MR. PFISTER: I'm not sure I'm rogue in anything, but  
12 thank you.

13 In terms of the key principles of admin claims, I know  
14 Mr. Ivester started with 503. I think Your Honor put your  
15 thumb on the right issue, which is, if you look at the statute,  
16 503, there's -- I call them the double inclusions, which I  
17 think explains much of the case law in this area. 503(b) says,  
18 "there shall be allowed administrative expenses, other than  
19 claims under 502(f), including - the actual, necessary costs  
20 and the expenditures of preserving the estate including", and  
21 then it lists wages and other things.

22 So there is certainly allowed, under 503(b), something  
23 called administrative expenses. It's not a defined term in the  
24 Code. The other thing we know about what's allowed as  
25 administrative expenses is 503(c), which categorically

1 disallows certain things as administrative expenses. And of  
2 course, fines, tort liability, and the like are not  
3 categorically disallowed.

4 So with that structure of the statute, which has been  
5 roughly the same from the act to the Code, you have the  
6 decision such as Redding, which says, if you're operating a  
7 business, costs ordinarily incident, such as tort liability --  
8 you don't ask did the tort liability confer substantial benefit  
9 on the debtor. You don't ask anything like that. Right? You  
10 have Conroy in the Third Circuit, 1994, saying administrative  
11 expenses include reimbursement to a regulator for cleanup.  
12 Again, you don't have a substantial -- necessarily substantial  
13 benefit in that sense. But there's just no question that those  
14 types of costs are in fact properly treated as administrative  
15 expenses.

16 THE COURT: And they're compensatory in nature, are  
17 they not?

18 MR. PFISTER: Those in Conroy, in particular, were.  
19 Now, in other circuits, in the Third -- in the First Circuit in  
20 particular, Cumberland Farms, First Circuit, 1997, civil  
21 penalty for post-petition failure to comply with environmental  
22 laws held as an administrative expense. Another case from the  
23 First Circuit, Monsus (ph.) Petroleum, same. Elkins (ph.)  
24 Energy, it's an ACT (ph.) case from the Fourth Circuit, holds  
25 that civil penalties for failure to comply with the

1 environmental laws are entitled to administrative-expense  
2 treatment, with none of this distinction between operating and  
3 not operating.

4           There's one case and one circuit where that  
5 distinction is important; that's the Eleventh Circuit; it's  
6 from the N.P. Mining case. N.P. Mining took a kind of  
7 different approach than the other circuit has taken, and said,  
8 well, we're going to focus on what the Supreme Court said in  
9 Redding, which is, costs incidental to the operation of the  
10 business, and we're going to draw a distinction between  
11 business operations versus liquidations. That's a distinction  
12 that Exide relies on throughout its papers once it gets past  
13 the Tri-State argument.

14           Now, in terms of -- I think that gets us straight to  
15 Tri-State. I think, if we were in -- again, if we were in the  
16 First Circuit, if we were in the Fourth Circuit, there would be  
17 no question that these are allowed. If we were in the Eleventh  
18 Circuit, they would be allowed with an asterisk, which is, it  
19 has to be directly keyed to the operation of what Exide was  
20 doing.

21           And the operation point -- I think the facts and the  
22 language that the N.P. Mining court used, which Exide relies on  
23 throughout its administrative-claim objection, is really  
24 important. It's a strip-mining case. And the way the court  
25 divides the penalties, it says, well, some of these penalties

1 are from pre-petition disturbances to the land; those pre-  
2 petition disturbances to the land that may be continued  
3 unabated post-petition, we're not going to call those  
4 administrative expenses, however, penalties that are  
5 attributable to post-petition violations by the debtor-in-  
6 possession, we are going to call those administrative expenses.  
7 And that's where the N.P. Mining case turns.

8           We don't necessarily agree that this distinction  
9 between operating and not operating is the best way to read the  
10 statute. The majority of the circuits have reached a contrary  
11 conclusion. But I think a gating issue, before we even get  
12 there, is the Tri-State point. And I heard Your Honor say, on  
13 the judicial-estoppel point -- so I want to just turn very  
14 quickly to Tri-State, because I think that is the gating legal  
15 issue, and I think Your Honor can and should decide the Tri-  
16 State issue.

17           So on Tri-State, the opinion begins by framing -- the  
18 opinion begins by framing the issue as whether a criminal fine  
19 is entitled to administrative-expense priority. It closes its  
20 opinion by asking whether a criminal fine or a criminal penalty  
21 is entitled to administrative-expense priority. We do not have  
22 here a criminal fine or a criminal penalty. The District is  
23 not a law-enforcement agency; it has no ability to bring an  
24 action in the criminal division of the California Superior  
25 Court. No one's arrested. No one bears a criminal conviction

1 at the end of the process. These facts were highly important  
2 to the Tri-State court.

3 The word "criminal", "crime", "crimes", "criminal  
4 intent", "criminal activity", appears, I think, forty-seven  
5 times throughout the Tri-State opinion. And the Court was, I  
6 think, frankly, offended at the notion that a judgment of  
7 criminal conviction that included a fine as punishment -- that  
8 that could ever be characterized as a cost ordinarily incident  
9 to the operation of a business. And it was on that basis the  
10 Third Circuit thought that the civil/criminal distinction was  
11 extremely important. And it was on that basis -- again, it  
12 bookends the opinion; that's how -- that's what we're deciding,  
13 that's what we've decided, and throughout we're talking about  
14 the whole thing.

15 Exide's response to that is to say, well, when the  
16 District sought remand of the case after -- of the District's  
17 civil-penalties case, after it was removed to federal court,  
18 the District referred to the penalties at issue as quasi-  
19 criminal. Well, Your Honor, I would submit there's a large  
20 difference between referring to something as quasi-criminal and  
21 criminal, and --

22 THE COURT: What would that be?

23 MR. PFISTER: Your Honor, if we had on the stand the  
24 other side's expert and they called him an expert and I called  
25 him a quasi-expert, I think no one in the world would fail to

1 grasp the distinction there. If there were a -- "quasi"  
2 necessarily means not the thing that you're referring to.

3 An intellectual: If I refer to someone as a quasi-  
4 intellectual, I don't think anyone would miss the -- anyone  
5 would miss the implication that I was drawing, which is not a  
6 real intellectual.

7 Here, there is -- there are parties in the state of  
8 California who have the ability to commence criminal  
9 litigation. There's federal authorities, the U.S. Attorney's  
10 Office, with which Exide entered into a nonprosecution  
11 agreement for. There's state authorities who have the ability  
12 to bring criminal charges. And we cited, for example, in our  
13 brief the healthcare cases where the deciding vote, the chief  
14 justice, said there is a giant difference between labeling  
15 someone a criminal and saying someone has simply not complied  
16 with an obligation that is a civil obligation. And that  
17 difference permeates our law. Criminal cases are heard in  
18 different divisions of the court. There's different rights  
19 that attach.

20 THE COURT: So I'm looking at the definition of  
21 "quasi" online --

22 MR. PFISTER: Um-hum.

23 THE COURT: -- in the Merriam-Webster online  
24 dictionary, and it says, "having some resemblance usually by  
25 possession of certain attributes". It seems to me pretty clear

1 that in the use by the District of "quasi-criminal", that's  
2 precisely what they intended, that the fines had some  
3 resemblance or possess certain attributes that mimicked a  
4 criminal fine.

5 MR. PFISTER: Um-hum.

6 THE COURT: How could you have meant anything else?

7 MR. PFISTER: I agree, under that definition of  
8 "quasi", that there are certain attributes. Right? One of  
9 those attributes could be that they're noncompensatory. Right?  
10 One of those attributes could be that they are penalties, the  
11 root of which obviously is "penal". Those are both fair  
12 characterizations of civil penalties, but it doesn't make them  
13 into criminal -- a judgment of criminal conviction. It doesn't  
14 label the person who has been -- who has suffered the penalty a  
15 criminal. It does not make them a -- it does not make them  
16 criminal. There's just a difference.

17 I will say I think our papers -- we've tried to be --  
18 thread a line here. If you asked me do I think the Tri-State  
19 case is rightly decided, I would say no. That's not an  
20 argument we're making to Your Honor, because you sit in the  
21 Third Circuit. What I can say on the Tri-State case is, the  
22 distinction that the court drew between criminal and civil was  
23 important to the Third Circuit. So whether it's important to  
24 me or how I might think about that is not --

25 THE COURT: Or to me.

1 MR. PFISTER: -- is less of an issue.

2 All I can say, Your Honor, is I found that the opening  
3 lines of the discussion are we're asked to decide if a criminal  
4 fine is entitled to priority, and the conclusion is, we hold  
5 that punitive criminal fines arising from post-petition  
6 behavior are not administrative expenses.

7 I don't think, when you have an agency that itself has  
8 no ability to charge or convict someone with a crime -- the  
9 Superior Court division that will be hearing this matter is in  
10 Central Civil West; it's the complex-civil-case division that  
11 has been assigned to this case. The procedures are simply  
12 different.

13 And again, I -- without agreeing in my heart of hearts  
14 with everything that's said in the Tri-State opinion, I think  
15 what we can very safely say is that the court took particular  
16 umbrage at the notion that a criminal fine might ever be called  
17 a cost of doing business.

18 And if we were talking about the merits of Tri-State,  
19 again, I think there're other issues or problems with it. I  
20 don't -- again, that doesn't matter what I think, because Your  
21 Honor's in the Third Circuit.

22 So -- but I think we plainly do not fit within what  
23 Tri-State decided, and I think that's very important. If Your  
24 Honor disagrees with me and believes that Tri-State is  
25 controlling, what the District asks is that you sustain the

1 administrative-claim objection on that basis and that you allow  
2 us to take that issue up to the appellate courts. At the  
3 appropriate court, we'll argue that Tri-State does not -- it's  
4 certainly a break from other circuits and that is not an  
5 accurate or appropriate way of reading the law. We think that  
6 pure legal issue can and should be decided.

7 But if Your Honor agrees with us that Tri-State is not  
8 dispositive, that Tri-State does not present a categorical bar  
9 to our recovery of these, then I think you get to the second  
10 point of Mr. Ivester's presentation, which are very fact-  
11 intensive questions. You can present them superficially and  
12 say they're not fact-intensive, by saying -- for example, Mr.  
13 Ivester said Exide ceased operations on March 14th of -- March  
14 of 2014, rather. Well, look at paragraph 199 of the complaint  
15 that Mr. Ivester handed up, and what you'll see there is an  
16 allegation that on March 22 and March -- 21 and 22, which is  
17 after the -- I believe it was the March 14th date he said --  
18 I'll let Your Honor get there.

19 THE COURT: I'm there.

20 MR. PFISTER: Okay. -- that there were some people  
21 who were doing maintenance work, they were hammering on a pipe,  
22 they did it the wrong way, that it shouldn't have been done,  
23 and it caused a release of dust. That's one that I found just  
24 during Mr. Ivester's argument. There are others.

25 He says, well, some of those are really small and

1 maybe we can go to the state court on those, and maybe the  
2 state court -- maybe we can just work those out. But the fact  
3 of the matter is that the complaint spans the pre-petition  
4 period and the post-petition period because the District has  
5 claims that are pre-petition claims and post-petition claims.

6           If we had come in here -- and first of all, I do want  
7 to emphasize -- I think it's important -- that there is no  
8 time-limits argument, there's no relation-back argument; none  
9 of those problems. We have a timely-filed administrative  
10 claim. If Your Honor had -- if there were no independent -- no  
11 state-court forum, not alternative forum, I think, having these  
12 kinds of demonstratives, talking about what happened in a town-  
13 hall meeting, talking about politicians -- and he said, we  
14 could bring in tons of newspaper articles the L.A. Times. I  
15 mean, we could have a full trial in this court on when specific  
16 things happened and which ones fall into the pre-petition  
17 category, which ones fall into the post-petition category,  
18 which ones straddle the line. But at the end of the day, and I  
19 think what's important to remember, is that the proof of claim  
20 that Mr. Ivester handed up is a timely-filed December 9th,  
21 2013 -- filed on the governmental bar date. It seeks  
22 38,915,000 dollars in liquidated penalties.

23           We filed the California lawsuit less than a month  
24 after that complaint was -- that proof of claim was filed. We  
25 reached a stipulation with the debtor that said the lawsuit

1 could proceed in California state court. When it came time for  
2 confirmation, we said to the debtor -- we raised a confirmation  
3 objection, said we don't want it -- we don't want there to be  
4 any doubt that our state-court lawsuit can proceed post-  
5 confirmation, notwithstanding the discharge injunction. And  
6 what we were able to agree on is embodied in Your Honor's  
7 order; it's paragraph 31 of the confirmation order, and it --  
8 pardon me one moment, Your Honor.

9           Okay. Pardon me. It's paragraph 31 of Your Honor's  
10 confirmation order and it says, "Notwithstanding any otherwise  
11 applicable injunction in the plan or in the confirmation order,  
12 the South Coast Air Quality Management District shall be  
13 permitted to prosecute its lawsuit captioned 'People of the  
14 State of California'", et cetera, "case number 533528, subject  
15 to and in accordance with the terms of that certain stipulation  
16 approved by this Court in March of 2014."

17           So at every possible stage, we ensured that our  
18 California state forum remains open. That forum will, even the  
19 debtor concedes, be the appropriate forum for -- if Your Honor  
20 rules against the District on the GUC-claims motion and says  
21 we're limited to the original proof of claim that was filed in  
22 December of 2013, those allegations will go forward in that  
23 court.

24           And there is no reason -- there's no unfairness.  
25 There's no reason why the third amended complaint's allegations

1 that relate to post-petition conduct shouldn't also be heard by  
2 that same court. It's a forum that's ready, willing, able,  
3 available. It's a forum to which Exide consented, and it is a  
4 forum to which everybody knew -- everybody knew about. This is  
5 not a surprise. This was in the confirmation order. This was  
6 in our confirmation objection.

7 And so what we would ask Your Honor is, rather than  
8 have the Court try and go through these various time lines, try  
9 and parse the basis, if there is any basis -- and I  
10 respectfully submit there's not -- for Exide's comments that  
11 there's some unfairness on the part of the board. I think it's  
12 important to recognize that the board is a public entity. This  
13 notion that it's been conscripted by politicians goes against a  
14 well-settled rule in our system that there's a presumption of  
15 regularity. And --

16 THE COURT: Well, look, I do remember that there was  
17 quite a bit of controversy about the injuries, particularly to  
18 workers and surrounding residents, that were alleged to have  
19 been caused by what happened. I also approved the  
20 nonprosecution agreement and read that which Exide was accused  
21 in connection with that.

22 So there was a lot of controversy surrounding this.  
23 What the consequence of that was with respect to how political  
24 bodies may have acted, frankly, is of no consequence to me  
25 here.

## EXIDE TECHNOLOGIES

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1 MR. PFISTER: I understand that, Your Honor, and I  
2 appreciate that. I wanted to just comment on the comment that  
3 was made.

4 Now, from a judicial-economy perspective why does this  
5 make sense, well, first of all, California state-court  
6 litigation will proceed; it will make certain factual findings.  
7 It is possible, if -- first of all, if Exide is right with the  
8 allegations it's made throughout its pleadings that it did  
9 everything that it possibly could have to meet these  
10 requirements, that there was -- I think the term they used is  
11 "bait and switch", if you install this particular device, then  
12 you'll be okay.

13 THE COURT: Look, let me just say this: The parties  
14 have teed up several issues for me to decide here. To the  
15 extent it's within my purview to decide certain issues without  
16 the benefit of a factual record, I will try to do that.

17 I understand ultimately, and I think it's appropriate,  
18 that -- when appropriately cabined, that the claim be  
19 liquidated in the California court. That causes me no issue.  
20 In fact, I often -- and I said this to you before: I often  
21 would like parties to go elsewhere to resolve their disputes.  
22 But to the extent something has been teed up and I can and  
23 should decide it, I will.

24 MR. PFISTER: Thank you, Your Honor.

25 THE COURT: I doubt I will leave everything for the

1 California court.

2 MR. PFISTER: And then -- so in closing, then, what I  
3 will say is the District has committed to, has always committed  
4 to, and commits again here today, that if the California state  
5 court ultimately finds not in Exide's favor on all issues but  
6 finds in the District's favor on one or more issues, the  
7 District will return to this Court before attempting to enforce  
8 any judgment. And if Your Honor has issues at that point, once  
9 there's been a fully developed factual record, we'll go through  
10 those issues.

11 But this is not -- again, this is not Your Honor's  
12 last and final chance before the parties go off to a different  
13 forum. This is an order -- again, we try to do an orderly  
14 process here.

15 THE COURT: Oh, gee, that'll give me something to look  
16 forward to.

17 MR. PFISTER: Unless you have any other questions  
18 on --

19 THE COURT: I don't. Thank you.

20 MR. PFISTER: Thank you.

21 MR. IVESTER: Your Honor, I'll be very brief. Your  
22 Honor, regarding whether we got a benefit from a cheaper source  
23 of lead or not, those comments in the pleadings were  
24 aspirational. We only were open seven and a half months. We  
25 would have liked to stayed open, but indeed the very evidence

1 that he points to on the record at the confirmation hearing and  
2 the other motions was the CEO's declaration describes the costs  
3 which weigh out -- far outweigh any benefit.

4 THE COURT: It's not relevant here, I don't think.

5 MR. IVESTER: Okay. We concur.

6 The -- Your Honor, on N.P. Mining, he tries to show  
7 that that's an outlier. We -- as I said, we cite a case in our  
8 brief that's not an outlier on this unabated pre-petition,  
9 continuing post-petition issue. And at least one of the  
10 circuit cases that they rely on did not have continuing pre-  
11 petition conduct involved there.

12 The -- I'm not going to go through the remand  
13 proceedings; I think I hear Your Honor doesn't want to go  
14 through it. We -- I just would also, in the reply -- in both  
15 of them, they describe that the -- both the criminal and the  
16 civil fines are quasi-criminal, are determined with the same  
17 eight factors that's statutory with this California code under  
18 which they seek to penalize us. The factors are the same. And  
19 that's highlighted in the remand pleadings that I handed up to  
20 you.

21 And I would also say the Third Circuit didn't say just  
22 this crime. It was talking about criminal -- crimes in  
23 general, Your Honor. And it reasoned that it was -- is unfair  
24 to saddle creditors with debtors' wrongful conduct. There's no  
25 meaningful difference, Your Honor. If it walks like a duck,

1 quacks like a duck, it is a duck.

2 THE COURT: What if it's a quasi-duck?

3 MR. IVESTER: We've had some of those too, Your Honor.

4 By the way, Your Honor, we're not alleging that  
5 they're a rogue creditor, but we do allege they're trying to  
6 run roughshod over the other creditors in this case. But  
7 the --

8 THE COURT: Okay, everybody comes in here entitled to  
9 assert their own rights.

10 MR. IVESTER: Yes, Your Honor.

11 THE COURT: And that's all that's happening here.

12 MR. IVESTER: Yeah.

13 He mentioned sustain the -- if you're going to  
14 overrule and sustain it on the basis of the Third Circuit's  
15 Tri-State opinion so they can appeal it. Your Honor, I think  
16 we've given other very valid reasons why they don't have admin  
17 claims except maybe in a couple of instances: failure to  
18 submit a report timely, or something like that, post-petition.  
19 And frankly, if Your Honor's ruling were framed in that, I bet  
20 you we'd be able to reach an agreement, at least on that aspect  
21 of the liability, once it's been -- potential liability, once  
22 it's --

23 THE COURT: Well, given the history of the parties'  
24 attempts at mediating here I wouldn't be sanguine about that.

25 MR. IVESTER: You may be right, Your Honor, good

1 point. But anyway it would focus the parties I think.

2 But the -- I think those other issues are -- should be  
3 addressed because we're just -- we'll be like a yo-yo, we go up  
4 and maybe we come back down and go back up again. So I would  
5 just -- that would be my plea to Your Honor if you were  
6 otherwise so inclined.

7 Your Honor, I don't have anything further.

8 THE COURT: Thank you. What's next?

9 MR. PATTERSON: Your Honor, Tom Patterson from Klee,  
10 Tuchin. I'll be presenting the motion with respect to the  
11 exception from discharge.

12 THE COURT: Mr. Patterson --

13 MR. PATTERSON: Good morning, Your Honor.

14 THE COURT: -- I must advise you at the outset this is  
15 a terrible argument, and a loser from the beginning. But I'll  
16 allow you to make your presentation and we'll go from there.

17 MR. PATTERSON: Well, Your Honor, I don't want to  
18 waste the Court's time. If the Court's read our papers and  
19 come to that conclusion, I guess I would just say is there one  
20 particular aspect that it would -- the Court could see a  
21 benefit from receiving a presentation from me on that would be  
22 of any assistance to the Court.

23 THE COURT: Well, I'll put it this way, let me just  
24 pick a couple of the things that I think weigh heavily --

25 MR. PATTERSON: Sure, thank you, Your Honor.

1 THE COURT: -- against you.

2 The first, of course, is statutory construction.  
3 Congress picked a specific provision which is (a)(7). You want  
4 to bootstrap that into (a)(2). As a matter of statutory  
5 construction, the exercise of statutory construction, the  
6 specific governance over the general otherwise there's no point  
7 of having the specific. And I think that's a pretty -- I don't  
8 want to say easy, but I think the most principal way to go  
9 about that.

10 And, secondly, this is not a situation in which an  
11 individual is being harmed, or that the District is asking to  
12 be compensated for a harm. And because of the noncompensatory  
13 nature of the fines here I think that's another barrier to the  
14 statutory argument you make here.

15 If you'd like to respond to either or both of those  
16 you're welcome to.

17 MR. PATTERSON: I appreciate your giving me that  
18 guidance, Your Honor.

19 So on the 523(a)(7) argument I think that is  
20 respectfully not well taken. Because 523(a)(7) and 523(a)(2)  
21 overlap. 523(a)(7) is not limited to noncompensatory fines  
22 related to fraud, it's all noncompensatory fines. If they  
23 were -- if one was inclusive of the other, subsumed in the  
24 other, then I could fully appreciate an argument that says that  
25 you can't assert in the one where the specific governs. But

1 because -- there's an argument about what's specific here, Your  
2 Honor. 523(a)(2) is specific as to fraud, 523(a)(7) is  
3 specific as to noncompensatory fines.

4 And so the particular over the general doesn't give  
5 any guidance when you have two particulars. And so that's why  
6 I think the Supreme Court said in the Husky case that the  
7 various subsections of 523 all overlap amongst each other. And  
8 in interpreting them they shouldn't be interpreted as if  
9 they're silos, standalone silos. But they should be  
10 interpreted in a manner that respects the important  
11 distinctions between them.

12 And in our case, Your Honor (a)(2) is specific as to  
13 fraud, and we've been very careful only to assert a fraud cause  
14 of action. And 523(a)(7) just deals with all the governmental  
15 penalties, noncompensatory penalties, whether or not they sound  
16 in fraud.

17 And so because the two have independent existence of  
18 each other, I don't think that that argument is well taken in  
19 this particular circumstance.

20 Second, Your Honor, with respect to whether the claims  
21 are compensatory or noncompensatory, and it is in the nature of  
22 a regulator, that the general counsel, my friend Mr. Weiss  
23 (ph.), did not suffer a loss as a result of what Exide did,  
24 other than a personal toll for which he's presumably already  
25 compensated I guess.

1           But the fact is, and the website shows, and we've  
2 produced evidence in other circumstances, that when the  
3 District receives fines it rolls them back into the community.  
4 It uses them to either correct a harm that the community  
5 suffered as a result of the conduct, or uses them for an  
6 unrelated -- I wouldn't say totally unrelated, but it uses them  
7 in such a manner that as a proxy for remediating.

8           And the challenge with air quality, Your Honor, is the  
9 next windstorm the damage presumably is gone in the sense that  
10 it needn't be remediated anymore, the air is now clean. But  
11 the people are hurt potentially, and the particulate can land  
12 on the ground which gives rise to problems. And so the  
13 District uses the funds to help clean the air or to clean the  
14 ground on which the particulate may have landed.

15           These are not fines or penalties that are ceded to the  
16 general fist of the State of California, they are used to help  
17 the residents who suffered as a result of those.

18           And so I think in that context, and maybe this feeds  
19 back a little bit into whether the fines are criminal or  
20 noncriminal. I think that's an important context in which to  
21 see those.

22           And in this context, the context of our motion, Your  
23 Honor, this issue of conduct -- the timing of conduct is not  
24 necessarily material, but what I was reflecting on the 503(b)  
25 motion and the dialogue you were having with Mr. Pfister and

1 Mr. Ivester, I was thinking we generally focus on what did the  
2 debtor do post-petition. And I completely agree that  
3 that -- if there is a passive condition, there's lead on the  
4 ground and the wind blows post-petition that's probably not a  
5 post-petition violation. But if the debtor does  
6 something -- and I think if the Court is looking for a  
7 construct, I know the Court asked Mr. Ivester that and some  
8 dialogue with Mr. Pfister, focusing on the debtors' actions and  
9 the debtors' conduct, if we go back on that issue to California  
10 would be one way to look at it.

11 Your Honor, the fraudulent conduct that we have  
12 alleged is real and meaningful to the District. Mr. Ivester  
13 spoke about the issue of the negative pressure and the fact  
14 that our rule was imposed on Exide, and the negative pressure  
15 rule was the basis of the good operating violation that was  
16 imposed. If the Court were to hear the evidence on this, the  
17 Court would hear that there was a multiyear dialogues between  
18 the parties on the issue of negative pressure.

19 And I apologize, Your Honor, I didn't know what  
20 negative pressure was. Now the Court hasn't asked, maybe the  
21 Court knows. But what negative pressure is is it's the  
22 operation of a furnace or other mechanism in a fashion where  
23 the pressure around it is lower than the ambient regular air  
24 pressure that we all survive in such that if there is some  
25 leakage then the leakage doesn't emit, it goes the other way.

1 And so that way all of the particulate is controlled.

2 And there was an ongoing dialogue about whether Exide  
3 needed to operate under negative pressure. And Exide insisted  
4 1) that it would be very expensive, and 2) it wasn't necessary.  
5 And much of the testing that is described in our motion for  
6 fraud is based on that dialogue, the testing was going to take  
7 place. And so that's why the District feels very, very  
8 strongly about this issue, because it believed it was working  
9 in good faith with a partner as a regulator, who was acting in  
10 good faith to see whether negative pressure was truly required.  
11 But, in fact, as we allege and we would ultimately have to  
12 prove, we believe Exide's people at the time were playing  
13 games, and manipulating the test to make it look as though  
14 negative pressure would not be required. And that, in fact,  
15 the furnaces could operate without it.

16 And so when all the evidence with respect to the  
17 testing came out, I think you would find that that's when the  
18 District sort of had enough and adopted a rule of Exide to  
19 require negative pressure.

20 THE COURT: So if I were to agree with you that you  
21 could pursue a fraud claim here, with respect to what  
22 specifically is before me today --

23 MR. PATTERSON: Yes.

24 THE COURT: -- what standard am I employing to  
25 determine whether you should go forewarned? Am I looking

1 basically at a motion to dismiss standard?

2 MR. PATTERSON: I think that's really it, Your Honor.  
3 It's a motion to dismiss. Does this satisfy the legal  
4 requirements? And we'd have to go prove it.

5 Now, let's say we went to the state court and we  
6 proved all the violations, but the court in all those  
7 circumstances imposed the violation either for strict liability  
8 as Mr. Ivester referred to, or negligence, and it found that  
9 there was no either reckless disregard or knowing violations, I  
10 don't know that it would be possible for us to come back and  
11 argue that there was something accepted from discharge.

12 THE COURT: Well, that's a whole other can of worms,  
13 because there's a whole body of laws you probably know about  
14 whether state court judgments concerning fraud automatically  
15 result in nondischargeability decisions, or whether under what  
16 circumstances --

17 MR. PATTERSON: Right.

18 THE COURT: -- bankruptcy courts can --

19 MR. PATTERSON: Can look behind the --

20 THE COURT: -- look beneath the judgment.

21 MR. PATTERSON: Sure. But what I'm saying, Your  
22 Honor -- well, first, from a practical standpoint, that if the  
23 evidence doesn't support it, that we can't show that people  
24 knowingly did this, then there is -- I just don't see how we  
25 can maintain a claim for fraud.

1           So to some extent these violations are going back to  
2 the state court, Your Honor's going to decide how and to what  
3 degree. Your Honor will ultimately control whether we've  
4 demonstrated fraud, or whether we can demonstrate it to you  
5 based on the facts there or --

6           THE COURT: Not whether you demonstrated, but on a  
7 motion to dismiss it's whether you sufficiently alleged it.

8           MR. PATTERSON: No, I appreciate that --

9           THE COURT: Yeah.

10          MR. PATTERSON: -- at this stage, Your Honor.

11          THE COURT: All right.

12          MR. PATTERSON: That's where we are.

13          THE COURT: Thank you.

14          MR. PATTERSON: And we believe we've complied with the  
15 statute, Your Honor. Thank you.

16          THE COURT: Thank you.

17          MR. CLARK: Your Honor, my prepared remarks were very  
18 brief, given the Court's comments I think my actual remarks are  
19 going to be even briefer.

20          THE COURT: I like that in a lawyer, Mr. Clark.  
21 Really I do.

22          MR. CLARK: I like that in a judge. I like a judge  
23 who likes me.

24                 I've got nothing else to say about the statutory  
25 interpretation, the interplay between 523(a)(7) and (a)(2), I

1 think Your Honor's got that -- hit that nail on the head.

2 With respect to -- Mr. Patterson talks about the  
3 District's "fraud claims" and the "fraudulent conduct" that  
4 they've alleged. I figured out how to turn their PDF complaint  
5 into a word-searchable complaint -- it took a while -- and  
6 searched for the word "fraud," it's not in there nowhere.

7 Moor to the point of Your Honor's second point,  
8 though, which is no harm alleged to the District, and no  
9 compensatory damages claimed here, they in their own papers  
10 cite to Judge Sontchi's 2009 decision Crowe v. Moran. There  
11 are dozens of other cases that stand for the same proposition,  
12 including the recent decision by the Third Circuit in the Afora  
13 (ph.) case, that talks about the five things that you  
14 absolutely have to affirmatively show to establish a  
15 nondischargeability claim under 523(a)(2)(A). the first four  
16 of which have to do with fraud or misrepresentations.

17 So putting to one side whether their complaint would  
18 satisfy those four, the five elements are conjunctive, you got  
19 to show all five of them. And the fifth one is really the one  
20 that Your Honor focused on, and the one that I was going to  
21 focus on.

22 THE COURT: And you've argued it in your brief.

23 MR. CLARK: The creditors sustained loss and damages  
24 as approximate result of the misrepresentations. There's just  
25 no allegations here to satisfy that requirement, and there

1 couldn't be given the nature of the claims that the -- that the  
2 District seeks to prosecute. So they haven't satisfied the  
3 standards for nondischargeability.

4 The only other thing I was going to say, and I will  
5 say, is that the District in its supplemental briefing featured  
6 prominently the Tenth Circuit bankruptcy appeal panel decision  
7 in Hatfield v. Thompson case. I'm not going to argue about  
8 that case. I just wanted the Court to be aware that since the  
9 supplemental briefing was completed the bankruptcy court on  
10 remand held a trial and has now issued its decision. I'd like  
11 to hand a copy of that up to the Court.

12 In that decision, I'm not going to argue it I'll just  
13 tell you the result, was that after trying it and applying the  
14 law as articulated by the BAP and the law as articulated by the  
15 Supreme Court in Husky, the trial court found that the claims  
16 there did not satisfy the requirements of 523(a)(2)(A) and,  
17 therefore, were dischargeable and discharged.

18 If I may approach, Your Honor?

19 THE COURT: You may. Thank you.

20 MR. CLARK: As I said, Your Honor, I'm not going to  
21 argue from the decision, it speaks for itself, and speaks in a  
22 way that is very supportive of the arguments we've made in our  
23 papers. If Your Honor has any questions or would really like  
24 to hear a great speech, I'm prepared to go forward further.

25 THE COURT: Are you suggesting you would be the person

1 to make the great speech?

2 MR. CLARK: Well, if you've got a great one I'll  
3 listen to it, Your Honor.

4 THE COURT: We're ready to move on I think.

5 MR. CLARK: Thank you.

6 MR. PFISTER: And, again for the record, Your Honor,  
7 Rob Pfister from Klee, Tuchin.

8 So, finally, the last motion before you is the GUC  
9 claims motion. In many ways I think this is the most  
10 straightforward of everything you have before you, because in  
11 some ways the parties' briefing was kind of ships passing in  
12 the night in terms of the operative facts. I think once you  
13 see the timeline I think the answer falls into place. The  
14 timeline's very important here.

15 That is first as I obverted to earlier, everyone  
16 agrees the District filed a timely proof of claim on the  
17 governmental claims bar date of December 9, 2013. That claim  
18 no matter what is going forward.

19 Second, the District in January of 2014 brought suit,  
20 as I mentioned. We were then sent a letter by Mr. Clark  
21 himself that said that the lawsuit was an attempt to collect  
22 these very penalties that were the subject of our proof of  
23 claim, and that it was a violation of the automatic stay. At  
24 that point we engaged a back and forth, and all of the back and  
25 forth is in my declaration that I originally submitted. We

1 reached a stipulation that would allow the lawsuit to go  
2 through.

3 A large area of debate that I think is very well laid  
4 out in the factual record, is that Mr. Clark initially proposed  
5 that the complaint could proceed in state court. We marked  
6 that up and said no, no, it's the lawsuit that can proceed in  
7 state court. And the debtor ultimately accepted that change,  
8 such that the District was authorized to prosecute the lawsuit  
9 through and including final judgment.

10 As part of prosecuting its lawsuit as is often the  
11 case in prosecuting the lawsuit the District wanted to amend  
12 its operative pleading in the case. And, therefore, filed a  
13 motion to file a first amended complaint. That motion is  
14 attached to my declaration, and it lays out all the changes  
15 between the original complaint and the first amended the  
16 complaint, and it makes the case under the California Pleadings  
17 Standard that these are appropriate in the Rule 15 sense. It's  
18 a different rule in California, but it essentially mirrors the  
19 Rule 15 standard.

20 In response, Exide did not oppose the motion, and  
21 instead entered into a stipulation which is also attached to  
22 the declaration where Exide "Denies the allegation in the  
23 proposed first amended complaint, but recognizes the standard  
24 for granting leave to amend a complaint and its ability to  
25 challenge the first amended complaint subsequently in this

1 litigation." Therefore, we filed the first amended complaint.

2           Promptly upon doing that, about two weeks later, we  
3 filed an amended proof of claim. The amended proof of claim  
4 attached the first amended complaint, and this was in August of  
5 2014, it was well, well prior to confirmation. And the  
6 debtors' entire legal argument depends upon us not -- in  
7 response to this motion, depends upon that amended proof of  
8 claim being ineffective or improper somehow, because the  
9 debtors' entry opposition brief compares the -- it says that  
10 anything that came after December 9th of 2013, what was filed  
11 on the governmental bar date doesn't matter, and that whether  
12 various iterations of the state court complaint relate back to  
13 each other or relate back to the amended proof of claim, which  
14 again attaches the first amended complaint, none of that  
15 matters. And that the only thing before Your Honor is the  
16 first original proof of claim.

17           That is is inconsistent with practice I believe  
18 everywhere, but it's certainly inconsistent with this case  
19 because the debtors' plan -- the confirmed plan in this case,  
20 has a section, 10.7, titled "Amendments to Claims" that says  
21 "On or after the effective date, except as otherwise provided  
22 herein, a claim may not be filed or amended without  
23 authorization of the Court or the reorganized debtor."  
24 Obviously the effective date didn't happen until into 2015.

25           Once you accept that the District properly amended its

1 original proof of claim the rest --

2 THE COURT: Doesn't that put the rabbit in the hat  
3 though?

4 MR. PFISTER: I'm --

5 THE COURT: Here's what I mean by that question. And,  
6 again, I try to, mostly that I can understand it, reduce things  
7 to its simplest terms. And the first question I ask is with  
8 respect to amendment to a claim, did the District make new  
9 claims that it didn't make in the original proof of claim that,  
10 in fact, it could have and should have? Or was there some new  
11 occurrence after the filing of the proof of claim that  
12 precipitated the amendment.

13 Now, there are two different concepts here. One, were  
14 there new claims and did the bar date cut off new claims? I  
15 don't know how it could have if they're truly new claims. But  
16 if they were claims that you knew about could have and should  
17 have made but didn't, they probably shouldn't be allowed.  
18 That's, at least initially, like my beginning framework.

19 So if you could address your argument at least  
20 initially in those terms it would be helpful to me.

21 MR. PFISTER: Absolutely. And I think at least as  
22 Your Honor describes it, this sounds a lot like the Rule 15  
23 standard. And we have a binding Third Circuit case, the TWA  
24 decision, 145 F.3d 124, that holds, I'm quoting, "Amendments to  
25 claims are governed by FRCP 15." I think Your Honor's decision

1 says if it's a post-confirmation, or it may say -- let me just  
2 make sure I have that right -- "After the bar date is Rule 15  
3 subject to scrutiny?" And as I read Your Honor's decision that  
4 was in the Tribune case, the scrutiny was to ensure that it  
5 wasn't a new claim. Now, again, Rule 15 is about amendments to  
6 claims, and the Third Circuit says you apply that to determine  
7 whether an amendment is a proper amendment or whether it's a  
8 new claim.

9           The standard here is the Rule 15 standard. And the  
10 Rule 15 standard is not toothless by any means. I mean, there  
11 are -- Exide cites cases where courts deny Rule 15 relation  
12 back, but those cases are cases where the claim was truly a new  
13 claim. The lead case I think that they cite in the  
14 oppositional brief is the Mayle, M-A-Y-L-E, case from the  
15 Supreme Court, we hear the -- it was a habeas case, but that's  
16 in the civil context. The gentleman first complained about a  
17 pre-trial detention and then later he wanted to amend to say  
18 that his confrontation clause rights were violated at trial.  
19 The Supreme Court said no, no, that's separate in time and  
20 place, deals with two different things. The fact that it all  
21 relates to your conviction that doesn't -- that doesn't  
22 control. Therefore, no Rule 15 relation back.

23           Now, here, the -- it think a proper application of the  
24 standard, the best exculpation I've seen is in the  
25 Bensel case from the Third Circuit, that's 387 F.3d 298, where

1 it says, "In essence, application of Rule 15(c) involves a  
2 search for a common core of operative facts in the two  
3 pleadings." And let me identify for Your Honor the common core  
4 of operative facts.

5 In the original proof of claim, the original  
6 complaint, the first amended complaint, the second, and the  
7 third, those all concern during the time frame that is  
8 immediately preceding the bankruptcy through the bankruptcy.  
9 There's some question on some of the timeframes, but they all  
10 concern Exide's unlawful release of lead and arsenic into the  
11 air during the course of its battery-recycling operations in  
12 Vernon, California.

13 We know from that it's only lead and arsenic, it's not  
14 any other contaminants. We know from that that it's only the  
15 Vernon facility. District has not tried to expand and say it's  
16 a different facility down the road. The only damages that have  
17 ever been at issue in this case are civil penalties. The only  
18 violations that have ever been alleged in this case are  
19 violations of the District's own rules. Not any kind of  
20 federal statute or state statute.

21 Those core -- that's the common core of operative  
22 facts that underlies every pleading. How do we know -- and I  
23 think a good indication of how we know that this is a common  
24 core of operative facts, the state court in California rules  
25 for amendment in relation back are essentially the same as in

1 federal court. And when Exide was served with a motion to file  
2 a first amended complaint, that went through the changes and  
3 went through the law, and said why this is a proper amendment,  
4 Exide signed a stipulation saying we recognize the standard,  
5 this is -- this is an amendment, we reserve the right to  
6 challenge in this litigation.

7 Second amended complaint, same situation. District  
8 prepared second amended complaint, motion to amend, attached  
9 the complaint, attached I believe a redline, summarized the  
10 changes for the Court. Said here's why it meets the standard.  
11 Exide got the motions on regular notice, decided not to oppose  
12 it, said we recognize the standard, we reserve the right to  
13 challenge in this litigation.

14 Third amended complaint, the one that I think  
15 triggered Exide to ultimately come to this Court is it  
16 mentioned the chips. In that one, even there they for the  
17 first time said we think there's a potential problem with the  
18 bankruptcy discharge. We reserve the right to go to the  
19 bankruptcy court. But even there Exide stipulated that the  
20 District could file the third amended complaint.

21 Now, when you file the third amended complaint, just  
22 like when you file a first amended complaint or second amended  
23 complaint, this isn't a mere ministerial act. Under the  
24 federal rules and under state rules an amended pleading  
25 supersedes entirely the original pleading. So what Exide said

1 in the first amended complaint stipulation, it's okay to go  
2 ahead and supersede the original complaint. That first amended  
3 complaint makes the superseded original complaint a nullity.  
4 What Exide said in the second amended complaint stipulation  
5 it's okay, file a second amended complaint that makes the first  
6 amended complaint a nullity. Same thing on the third.

7           So for Exide now to come into court and say well, the  
8 District can litigate claims but only in a thrice-superseded  
9 complaint that's no longer operative it literally makes  
10 procedurally no sense. The procedural safeguards here have  
11 been the California State Court proceedings. And, again, I  
12 would just reemphasize, Exide agreed both in its stipulation  
13 and in the confirmation order that the lawsuit could proceed.  
14 And a lawsuit --

15           THE COURT: Oh, wait a minute. As I understood the  
16 stipulation -- well, the current state of the California  
17 litigation is it's stayed awaiting action by this court,  
18 correct?

19           MR. PFISTER: Correct.

20           THE COURT: As I understood the stipulation and the  
21 reservation of rights is that once the stay is ended Exide  
22 reserved the right to say -- to make all the Rule 15 arguments  
23 that there are to be made. Am I wrong about that?

24           MR. PFISTER: You mean in this court or in --

25           THE COURT: No, in the California court.

EXIDE TECHNOLOGIES

1 MR. PFISTER: No, that -- I -- that is not correct.

2 THE COURT: Okay.

3 MR. PFISTER: Exide by stipulating to amend the prior  
4 complaints have been superseded. And if that that lawsuit is  
5 restarted, which again we think it has to be at a bare minimum  
6 on the thirty-eight million penalties that are undisputedly  
7 timely, that original complaint is gone. I mean, I suppose you  
8 could force the District to refile it as a fourth amended  
9 complaint, but that -- but just procedurally I don't believe  
10 that is correct.

11 THE COURT: Okay. I understand your answer.

12 MR. PFISTER: And then the other -- in terms of Rule  
13 15 case law, also another quote from the Bensel case that I  
14 thought was apropos here was, "The key inquiry is whether the  
15 opposing party has had fair notice of the general fact  
16 situation and legal theory upon which the amending party  
17 proceeds."

18 And then a very good case law example, which frankly  
19 is a little on the more extreme side, we cited in our brief  
20 it's the Miller case from the Sixth Circuit, where some sailors  
21 said they filed an original complaint saying they were exposed  
22 to asbestos and hazardous substances other than asbestos and  
23 they got sick. And an amended complaint they said we were  
24 exposed to benzene and we got leukemia. Sixth Circuit said  
25 well, the original complaint cite asbestos and hazardous

1 substances other than asbestos, benzene sounds like a hazardous  
2 substance of asbestos, it's all about ships, it's all about  
3 sailors, it's all about getting sick as a result of their work,  
4 ergo it satisfies the Rule 15(c) standard.

5           Your Honor doesn't have to go nearly that far. Our  
6 common core of operative facts is release of lead and arsenic  
7 during the course of battery recycling operations at a  
8 particular facility in violation of a particular set of rules  
9 with a specific consequences being civil penalties. That is a  
10 cohesive common nucleus of operative fact. It meets the Rule  
11 15 standard. And, again, if it didn't meet the Rule 15(c)  
12 standard Exide's very able counsel in the state court would not  
13 have stipulated to those amendments.

14           Unless Your Honor has questions I think that's what I  
15 want to say.

16           THE COURT: I do not, thank you.

17           MR. PFISTER: Thank you.

18           MR. CHIAPPETTA: Good morning, Your Honor. Louis  
19 Chiappetta on behalf of the reorganized debtor. If I may,  
20 because Mr. Pfister went so thoroughly through the time line, I  
21 do think it's important that we look at it, and it's over here  
22 to the left, though I'd like to just discuss it briefly. May I  
23 approach?

24           THE COURT: Yes.

25           MR. CHIAPPETTA: Thank you.

1 THE COURT: Thank you.

2 MR. CHIAPPETTA: So before I directly respond to some  
3 of the District's assertion, I think it's important to just  
4 narrow down exactly what's happening. We are dealing with the  
5 state court complaint that was filed undisputedly after the  
6 effective date. Mr. Pfister read what happened to amendments  
7 after the effective date. He read 10.7, and it said any  
8 amendment that comes in after the effective date, it's gone.  
9 Even if that amendment was perfect, related in time and type to  
10 an originally filed pleading, that amendment is gone under the  
11 plan. Our claims agent didn't even look at it. That's the  
12 exact provision he read. 10.7 is clear, any claim that came in  
13 after the effective date, whether it's new or whether it's a  
14 perfect amendment of time and type, it doesn't exist because  
15 post-effective dates amendment, again, new or otherwise, are  
16 automatically disallowed.

17 The only way you get a disallowed claim back is  
18 through excusable neglect, that you plead 502(j) for cause and  
19 you plead excusable neglect. We said that in paragraph 23 of  
20 our motion to enforce. Mr. Clark said it at the July 2015  
21 hearing: hey guys, this happened after the effective date;  
22 it's gone. If you want it to happen, you need to plead  
23 excusable neglect.

24 Rather than satisfy that standard and prove under  
25 heightened scrutiny that there's a compelling reason to allow a

1 third amended complaint filed 535 days after the bar date, they  
2 argue about the third amended complaint relates back to the  
3 original complaint. And Mr. Pfister said it, we argued that's  
4 irrelevant. Whether the second amended complaint relates back  
5 to the first amended complaint or whether -- it's irrelevant.  
6 Your Honor hit it on the head. What's relevant is when they  
7 filed that amended proof of claim, did they assert new claims  
8 in there? Yes, they did. Anything that doesn't relate to the  
9 original proof of claim that's laid out in specific details --  
10 in fact, I believe Mr. Ivester gave me the original proof of  
11 claim, and I want to take a look at that one more time, if I  
12 can. If you want, I have another copy.

13 THE COURT: I have it.

14 MR. CHIAPPETTA: So it's the very last page again.  
15 It's the same page that Mr. Ivester read the footnote. It's in  
16 big, bold block letters. And the District states that it is a  
17 fully liquidated and final claim for -- again, bold letters --  
18 total penalty amount due for NOVs P49894, P49895 --

19 THE COURT: I can see the numbers.

20 MR. CHIAPPETTA: Okay. For 38.915 million dollars.  
21 There's no contingent claims. There's no allegations of an  
22 overarching pollution scam. There's no allegations of deceit  
23 of leaking trailers, of chip handling, of concealment of  
24 virtually any other claim that was thrown into the third  
25 amended complaint. There's five NOV's. And unless the first

1 amended complaint, and the third amended complaint, and  
2 whatever they want to assert after the bar date, relates in  
3 time and type -- they talk about a freely amendable Rule 15  
4 standard, and they go very much on the Bensel case. I believe  
5 it's the Bensel v. Allied Pilot case. There's a great line in  
6 that case because it actually has nothing to do with proof of  
7 claims. In fact, they cite twenty-four cases; only five of  
8 them actually talk about amendments to proof of claims. The  
9 Rule 15 standard that they discuss, the prelim minimal  
10 standard, has no bearing after the bar date. After the bar  
11 date, the rule to amend the proof of claim is Rule 15 subject  
12 to scrutiny, and the rationale there is you want to make sure  
13 new claims aren't coming in.

14           So now we're after the effective date. Now, the rule  
15 is not just Rule 15 subject to scrutiny; it's Rule 15 subject  
16 to a compelling reason. And then to the extent that it is not  
17 of the same time and type and what's controlling law here with  
18 respect to Rule 15 and everywhere is *Mayle v. Felix*. That's  
19 the Supreme Court's decision, and it's echoed in virtually  
20 every case, including in theirs, including Bensel, that claims  
21 must be of the same time and type. Time and type. There was  
22 no overarching scheme alleged. And for them to say, well, you  
23 know that the plant releases lead or arsenic, and we attached  
24 our rules to it, that is tantamount to the IRS attaching the  
25 Internal Revenue Code to a proof of claim and saying you're now

1 on notice for every tax.

2 We cited more than a dozen cases that, if you have a  
3 different time and type, it does not relate back. Even the  
4 same type of transaction, if you did it on a different day --  
5 this was the Matter of Unroe case out the Seventh Circuit. If  
6 you have a different transaction on a different day, it doesn't  
7 relate back.

8 One of the things that they talk about, they make much  
9 about the March 2014 stipulation, and I think Your Honor kind  
10 of got that. That was a stay stipulation. The word "bar date"  
11 is nowhere in that stipulation, and Judge Gross actually, in  
12 his DESA decision, really hit the nail on the head here. In  
13 that case, you had a debtor who sold property free and clear.  
14 They get an order saying this property is sold free and clear.  
15 A creditor later comes forward and says, we want to sue. And  
16 so the debtor says, fine, we'll lift the stay; go to state  
17 court; sue. And then, the buyer's like, no, your claims are  
18 gone. And they're like, well, we have this lift stay order, so  
19 we could pursue this lawsuit with this lift stay order. They  
20 said, that lift -- and Judge Gross said, that dealt with the  
21 automatic stay, and if you want to modify a pre-existing order,  
22 you better be explicit.

23 Absent from the March 2014 stipulation is the word  
24 "bar date". We didn't modify the bar date. We let them -- we  
25 decided we're not going to fight. That was around the

1 beginning of the case, and I'm sure you can imagine what's  
2 going on with the madness of trying to get the plan  
3 negotiations done. We're fighting wars on all fronts.

4 THE COURT: Oh, don't drag me through it again.

5 MR. CHIAPPETTA: I don't have to, Your Honor. You  
6 lived it.

7 And the point was, we're not going to deal with the  
8 stay issue right now. Go ahead, we'll lift the stay, but we're  
9 not dealing with that right now. But the bar date and in the  
10 first amended complaint that is attached to our answer,  
11 statement 103, we reserve all statute of limitation defenses.  
12 The bar date's a statute of limitation. We did not waive that.  
13 It's in our answer. These claims -- anything else that is not  
14 part of those original five NOV's are gone.

15 So I actually think this is pretty easy. You just  
16 have to decide, does the bar date apply to the District; the  
17 answer's yes. If it doesn't apply to it, they can come up with  
18 a seventeenth amended complaint and just utter the words "lead"  
19 or "arsenic" and then everything comes in, so the bar date does  
20 apply. So then, are there any new post-bar date claims? And  
21 again, if they differ in time and type, they do not relate  
22 back.

23 Moreover, that's the wrong standard to the wrong  
24 pleading. I know they called this the original allegations,  
25 and I looked for a case where you take two pleadings, where

1 you've got the original POC filed before or on the bar date,  
2 and then thirty-eight days after the bar date, you have  
3 something else. And now they take those two things and say,  
4 this is one. I have not seen anywhere in any case where the  
5 original pleading -- and Rule 15's strict construction says you  
6 relate back to the original pleading. I've never seen anything  
7 where you combine two documents and that makes the original  
8 pleading.

9 So essentially, what they should be limited to -- and  
10 I can tell you, it's the following causes of action: 1, 2, 9,  
11 10, 12, 19, 20, 25, and 26. In fact, if I could approach, I'd  
12 like to hand you the exhibit that lays out why the other causes  
13 of action should be gone.

14 THE COURT: All right. Thank you.

15 MR. CHIAPPETTA: So Your Honor, this was Exhibit E to  
16 our objection. And no matter what standard you're using, if  
17 you're applying the new claim standard, it's for sure gone; if  
18 you're doing the Rule 15 standard, it's still gone under time  
19 and type. There is no way with a straight face anyone can say  
20 that chips leaking in -- plastic chips leaking off a trailer in  
21 2008 is somehow of the same time and type as a mid monitor  
22 going off on June 12th, 2012, which was one of the thirteen  
23 specific days alleged in the original proof of claim. Those  
24 NOVs dealt with fourteen days of a mid monitor going off,  
25 failure to report 2011 requirements, and then the negative

1 pressure that's been overarching all of the noncompensatory  
2 penalties.

3 Unless Your Honor has questions, I'm ready to rest.

4 THE COURT: Why wouldn't I let the state court decide  
5 this issue?

6 MR. CHIAPPETTA: Whether the bar date applies?

7 THE COURT: What survives or not?

8 MR. CHIAPPETTA: Well, I think you have to meet -- the  
9 first question is, does the bar date apply? It is this Court's  
10 determination and solely within your discretion to allow proof  
11 of claim. If the claim has been discharged, then why would we  
12 litigate? Why would a California state court determine whether  
13 or not a claim has been disallowed in bankruptcy? According to  
14 our plan, these claims are automatically disallowed. In fact,  
15 we negotiated with the creditors' committee, and if I might,  
16 I'd actually like to read part of the GUC Trust joinder to show  
17 why this is so important in this case.

18 This is their joinder attached under our matter 5;  
19 it's in our matter 5 pleadings. Paragraph 5 of its joinder,  
20 docket number 4245: permitting untimely claims, especially  
21 under the District's interpretation, which arguably were  
22 permitted to continue to amended state court complaint to  
23 assert increasing amounts and additional cause of actions ad  
24 infinitum would eviscerate the economic basis on which the plan  
25 was negotiated and prejudice the debtor's estate and its

1 creditors. A clear mutual understanding on the projected  
2 aggregate claims in this case was essential to the extensive  
3 negotiations between the debtor and the official committee of  
4 unsecured creditors, which ultimately gave rise to the GUC  
5 Trust settlement agreement and made confirmation of a  
6 consensual plan even possible.

7           When we discussed this, when we talked about these  
8 claims -- and again, if you look at the GUC Trust joinder,  
9 again, they talk about our disclosure statement. We noted that  
10 we had about 200 untimely claims and amendments totalling  
11 nearly a billion dollars. And we said when draft our plan, we  
12 are going to request that all of those be automatically  
13 disallowed, because if they come in, we now have a GUC pool  
14 that's been increased by nearly a billion dollars. The  
15 District is trying to take away the foundation of which that  
16 consensual plan was made. Don't let them do that.

17           THE COURT: Thank you.

18           MR. CHIAPPETTA: Thank you.

19           MR. PFISTER: Just a few brief responses, if I may,  
20 Your Honor. First, I don't know if I misheard or not, but to  
21 the extent -- so on the timeline, the timeline is accurate that  
22 the only complaint that was filed after the effective date was  
23 the third amended complaint. The first amended complaint, the  
24 amended proof of claim, the second amended complaint were all  
25 filed prior to the effective date. I thought I heard counsel

1 say something different. I don't want the record to be unclear  
2 on that.

3 Second -- oh, also on the confirmation order, in  
4 addition to 10.7, which is explicitly titled, "Amendment to  
5 Claims", which I read to Your Honor, under 10.4 -- that's the  
6 automatic disallowance of claims that counsel just  
7 referenced -- the second paragraph of that, ends with this  
8 sentence -- so this is after about everything filed after the  
9 deadline is automatically disallowed. Then, there's the  
10 sentence that says, "Nothing in this plan shall preclude  
11 amendments to timely filed proofs of claim to the extent  
12 permitted by applicable law." Nothing in this plan -- and is  
13 even after the effective date. This is their plan.

14 Now again, the opinion of the Third Circuit in TWA  
15 says the standard for amending proofs of claim is Rule 15.  
16 This all circles back to Rule 15. On Rule 15, counsel pointed  
17 to a series of two types of cases. One is the Mayle case,  
18 which I referenced before. In that case, the time -- and I  
19 think you have to look at the context in which the case was  
20 decided. It's a habeas petitioner, again, who first said pre-  
21 trial stuff was bad; then, my trial was bad; I should be able  
22 to amend. The Supreme Court said, nope, two different things;  
23 they differ in time and place. Totally different than our  
24 case.

25 The other series of cases that counsel described were

1 a series of tax cases, and tax cases have a very specific rule  
2 on collateral estoppel effect, and amendment, and relation  
3 back. And the reason is because every year is a new day  
4 between you and the IRS, and if you win one fight with the IRS  
5 for the tax year 2017, it doesn't bind the IRS to the tax year  
6 2018. That's well-settled law. That's what those cases hinge  
7 upon. They're tax cases. That's the reason that they're in  
8 that specific context. We pointed that out.

9 So at bottom, this all comes back to the Rule 15  
10 standard. We meet the Rule 15 standard. If we didn't meet the  
11 Rule 15 standard, they wouldn't have signed those stipulations  
12 in state court. They've treated our operative complaints.  
13 Every time we've done them, they've treated them as the  
14 operative complaint through and including the second amended  
15 complaint, which is what they quoted in their disclosure  
16 statement. It said this is the operative complaint; here's  
17 what it asks for. Right? Why is that? Well, it's because  
18 we're litigating a California state court lawsuit. Litigating  
19 a lawsuit includes the ability to amend claims.

20 And one more point, I think the real crux of the issue  
21 on the third amended complaint is the leaking van trailers.  
22 Just to be crystal clear, the leaking van trailers as criminal  
23 conduct between the U.S. Attorney's Office, that's a matter  
24 between Exide and the U.S. Attorney's Office that was  
25 successfully resolved. The leaking van trailers, for our

1 purposes, are an alternative explanation for the high lead  
2 readings that were their lead sensors around the perimeter of  
3 Exide's plants.

4           What those notices of violations show was you exceeded  
5 the lead standard on this date, or on this date, or on this  
6 date. Right? Why they exceeded the lead standard on any  
7 particular date is a matter that's hotly disputed. In their  
8 reservation of rights, they say, well, it was the neighbor's  
9 fault down the road; well, it was something else. The District  
10 says, no, it's because you weren't using negative pressure.  
11 When the District learned about the van trailer cases -- the  
12 van trailer issues, the light went off, and said, look, that's  
13 an explanation for leaking lead onto the ground; those trailers  
14 weren't sealed. If the trailers aren't sealed, lead leaks onto  
15 the ground, and when a truck drives over it, it kicks the lead  
16 up. That could be one causal factor in why they're tripping  
17 our lead alarms. It's not new violations; it's a different  
18 explanation for why the lead alarms got tripped. It's not,  
19 again, a new cause of action or a new violation.

20           And unless Your Honor has questions?

21           THE COURT: I don't. Thank you.

22           MR. PFISTER: Okay. Thank you.

23           THE COURT: I'd like to turn to the one thing we  
24 haven't discussed yet, and that's the judicial notice motion  
25 that's filed. Is there any dispute about that that remains?

1 MR. IVESTER: No, Your Honor. On the first one,  
2 certainly not. Those are pleadings. And we would suggest that  
3 all the court-filed documents we submitted today, you can take  
4 judicial notice of those pleadings, not for the truth of the  
5 matter asserted, but for the fact that they do exist.

6 As far as the second request for judicial notice,  
7 these actually make our point because they're all dealing with  
8 stuff that happened in 2009, trying to show how tough the  
9 determination would be for you. But as long as they're  
10 admitted to take judicial notice of it and not for the truth of  
11 the matter asserted in those, the second judicial notice  
12 motion, we don't have any problem.

13 MR. PFISTER: We filed the judicial notice request,  
14 Your Honor. On the second one, I don't think counsel's  
15 limitation is quite appropriate because they are duly certified  
16 records of a governmental entity. There's a specific Federal  
17 Rule of Evidence provision. I don't think we're asking the  
18 Court to take them for anything other than this is what  
19 happened, but I'm not sure that that formal limitation is  
20 appropriate.

21 THE COURT: What's the relevance of it?

22 MR. PFISTER: The relevance goes to -- those were  
23 filed in connection with the administrative claim objection,  
24 and what they demonstrate is that Exide single-handedly took  
25 the District out of compliance with the lead requirements of

1 the District. That's the relevance to that. If that's not  
2 relevant to Your Honor, then --

3 MR. IVESTER: One, it's not relevant, Your Honor. We  
4 would dispute the truth of that matter asserted greatly, so we  
5 would not stipulate on that basis to it being admitted into  
6 evidence.

7 THE COURT: All right. Well, just one more thing for  
8 me to decide. Thank you.

9 MR. IVESTER: Thank you.

10 MR. CLARK: Your Honor, I think that covers all the  
11 items on the agenda for today.

12 THE COURT: All right. Well, despite -- thank you.  
13 I'll take the matter under advisement and issue a decision in  
14 due course. But despite the parties' inability to come to an  
15 agreed resolution of these matters, I will hearken back to -- I  
16 think what I was told at the status hearing that the parties  
17 agreed on a number but other terms were not -- the parties  
18 could not meet on. So I hope discussions will continue, but to  
19 age on those discussions, let me give you my preliminary views,  
20 based upon my review of the submissions and the oral argument  
21 today.

22 I don't think these are administrative expenses,  
23 except for claims which may have arisen post-petition as a  
24 result just to figure out a way to characterize it as the  
25 affirmative act of the debtor in connection with their

1 operations for the time they did operate. Failure to act about  
2 pre-petition violations wouldn't fall in that administrative  
3 category, as far as I'm concerned. These claims are  
4 dischargeable, I think, for the reasons I've discussed with  
5 counsel at argument.

6 The category that's more problematic for me is the  
7 third one, and I have some preliminary views on that. I'll  
8 keep them to myself, but I'll simply say it's a reason why both  
9 parties ought to continue to talk.

10 And with that, I will conclude this hearing. Court  
11 will stand in recess. Thank you all very much.

12 IN UNISON: Thank you.

13 UNIDENTIFIED SPEAKER: Go Eagles.

14 (Whereupon these proceedings were concluded at 12:33 PM)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript is a true and accurate record of the proceedings.

*Sharona Shapiro*

February 1, 2018

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SHARONA SHAPIRO (CET-492)                      DATE

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**UNITED STATES BANKRUPTCY COURT**  
**District of Delaware**  
**824 Market Street, 3rd Floor**  
**Wilmington, DE 19801**

**In Re:**

Exide Technologies  
13000 Deerfield Parkway  
Building 200  
Milton, GA 30004  
**EIN:** 23-0552730

**Chapter:** 11

*Case No.:* 13-11482-KJC

***NOTICE OF FILING OF TRANSCRIPT AND OF DEADLINES RELATED TO RESTRICTION AND REDACTION***

A transcript of the proceeding held on 1/31/2018 was filed on 2/2/2018 . The following deadlines apply:

The parties have seven days to file with the court a *Notice of Intent to Request Redaction* of this transcript. The deadline for filing a *request for redaction* is 2/23/2018 .

If a request for redaction is filed, the redacted transcript is due 3/5/2018 .

If no such notice is filed, the transcript may be made available for remote electronic access upon expiration of the restriction period, which is 5/3/2018 unless extended by court order.

To review the transcript for redaction purposes, you may purchase a copy from the transcriber (see docket for Transcriber's information) or you may view the document at the clerk's office public terminal.



Una O'Boyle, Clerk of Court

Date: 2/2/18

(ntc)

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