

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

In re: : Chapter 11
: :
EXIDE TECHNOLOGIES, : Case No. 13-11482 (MFW)
: :
Debtor. : **Hearing Date: September 18, 2019, 2 p.m.**
: **Doc. No. 5197**
:

**UNITED STATES TRUSTEE’S REPLY IN SUPPORT OF MOTION FOR THE ENTRY
OF AN ORDER REQUIRING THAT ANY CAUSE OF ACTION ASSERTED IN THE
REORGANIZED DEBTOR’S MOTION TO DETERMINE EXTENT OF LIABILITY
FOR POST-CONFIRMATION QUARTERLY FEES PAYABLE PURSUANT TO
28 U.S.C. § 1930(a)(6) BE FILED AS AN ADVERSARY PROCEEDING [Doc. No. 5197]**

RAMONA D. ELLIOTT
Deputy Director/General Counsel
P. MATTHEW SUTKO
Associate General Counsel
SUMI K. SAKATA
WENDY COX
Trial Attorneys

Department of Justice
Executive Office for United States
Trustees
441 G Street, N.W., Suite 6150
Washington, DC 20530
Tel: (202) 307-1399
Fax: (202) 307-2397

ANDREW R. VARA
Acting United States Trustee, Region 3
T. PATRICK TINKER
Assistant United States Trustee
LINDA J. CASEY
ROBERT J. SCHNEIDER, JR.
Trial Attorneys
Department of Justice
Office of the United States Trustee
J. Caleb Boggs Federal Building
844 King Street, Suite 2207, Lockbox 35
Wilmington, DE 19801
Tel: (302) 573-6491
Fax: (302) 573-6497

TABLE OF CONTENTS

ARGUMENT 1

I. Exide Must Pursue the Relief It Wants Through an Adversary Proceeding..... 1

A. Exide has requested declaratory relief “related to” an action to invalidate the United States Trustee’s interest in, and to recover, Exide’s alleged overpayments of quarterly fees, and to enjoin future enforcement of the temporarily increased fees under Bankruptcy Rule 7001(1), (2), (7) and (9)..... 2

B. In the alternative, Exide must proceed by adversary proceeding because it requests injunctive relief under Bankruptcy Rule 7001(7). 4

C. Exide cannot evade the requirements of an adversary proceeding by artfully pleading around Bankruptcy Rule 7001. 6

II. Exide’s Constitutional Challenge Is Not a Claim Objection. 6

III. Neither Bankruptcy Rule 9005.1 Nor Civil Rule 5.1 Authorizes Exide to Sue the United States For Declaratory or Injunctive Relief by Way of Notice..... 9

IV. Bankruptcy Rule 2020 Does Not Authorize Exide to Use a Motion to Challenge Acts of Congress..... 11

CONCLUSION..... 12

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Belcufine v. Aloe</i> , 112 F.3d 633 (3d Cir. 1997).....	2
<i>In re Clinton Nurseries, Inc.</i> , No. 17-31897 (Bankr. D. Conn. Aug. 28, 2019)	3, 11
<i>In re Gledhill</i> , 76 F.3d 1070 (10th Cir. 1996)	10
<i>Goldman v. Citigroup Global Markets, Inc.</i> , 834 F.3d 242 (3d Cir. 2016).....	7
<i>In re Harry C. Partridge, Jr. & Sons, Inc.</i> , 43 B.R. 669 (Bankr. S.D.N.Y. 1984).....	4
<i>In re Hefner</i> , 32 B.R. 382 (Bankr. W.D.N.Y. 1983)	8
<i>Huisinga v. Carter (In re Juhl Enters., Inc.)</i> , 921 F.2d 800 (8th Cir. 1990)	9
<i>Jarbough v. Att’y Gen.</i> , 483 F.3d 184 (3d Cir. 2007).....	6
<i>In re Jonick Deli Corp.</i> , 263 B.R. 196 (S.D.N.Y. 2001).....	9
<i>In re Life Partners Holdings, Inc.</i> , No. 15-40289-mxm-11, 2019 WL 3987797 (Bankr. N.D. Tex. Aug. 22, 2019).....	3
<i>Pacor v. Higgins</i> , 743 F.3d 984 (3d Cir. 1984).....	2
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969).....	3
<i>In re Prines</i> , 867 F.2d 478 (8th Cir. 1989)	6
<i>Steffel v. Thompson</i> , 415 U.S. 452 (1974).....	3

U.S. v. D’Amario,
593 F. App’x 97 (3d Cir. Dec. 9, 2014).....6

United States Trustee v. Endy (In re Endy),
104 F.3d 1154 (9th Cir. 1997)9

United States Trustee v. Gryphon at Stone Mansion, Inc.,
166 F.3d 552 (3d Cir. 1999).....6, 7

United States Trustee v. Ste-Bri Enters., Inc.,
579 B.R. 448 (N.D. Ohio 2017).....9

United States v. Stoerr,
695 F.3d 271 (3d Cir. 2012).....7

Wolff v. McDonnell,
418 U.S. 539 (1974).....3

Statutes

11 U.S.C. § 101(10)8

11 U.S.C. § 101(10)(B).....8

11 U.S.C. § 348(d)8

11 U.S.C. § 501.....8

11 U.S.C. § 501(a)8

11 U.S.C. § 502.....8

11 U.S.C. § 502(a)8

11 U.S.C. § 503(b)8, 9

11 U.S.C. § 507(a)(2).....8

28 U.S.C. § 157.....7

28 U.S.C. § 581(a)(2).....1

28 U.S.C. § 1334.....7

28 U.S.C. § 1334(b)2

28 U.S.C. § 1930.....9

28 U.S.C. § 1930(a)(6)..... *passim*

Other Authorities

9 COLLIERS ON BANKRUPTCY ¶ 3007.01 (16th ed., 2019)8

Fed. R. Bankr. P. 20201, 11

Fed. R. Bankr. P. 3001(a)8

Fed. R. Bankr. P. 30048

Fed. R. Bankr. P. 30077, 8, 9

Fed. R. Bankr. P. 3007(b)7, 9

Fed. R. Bankr. P. 7001 *passim*

Fed. R. Bankr. P. 7001(1)1, 2, 3, 4

Fed. R. Bankr. P. 7001(2)1, 2, 3

Fed. R. Bankr. P. 7001(7) *passim*

Fed. R. Bankr. P. 7001(9)1, 2, 3, 4

Fed. R. Bankr. P. 9005.11, 9, 10

Fed. R. Civ. P. 5.19, 10

Fed. R. Civ. P. 1210

Fed. R. Civ. P. 60(b)10

Andrew R. Vara, the Acting United States Trustee for Region 3, in his capacity as a federal official, 28 U.S.C. § 581(a)(2), respectfully submits the following reply in support of his *Motion for the Entry of an Order Requiring That Any Cause of Action Asserted in the Reorganized Debtor's Motion to Determine Extent of Liability for Post-Confirmation Quarterly Fees Payable Pursuant to 28 U.S.C. § 1930(a)(6) Be Filed As an Adversary Proceeding* [Doc. No. 5197].

ARGUMENT

1. The United States Trustee's motion explained why this Court should deny the motion of the debtor, Exide Technologies, challenging the 2017 amendment to 28 U.S.C. § 1930(a)(6) [Doc. No. 5188], and instead direct Exide to commence an adversary proceeding to seek the relief that it has requested. Exide improperly seeks to resolve by motion matters that are defined under Bankruptcy Rule 7001(1), (2), (7) and (9) as "adversary proceedings."

2. Exide suggests it has not sought relief under Bankruptcy Rule 7001 and its constitutional challenge is simply a claim objection. And it suggests Bankruptcy Rules 2020 and 9005.1 allow it to sue the federal government by motion. None of these arguments have merit.

I. Exide Must Pursue the Relief It Wants Through an Adversary Proceeding.

3. Exide claims that it only wants a declaration that the 2017 amendment to 28 U.S.C. § 1930(a)(6) is unconstitutional, and because it has not directly sought the return of its alleged overpayments or injunctive relief in its motion, it has not sought relief under Bankruptcy Rule 7001. Exide Obj. ¶¶ 12-14¹. Exide is incorrect for two reasons.

¹ References to "UST Motion" are to the United States Trustee's motion (Doc. No. 5197), "Exide Obj." to Exide's objection thereto (Doc. No. 5205), "Exide Brief" to Exide's memorandum of law supporting its motion (Doc. No. 5189), "Exide Mot." to Exide's motion (Doc. No. 5188), and "UST Obj." to the United States Trustee's objection thereto (Doc. No. 5204).

4. First, the declaratory relief Exide has requested is firmly “related to” actions that are adversaries under Bankruptcy Rule 7001(9).

5. Second, by asking this Court to set the amount of quarterly fees Exide will pay until the close of its case, Exide has requested injunctive relief under Bankruptcy Rule 7001(7).

A. Exide has requested declaratory relief “related to” an action to invalidate the United States Trustee’s interest in, and to recover, Exide’s alleged overpayments of quarterly fees, and to enjoin future enforcement of the temporarily increased fees under Bankruptcy Rule 7001(1), (2), (7) and (9).

6. Bankruptcy Rule 7001 sets out ten actions that must be commenced as adversaries. These include actions to “recover money,” to “determine the validity . . . of . . . interest in property,” and “to obtain an injunction.” Fed. R. Bankr. P. 7001(1), (2) & (7). The rule also requires an adversary when a party’s action for “declaratory judgment relat[es] to any of the foregoing [actions listed].” Fed. R. Bankr. P. 7001(9).

7. Exide’s reading of Rule 7001 cannot be squared with the Third Circuit’s reading of “related to” in 28 U.S.C. § 1334(b). *See Belcufine v. Aloe*, 112 F.3d 633, 636 (3d Cir. 1997). The Third Circuit recognized that the term “related to” has a “broad reach,” and concluded that jurisdiction under 28 U.S.C. § 1334(b) extended to any action that “could conceivably have any effect on” the bankruptcy estate. *Id.* (quoting *Pacor v. Higgins*, 743 F.3d 984, 994 (3d Cir. 1984)). Under this reasoning, an action requesting declaratory relief “related to” other adversaries is one where the declaratory relief granted “could conceivably have any effect” on those adversaries.

8. Exide indicated that as a result of the 2017 amendment, it paid what it alleges were unconstitutionally increased quarterly fees for no fewer than five quarters. Exide Brief ¶ 12 & Ex. 1. Were Exide to prevail on its argument that the 2017 amendment is unconstitutional, the resulting declaratory relief would serve as a predicate for Exide to invalidate the United States’

interest in, and monetarily recover, Exide's alleged overpayments for those five quarters. *See Powell v. McCormack*, 395 U.S. 486, 500 (1969) (“A declaratory judgment can then be used as a predicate to further relief. . . .”); *see also Wolff v. McDonnell*, 418 U.S. 539, 555 (1974) (holding inmate may challenge constitutionality of state prison disciplinary proceedings under 28 U.S.C. § 1983 for “declaratory judgment as a predicate to a damages award”). Thus, the declaratory relief Exide seeks would “conceivably have an effect on” a subsequent action to recover its alleged overpayments. Consequently, this proceeding for declaratory relief is “related to” proceedings to “recover money or property,” Fed. R. Bankr. P. 7001(1), and to “determine the validity” of an “interest in property,” Fed. R. Bankr. P. 7001(2), and is an adversary proceeding under Bankruptcy Rule 7001(9).

9. The U.S. Bankruptcy Court for the District of Connecticut addressed a similar motion challenging the constitutionality of the quarterly fee statute and ruled that an adversary proceeding was required by Bankruptcy Rule 7001.² *In re Clinton Nurseries, Inc.*, No. 17-31897, slip op. at 7 (Bankr. D. Conn. Aug. 28, 2019) (attached as Ex. A).

10. Similarly, a declaration that the 2017 amendment is unconstitutional may serve as a predicate for, and thus would “conceivably have an effect on,” an action to enjoin the United States from future enforcement of the temporary fee increase against Exide. *See Wolff*, 418 U.S. at 555 (holding that if state prison disciplinary proceedings are declared unconstitutional, inmates may be granted “injunction enjoining the prospective enforcement of invalid prison regulations”); *see also Steffel v. Thompson*, 415 U.S. 452, 471 (1974) (holding that declaratory judgment “is a much milder form of relief than an injunction”). As this proceeding for

² Another bankruptcy court recently faced with a similar motion converted the contested matter to an adversary proceeding “[o]ut of an abundance of caution” after deciding some issues. *In re Life Partners Holdings, Inc.*, 2019 WL 3987707, at *4 (Bankr. N.D. Tex. Aug. 22, 2019).

declaratory relief is “related to” a proceeding to “obtain an injunction,” Fed. R. Bankr. P. 7001(7), it is an adversary proceeding under Bankruptcy Rule 7001(9).

11. Exide’s decision not to broach monetary recovery at this juncture does not negate the “related to” nature of the proceedings. Under Exide’s logic, it is entitled to get declaratory relief through the simplified process of a contested matter, before using that as a predicate in seeking monetary relief in an adversary proceeding. Exide Obj. at p. 7 n. 3. This is contrary to Bankruptcy Rule 7001(9), which mandates that declaratory relief “related to” an action to recover money is an adversary.

12. Exide’s arguments might bear more weight had it expressly waived any right to the alleged overpayments. But Exide did not do this. Rather, Exide openly concedes it could subsequently recover the alleged overpayments in the event it prevails on its motion and the 2017 amendment is declared unconstitutional. Exide Obj. at p. 7, n. 3. It cannot claim in the same instance that the proceedings are unrelated.

13. Had Exide requested monetary recovery in its motion, this would have been an adversary proceeding under Bankruptcy Rule 7001(1). Because Exide instead seeks a declaratory judgment in the first instance that would allow it to recover money from the federal government, it must file an adversary proceeding under Bankruptcy Rule 7001(9). *See, e.g., In re Harry C. Partridge, Jr. & Sons, Inc.*, 43 B.R. 669, 672 (Bankr. S.D.N.Y. 1984) (rejecting as procedurally deficient debtor’s motion for declaratory judgment that it had not breached executory contract it wished to assume, because declaratory judgment related to contract dispute was an adversary proceeding).

B. In the alternative, Exide must proceed by adversary proceeding because it requests injunctive relief under Bankruptcy Rule 7001(7).

14. The United States Trustee’s motion explained why Exide has requested

injunctive relief. Motion ¶¶ 14 & 16. Exide’s response does not rebut the government’s argument on this ground.

15. Exide seeks an order “determining that . . . the amount of fees owed to the UST pursuant to 28 U.S.C. § 1930(a)(6) is no more than \$30,000 per quarter *through the entry of the final decree* in this chapter 11 case.” Exide Motion ¶ 5 (emphasis added). While Exide dances around the word injunction, that is what Exide seeks in its request for relief—an order prohibiting the assessment of a quarterly fee in excess of \$30,000 in any quarter of Exide’s bankruptcy case for any reason.

16. Exide claims that the United States Trustee “simply misunderstands the legal consequences of declaring a legislative enactment to be unconstitutional.” Exide Obj. at ¶ 14. To the contrary, Exide misunderstands the relief it requested. The United States Trustee’s objection explains that Congress frequently assesses and adjusts the amounts and allocation of filing fees and quarterly fees for deposit into the U.S. Trustee System Fund. UST Obj. ¶ 23. Any declaration that the 2017 amendment is unconstitutional would not, by itself, prevent Congress from taking future action before Exide’s case is closed that would change the amount of fees Exide will owe in a quarter. Rather, Exide is effectively asking that this Court enjoin the government from taking any such action.

17. Exide argues that because it had filed for bankruptcy relief in this district in 2013, and confirmed its plan in 2015, the increase in quarterly fees “reaches back in time to increase Exide’s liability for long-ago conduct,” and is unconstitutionally retroactive. Exide Brief ¶ 45, *see* Exide Brief ¶¶ 40-51. While this proposition is incorrect for the multiple reasons set forth in the United States Trustee’s objection, UST Obj. ¶¶ 66-79, were Exide to prevail on this argument, the implications are that no quarterly fee increases would be permissible in

Exide's case during the course of its existence. As explained by the Eighth Circuit, “[c]arried to its logical conclusion, debtors’ [retroactivity] arguments would mean no increases in fees, taxes, or assessments could be applied to any bankruptcy case after filing.” *In re Prines*, 867 F.2d 478, 485 (8th Cir. 1989). Consequently, by making this argument and seeking an order to set the amount of its quarterly fees until the end of its case, Exide has sought to “obtain an injunction,” which is an adversary proceeding under Bankruptcy Rule 7001(7).

C. Exide cannot evade the requirements of an adversary proceeding by artfully pleading around Bankruptcy Rule 7001.

18. Exide may not side-step the requirements of the Rule 7000 series by carefully selecting the terminology of its requested relief or electing to seek its relief in stages. Courts “consider the substance, rather than the title, of claims.” *U.S. v. D’Amario*, 593 F. App’x 97, 99 (3d Cir. Dec. 9, 2014) (citing *Jarbough v. Att’y Gen.*, 483 F.3d 184, 189 (3d Cir. 2007)). “To do otherwise would elevate form over substance and would put a premium on artful labeling.” *Id.* (quoting *Jarbough*, 483 F.3d at 189). The relief that Exide seeks falls under the scope of Bankruptcy Rule 7001; it is required to follow the procedures set forth for adversary proceedings accordingly.

II. Exide’s Constitutional Challenge Is Not a Claim Objection.

19. Exide suggests that it need not proceed through an adversary proceeding because the holding of *United States Trustee v. Gryphon at Stone Mansion, Inc.*, 166 F.3d 552 (3d Cir. 1999), means its constitutional challenge is simply a claim objection under Bankruptcy Rule 3007(b), and is thus a contested matter. Exide Obj. ¶ 24. Exide is wrong for at least four reasons.

20. First, *Gryphon* did not hold that an objection to quarterly fees under 28 U.S.C. § 1930(a)(6) is a contested matter. Indeed, neither that phrase—nor adversary proceeding—is

even mentioned in the opinion. 166 F.3d at 552-557. While the debtor there filed an objection to the post-confirmation quarterly fees, *id.* at 554 n. 3, the court never addressed whether this was or was not the proper procedural method by which the debtor should have proceeded. Absent any indication that the issue was considered and analyzed therein, the opinion provides no relevant guidance on this point.³ *Cf. Goldman v. Citigroup Global Markets, Inc.*, 834 F.3d 242, 251 (3d Cir. 2016) (observing that a “drive-by jurisdictional ruling, in which jurisdiction has been assumed by the parties, and assumed without discussion by the court, does not create binding precedent”) (quoting *United States v. Stoerr*, 695 F.3d 271, 277 n.3 (3d Cir. 2012)).

21. Second, *Gryphon* never identified the objection to quarterly fees as a claim objection governed by Bankruptcy Rule 3007(b). Even in *dicta*. Rather, *Gryphon* held that bankruptcy courts have “related to” or “arising in” jurisdiction under sections 157 and 1334 of title 28 to enforce the debtor’s statutory duty to pay quarterly fees post-confirmation. *Id.* at 555-56. Indeed, *Gryphon* fully supports the United States Trustee’s objection to Exide’s motion on the merits of its constitutional arguments, as there the Third Circuit addressed and rejected retroactivity and takings challenges to an earlier amendment to 28 U.S.C. § 1930(a)(6). *Id.* at 557 n.7. The jurisdictional holding of *Gryphon* in no way supports Exide, because whether a bankruptcy court has jurisdiction to enforce the statutory requirement to pay post-confirmation fees is unrelated to whether constitutional challenges to those fees are governed by the claims allowance process of which Rule 3007 is part.

³ For the same reason, the laundry list of constitutional challenges noted in Exide’s objection are also inapposite. Exide Obj. at p. 11 n.5. Contrary to Exide’s explanatory parentheticals, not even one of them held that adversary proceedings are unnecessary to resolve the constitutional challenges. Instead, whether the challenge could proceed as a contested matter or must be brought as an adversary proceeding was never discussed.

22. Third, the quarterly fees due under 28 U.S.C. § 1930(a)(6) are not claims to which Exide has objected under Bankruptcy Rule 3007, because they are not claims that the United States Trustee has sought to be allowed under 11 U.S.C. §§ 501 and 502.

23. A “creditor” that has a claim against a debtor may file a proof of claim under 11 U.S.C. § 501(a), in the form and manner required by Bankruptcy Rule 3001(a). That claim is “deemed allowed” unless a party in interest to the bankruptcy proceeding files an objection to the claim under 11 U.S.C. § 502(a), in the form and manner required by Bankruptcy Rule 3007. *See* 9 COLLIERS ON BANKRUPTCY ¶ 3007.01 (16th ed., 2019) (“Federal Rule of Bankruptcy Procedure 3007 implements portions of section 502 of the Bankruptcy Code.”)

24. Yet, for purposes of the claims allowance process, the United States Trustee is not a “creditor” as defined by 11 U.S.C. § 101(10). Under that definition, a creditor “is an entity that in essence has a pre-petition claim.” *In re Hefner*, 32 B.R. 382 (Bankr. W.D.N.Y. 1983) (holding that post-petition creditor is not “creditor” within meaning of Bankruptcy Rule 3004). The quarterly fee arises by statute only after the case is filed.⁴ 11 U.S.C. § 101(10)(B). Consequently, the United States Trustee has not filed, and need not file, a proof of claim to which Exide can object under Bankruptcy Rule 3007.

25. Nor are quarterly fees due under 28 U.S.C. § 1930(a)(6) an “administrative expense” to be allowed under 11 U.S.C. § 503(b). *See* 11 U.S.C. § 507(a)(2) (distinguishing fees assessed under chapter 123 of title 28, which includes quarterly fees and other court fees and

⁴ While the Bankruptcy Code does recognize holders of certain post-petition claims as “creditors,” none of those claims apply here. For example, had Exide converted its chapter 11 case to one under chapter 7, then under 11 U.S.C. §§ 101(10)(B) and 348(d), any unpaid quarterly fees would constitute a prepetition claim after conversion, for which the United States Trustee would be a “creditor” in the chapter 7 case. But Exide’s case has not been converted to chapter 7, so this exception is not applicable.

costs, from section 503(b) administrative expense).⁵ Because quarterly fees are not administrative expenses, the United States Trustee does not, and need not, file requests for their payment under 11 U.S.C. § 503(b), and did not do so here.

26. Fourth, even if Exide’s constitutional challenge were a claims objection, Rule 3007 expressly mandates that any such objection “shall not include a demand for relief of a kind specified in Rule 7001.” Fed. R. Bankr. P. 3007(b). As explained *supra* at ¶¶ 6 to 17, Exide’s demands for relief in its motion are of a kind specified in Rule 7001. Rule 3007 thus does not allow Exide to circumvent the rules’ requirement that it commence an adversary proceeding here.

III. Neither Bankruptcy Rule 9005.1 Nor Civil Rule 5.1 Authorizes Exide to Sue the United States For Declaratory or Injunctive Relief by Way of Notice

27. Exide argues that because Bankruptcy Rule 9005.1, which incorporates Civil Rule 5.1, contemplates that the constitutionality of a federal statute may be drawn into question by written motion, Exide need not comply with the procedural requirements of an adversary proceeding in challenging the 2017 amendment to 28 U.S.C. § 1930(a)(6). Exide misapprehends both the applicable rules and the relief that it is seeking.

28. Civil Rule 5.1 mentions motions because it recognizes that other rules of procedure may permit a constitutional challenge to be raised by motion in specific circumstances. For example, if a creditor brings an action against the estate seeking relief for

⁵ Thus, in the context of determining the priority of claims after a chapter 11 case is converted to chapter 7, *see supra* n. 4, courts have held that quarterly fees under 28 U.S.C. § 1930 are not the same as—and thus have different and higher priority than—chapter 11 administrative expenses under 11 U.S.C. § 503(b). *See, e.g., United States Trustee v. Endy (In re Endy)*, 104 F.3d 1154, 1156–58 (9th Cir. 1997) (collecting cases); *Huisinga v. Carter (In re Juhl Enters., Inc.)*, 921 F.2d 800, 803–04 (8th Cir. 1990); *United States Trustee v. Ste-Bri Enters., Inc.*, 579 B.R. 448, 453 (N.D. Ohio 2017); *In re Jonick Deli Corp.*, 263 B.R. 196, 198-99 (S.D.N.Y. 2001)).

alleged violations of the federal securities laws, the estate may move by motion to dismiss the claim under Civil Rule 12 by challenging the constitutionality of the federal statute alleged to have been violated. Thus, constitutionality may be raised by a motion to dismiss. But that recognition does not authorize commencing a suit against the United States by motion.

29. Contrary to Exide's contention, Exide Obj. ¶ 27, neither Civil Rule 5.1 nor Bankruptcy Rule 9005.1 *authorizes* a party to bring any constitutional challenge by motion, much less an affirmative claim seeking relief against the government. Rather, those rules require that, where such challenges are raised when the government is not a party, whether by pleading or by motion, additional notice requirements must be complied with. Fed. R. Civ. P. 5.1 advisory committee's note. Thus, *In re Gledhill*, 76 F.3d 1070 (10th Cir. 1996), on which Exide relies, Exide Obj. ¶ 28, is inapposite. That case involved a motion under Civil Rule 60(b) to vacate an order lifting the automatic stay; as the court recognized, Civil Rule 60(b) expressly authorizes a party seeking relief under that rule to proceed by motion. 76 F.3d at 1077-79. No such express authorization exists under Civil Rule 5.1 to challenge, by way of notice, Congress's ability to increase Exide's quarterly fees to pay for the bankruptcy system.

30. To be sure, the constitutionality of federal or state statutes are sometimes drawn into question where the government is not a party to the action. But here, Exide seeks (1) a declaration that a statute is unconstitutional that would (a) establish a predicate to recover from Treasury any alleged overpayments that Exide made, and (b) prevent the federal government from collecting increased fees, and (2) an order enjoining Congress from raising quarterly fees for the remainder of Exide's bankruptcy case. This is nothing other than a lawsuit against the United States seeking relief that falls under Bankruptcy Rule 7001.

IV. Bankruptcy Rule 2020 Does Not Authorize Exide to Use a Motion to Challenge Acts of Congress.

31. Exide has not identified any act taken by the United States Trustee that is inconsistent with his statutory duties. *See* Exide Obj. ¶ 33. Exide has not complained that the United States Trustee’s calculation and collection of Exide’s quarterly fees was incorrect under the fee schedule established by Congress. Rather, Exide claims the amended fee schedule itself, as enacted by Congress and signed into law by the President, is unconstitutional. Given that, Bankruptcy Rule 2020 does not govern these proceedings.⁶

⁶ Alternatively, as another bankruptcy court concluded, Rule 2020 does not apply when a debtor seeks a determination as to fees not yet assessed because the Rule “does not provide for advisory opinions in advance of the act.” *In re Clinton Nurseries*, slip op. at 7 (quoting Fed. R. Bankr. P. 2020).

CONCLUSION

32. For these reasons, the United States Trustee respectfully asks this Court to deny the Motion, require the Debtor to assert any causes of action in the Motion in the form of an adversary proceeding, and grant any further relief that the Court deems proper.

DATED: August 30, 2019

Respectfully submitted,

ANDREW R. VARA
Acting United States Trustee for Region 3

By /s/Linda J. Casey

RAMONA D. ELLIOTT
Deputy Director/General Counsel
P. MATTHEW SUTKO
Associate General Counsel
SUMI K. SAKATA
WENDY COX
Trial Attorneys

Department of Justice
Executive Office for United States
Trustees
441 G Street, N.W., Suite 6150
Washington, DC 20530
Tel: (202) 307-1399
Fax: (202) 307-2397

ANDREW R. VARA
Acting United States Trustee, Region 3
T. PATRICK TINKER
Assistant United States Trustee
LINDA J. CASEY
ROBERT J. SCHNEIDER, JR.
Trial Attorneys
Department of Justice
Office of the United States Trustee
J. Caleb Boggs Federal Building
844 King Street, Suite 2207, Lockbox 35
Wilmington, DE 19801
Tel: (302) 573-6491
Fax: (302) 573-6497