COHN LIFLAND PEARLMAN
HERRMANN & KNOPF LLP
PETER S. PEARLMAN
Park 80 Plaza West-One
Saddle Brook, NJ 07663
Telephone: 201/845-9600
201/845-9423 (fax)

LITE DePALMA GREENBERG
& RIVAS, LLC
JOSEPH J. DePALMA
SUSAN D. PONTORIERO
Two Gateway Center, 12th Floor
Newark, NJ 07102-5003
Telephone: 973/623-3000
973/623-0211 (fax)

Co-Liaison Counsel

[Additional counsel appear on signature page.]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

"DOCUMENT ELECTRONICALLY FILED"

AVIVA PARTNERS LLC, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. EXIDE TECHNOLOGIES, et al., Defendants.	No. 3:05-cv-03098-MLC-JJH **(Consolidated)** CLASS ACTION PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE CONSOLIDATED CLASS ACTION COMPLAINT

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LEGISLATIVE HISTORY

I. INTRODUCTION

Shares of stock in defendant Exide Technologies ("Exide" or the "Company") plunged from $11.15 per share to $4.20 in two days – a drop of over 60% – in May 2005 after the Company reported an earnings shortfall of $15-$20 million that caused the Company to violate specific covenants with its lenders. Even defendants concede that the factors that contributed to this shortfall include over $10 million that directly relate to inventory and contract problems specifically alleged in Plaintiffs' Consolidated Class Action Complaint for Violation of Federal Securities Laws ("Complaint"). *See* Defendants' Memorandum of Law in Support of Their Motion to Dismiss ("Defs.' Mem.") at 4.

As detailed in the Complaint, based in part upon the eyewitness accounts of former employees of Exide, the problems that led to the collapse of Exide's stock price on May 17 and 18 of 2005 existed well before the announcements, were well known to defendants, and were completely inconsistent with representations that they had been making to investors for a year.

The detail provided in the Complaint surpasses what is normally available in securities fraud cases and well exceeds any detail required by the Private Securities Litigation Reform Act of 1995 ("PSLRA"). For example, former employees stated that the inventory problems which were instrumental to the May 2005 earnings shortfall were endemic at the Company for well over a year, and that defendants were made aware of these problems before and during the Class Period (May 5, 2004-

May 17, 2005, inclusive), both verbally and in writing. Similarly, the witnesses indicate that defendants were made aware of the contract problems with the "large North American customer" – the U.S. government – well before the May 2005 announcements. However, defendants concealed these problems and issued financial reports that failed to properly account for obsolete or missing inventory throughout the Class Period. In addition, they continued to assure investors that they would satisfy the covenants in their existing loan instruments, even though they knew that their inventory numbers were incorrect, their internal controls systems were wholly inadequate, and their sales projections were without foundation. They maintained this fiction just long enough to obtain additional financing, through the completion of a $350 million senior notes and convertible securities offering.

Defendants wrongly argue that these allegations fail to state a claim under the securities laws, attempting to use the PSLRA as an impenetrable shield against liability.[1] First, contrary to defendants' assertions, the sources for the allegations in the Complaint are identified with sufficient detail to permit the Court to determine how they possessed information related to the alleged fraud. *See* §III.B., *infra*. Moreover, the Complaint sufficiently sets forth each statement alleged to be false or

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[1] The PSLRA was never intended to place insurmountable barriers to legitimate securities fraud actions – such as this – which are an "indispensable tool with which defrauded investors can recover their losses" and which "promote . . . confidence in our capital markets and help to deter wrongdoing." H.R. Conf. Rep. No. 104-369, at 31 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 730.

misleading, identifies the speaker, and explains why each statement was false and/or misleading when made. *See* §III.C., *infra*.

Second, the Complaint raises a strong inference that defendants knowingly or recklessly disseminated false and/or misleading statements during the Class Period. *See* §III.D., *infra*. The Complaint also pleads that defendants had a powerful motive to mislead investors about the Company's true financial condition: The need to complete the $350 million private placement of senior notes and convertible securities. *Id.*

Third, defendants' false and/or misleading statements are not shielded by the PSLRA's safe harbor provision and were not immaterial as a matter of law. *See* §III.E. & F., *infra*. The PSLRA's safe harbor provision is not a license to lie. Defendants' Class Period statements were false and misleading because, as defendants were well aware, significant amounts of inventory were required to be written off before those statements were made. Moreover, investors found defendants' Class Period misstatements and omission to be material. Between May 16 and May 18, 2005, when defendants revealed the truth of their fraudulent scheme, Exide's stock price slumped by over 60%, causing unwitting investors large losses.

Fourth, while the "group pleading" doctrine is not needed to support liability for any of the defendants, each of whom is alleged to have made or signed false or misleading statements, the Complaint properly pleads the "group-pleading" doctrine as an alternative theory of defendants' liability. *See* §III.G.

Finally, the Complaint sufficiently pleads a claim pursuant to §20(a) of the Securities Exchange Act of 1934 ("Exchange Act"). *See* §III.H., *infra*.

Accordingly, plaintiffs respectfully request that the Court deny defendants' motion to dismiss in its entirety.

II. STATEMENT OF FACTS

This is a securities class action against Exide, its President and Chief Executive Officer ("CEO"), Craig H. Muhlhauser, and two of the Company's former Vice Presidents and Chief Financial Officers ("CFO"), Ian J. Harvie and J. Timothy Gargaro (collectively, the "Individual Defendants"). Plaintiffs allege that defendants violated certain provisions of the Exchange Act (15 U.S.C. §78 *et seq.*) and United States Securities and Exchange Commission ("SEC") Rule 10b-5 promulgated thereunder (17 C.F.R. §240.10b-5).

A. Exide's Emergence from Bankruptcy and Establishment of the Senior Credit Facility

Exide is a world-wide manufacturer and supplier of lead acid batteries, associated equipment, and services for transportation and industrial customers. ¶¶18, 32.[2] On May 5, 2004, the first day of the Class Period, Exide emerged from bankruptcy protection, proclaiming that the reorganization process had enabled the Company to resolve financial issues, improve operations and create "long-term value

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[2] Paragraph references ("¶__" or "¶¶__") are to the Complaint.

for [its] shareholders." ¶¶2, 33, 37. On the same day, Exide obtained a $600 million Senior Credit Facility ("Senior Credit Facility") from a host of investment banks.

The $600 million Senior Credit Facility enabled the Company to satisfy its heavy dependence on debt financing and continue funding its ongoing operations. ¶¶2, 33. The Senior Credit Facility was subject to several financial covenants, which, if violated by the Company, would have resulted in default and could have required Exide to further restructure its operations. ¶35; Affidavit of James E. Tonrey, Jr. ("Tonrey Aff."), Ex. C at 33. As such, Exide's compliance with the Senior Credit Facility covenants was of utmost importance to the Company as a going concern.

Likewise, Exide's ability to comply with the covenants was of paramount importance to investors. Accordingly, during the Class Period defendants created the false impression that Exide was doing well post-bankruptcy by repeatedly touting their plan for "long-term value creation" to unwitting investors while misrepresenting the Company's compliance with the Senior Credit Facility covenants. To wit, defendants: (a) claimed that Exide had implemented a number of cost cutting and quality improvement initiatives that were currently benefiting the Company and would continue to do so in the future; (b) touted Exide's successful bankruptcy reorganization and continued improvement of financial performance; and (c) represented that "based upon [Exide's] financial forecasts and plans . . . it will comply with [the Senior Credit Facility] covenants for the foreseeable future." ¶¶37-40, 45-48, 54, 61, 65, 71-73, 75.

B. Exide's Real Condition Emerging from Bankruptcy

In fact, the Company's financial condition after emerging from bankruptcy was far from what the defendants portrayed it to be. ¶¶130-133. The Company's largest single business segment – the North American Transportation division ("NATD")[3] – failed to reach its forecasted sales target each month during the Class Period, and defendant Muhlhauser received the "Weekly Report," which communicated just this fact (it "wasn't even close"; it was "not a pretty picture"). ¶¶93, 130. Of equal importance, the Company was experiencing substantial undisclosed problems with inventory, internal disclosure controls and restructuring, which defendants knew rendered compliance with the Senior Credit Facility covenants impossible.

1. Exide's Obsolete Inventory

Defendants' positive statements were in direct contravention of serious problems at the Company. Immediately before the Class Period, Exide had been trying to identify means of disposing of tens of millions of dollars of obsolete and old inventory that had been accumulating throughout the organization. ¶¶92, 112. In fact, the excess and obsolete inventory problem was so pervasive that Exide hired a consultant to aid the Company in its disposal. ¶92. Prior to the Class Period, Exide's Financial and Treasury Analyst prepared "Obsolete Inventory Reports" that quantified

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[3] The NATD historically represented approximately 35% of Exide's consolidated revenues and earnings. *See* Defs.' Mem. at 24; Tonrey Aff., Ex. O at 30-31.

the ever-growing amounts of excess and obsolete inventory building up throughout the organization. *Id.* Notably, defendant Muhlhauser was a recipient of these reports. *Id.* One reason why the "Obsolete Inventory Reports" were distributed to defendant Muhlhauser was so that he would have readily-available information during periodic conference calls held to discuss the growing inventory problem. *Id.* During the calls, Exide's Financial and Treasury Analyst and the consultant hired by the Company repeatedly warned defendant Muhlhauser that the inventory must be written off. *Id.* However, he refused to do so until the end of the Class Period. *Id.*

Defendant Muhlhauser also had knowledge that the excess and obsolete inventory problem infected Exide's prized NATD. ¶93. Each week during the Class Period Muhlhauser received the NATD's "Weekly Report." *Id.* The "Weekly Report" clearly communicated the fact that the NATD was missing its sales forecasts and, since batteries were manufactured based on those faulty sales forecasts, the Company was consistently making more batteries than it sold. In consequence, Exide was suffering from the accumulation of excess and unsalable batteries. *Id.* Indeed, the inventory problem was pervasive at Exide throughout the Class Period. For example, there was so much excessive inventory building up in the Bristol, Tennessee, Fort Smith, Arkansas, and Salina, Kansas, facilities during the Class Period that it was literally piling up on the floors. ¶¶94-95.

Exide also failed to make timely and adequate accruals for losses on obsolete inventory, which had the effect of materially overstating the Company's reported net

income and inventory during the Class Period. ¶¶84-100, 112. Pursuant to Generally Accepted Accounting Principles ("GAAP"), Exide is required to report the value of its inventory in its financial statements at the lower of cost or market. ¶¶90-91. This defendants failed to do. *See also* ¶¶97-99. During the Class Period, accordingly, defendants inaccurately represented the Company's net income and inventory to the investing public in Exide's SEC filings. ¶¶41, 91.

2. Exide's Lack of Internal Disclosure Controls

Defendants Muhlhauser, Harvie and Gargaro each signed Sarbanes-Oxley certifications in connection with each Form 10-Q and 10-K filed with the SEC during the Class Period. ¶¶115-117. The defendants' certifications purported to assure investors that the Individual Defendants had designed the Company's internal disclosure controls and procedures and that they were effective. ¶¶42-43, 51-52, 62-63, 76-77, 116. Each such certification was a misrepresentation. Exide utterly lacked effective internal disclosure controls and procedures during the Class Period, directly contributing to the Company's inability to account for its inventories, generate accurate and timely product invoices, and accurately forecast sales and future inventory needs. ¶¶101-120.

One area where Exide's lack of effective internal controls was particularly harmful was in sales forecasting. NATD consistently failed to attain its sales forecasts, even after its forecasts were downwardly revised. ¶108. The grossly inaccurate sales forecasts were then used to project inventory requirements. *Id.* If the

sales forecasts projected a large number of sales, the inventory forecasts projected the need to make a large number of batteries to meet the sales targets. *Id.* However, because the sales forecasts "drove" the inventory forecasting and NATD continued to miss its sales targets, the Company manufactured numerous batteries in anticipation of forecasted sales which never materialized. ¶¶92-93, 102-105, 108.

The inventory disasters that resulted from Exide's lack of effective internal controls are detailed in the Complaint. For example: (a) Exide had accumulated tens of millions of dollars in excess and obsolete inventory before the Class Period, which the Company was left saddled with during the Class Period; (b) the Bristol plant Materials Manager, Gary Shaw, complained throughout the Class Period that Exide's sales and inventory forecasting was extremely inaccurate; and (c) tons of excess inventory was building up at the Bristol, Fort Smith and Salina plants as a result of inaccurate sales forecasting. ¶¶110-112.

Failure to have systems in place to properly track inventories during the Class Period also led to substantial problems with Exide's performance of a supply contract for the U.S. government. ¶¶102-104, 129. The terms of the contract required Exide to maintain a three-month supply of batteries, or a total of around 23,000, at various Company locations. ¶129. However, the Company's internal control systems were unable to determine how many batteries that met the government's specifications were on hand, how many were used by the government, or when and how many batteries were rotated in or out of inventory due to expiration issues. ¶¶102, 129. In December

2004, as a consequence of these internal control failings, a former Exide Government Contract Administrator personally shared an inventory review with defendant Harvie concerning the government contract. *Id.* The review revealed that the Company only had 5,000 batteries in inventory that met the government's requirements and specifications. ¶129. Accordingly, by no later than December 2004, it was obvious that Exide would be required to write down the value of the contract because of the 18,000 missing batteries. *Id.* In December 2004, at the same time defendant Harvie learned that the Company was not in compliance with the terms of the government contract, he queried several Exide employees: "If that inventory is gone how can we possibly account for other materials?" ¶104.

In addition, the Company's billing program (written by J.D. Edwards) was wholly incapable of generating invoices for government orders and Exide's largest customer, Napa Auto Parts. ¶106. The dismal billing system performance led to numerous dissatisfied customers and billing disputes. *Id.* For example, the Company often failed to realize that it had billed customers until months after it had shipped product, which required Exide to manually create invoices and mail them months after-the-fact. ¶107. According to a former Exide Billing Analyst/Customer Service Representative, the prolonged passage of time between the shipment of product and when the customer was invoiced often rendered it difficult or impossible for the Company to confirm that it had actually shipped the customer's order. *Id.*

3. Exide's Restructuring Problems

Defendants continued to assure investors that Exide was making great progress and would comply with the Senior Credit Facility covenants, while knowing that, as a result of the adverse and undisclosed facts discussed above, they had no rational basis for making such representations. Indeed, defendants took full advantage of their lies, which enabled Exide both to maintain investor interest in a $350 million bond offering and borrow the money at favorable interest rates. ¶¶80-82, 139-140. Indeed, on March 15, 2005, Exide pocketed $350 million in cash from bond offerings at the time the Individual Defendants knew that the Company was in blatant violation of the covenants. ¶¶80-82, 143-144.

The Company's customer service also suffered significantly for other reasons. The Alpharetta, Georgia, employees tasked with customer service lacked relevant experience. ¶123. Because the J.D. Edwards billing system failed to create timely and accurate invoices, large customers such as the U.S. government and Volkswagen cancelled contracts with Exide in disgust. ¶¶124, 126. Notably, the Company's J.D. Edwards billing system often granted huge discounts not owed to customers or gave product away for free. ¶125.

During the Class Period, the Company's finance and accounting departments experienced high turnover among senior management and staff level employees, which led to deficient "check and balances" (*i.e.*, internal controls) in those departments and Exide's accounting. ¶131. Finally, employee morale was extremely

low because Exide's more talented people were fleeing the Company and leaving "lots of big problems" with less-talented and less-qualified employees. ¶132.

C. Defendants' Scheme Unravels

Defendants continued to assure investors that Exide was making great progress and would comply with the Senior Credit Facility covenants, while knowing that, as a result of the adverse and undisclosed facts discussed above, they had no rational basis for making such representations. Indeed, defendants took full advantage of their lies, which enabled Exide to both maintain investor interest in the Company's March 2005 $350 million bond offering and borrow that money at more favorable interest rates. ¶¶80-82, 139-140.

A mere two months after receipt of the $350 million, defendants' house of cards collapsed. On May 16, 2005, defendants disclosed that Exide expected to be in violation of two critical financial covenants: EBIDTA (*i.e.*, earnings before interest, depreciation, taxes and amortization) and leverage ratio. ¶¶134-136. Then, on May 17, 2005, defendants were forced to disclose why the Company had violated these covenants. Defendants explained to angry investors that the Company was required to write off $4.5 million of obsolete inventory and write off approximately $1.4 to $2.8 million on a contract with the U.S. government. Defendants also explained that they failed to forecast inventory reductions accurately, leading to a $6 million loss of absorbed overhead costs. ¶136.

Innocent investors were stunned by defendants' revelations of the true facts.[4] On May 17, 2005, the Company's stock price, which had closed at $11.15 per share on May 16, 2005, plunged to an opening price of $5.75 the following day, May 17, 2005, representing a one-day decline of $5.40, or 48%. ¶135. On May 18, 2005, the Company's stock price shed another $1.55, or 22%, after defendants disclosed the reasons why Exide was in blatant violation of the Senior Credit Facility covenants. ¶¶136-137. Ultimately defendants admitted in Exide's FY05 Form 10-K (filed with the SEC on June 29, 2005) what they knew all along: during and prior to the Class Period the Company failed to maintain effective internal controls concerning, *inter alia*, its accounting for inventories and business performance reviews. ¶119. Defendants' admission to such a "material weakness" had the capacity to result in

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[4] The "Background" section of defendants' brief appears to advance a loss causation argument. *See* Defs.' Mem. at 3-5 (attempting to argue that factors other than the disclosures set out in the Complaint caused the losses for which plaintiffs seek redress). The law, however, requires only that the Complaint allege that defendants' wrongful conduct was a substantial factor in plaintiffs' losses. *Semerenko v. Cendant Corp.*, 223 F.3d 165, 187 (3d Cir. 2000). The Complaint's loss causation allegations more than satisfy that standard. *See, e.g.*, ¶¶145-150. Moreover, Third Circuit precedent holds that loss causation is a fact intensive inquiry which is best resolved by the trier of fact. *See EP Medsystems, Inc. v. EchoCath, Inc.*, 235 F.3d 865, 884 (3d Cir. 2000). As such, defendants' attempt to infuse facts concerning their interpretation of what may or may not have caused plaintiffs' losses is premature at this stage. Moreover, even defendants do not dispute that the disclosure of the problems alleged in the Complaint likely caused at least some of the stock price drop, and the exact amount of such damages are for expert witnesses at a later date. Indeed, defendants do not even advance a loss causation argument in the "Argument" section of their brief. Should defendants attempt to make such an argument in their reply brief, plaintiffs reserve the right to address it fully thereafter.

"material misstatements" to Exide's financial results – precisely what occurred here. ¶136.

III. ARGUMENT

A. Standard of Review

The PSLRA did not change the standards for a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *See, e.g.*, *In re Cendant Corp. Sec. Litig.* ("*Cendant I*"), 76 F. Supp. 2d 531, 533-34 (D.N.J. 1999) (applying traditional Rule 12(b)(6) standards under PSLRA). As such, the Court must read the Complaint as a whole, presume the allegations are true, and give plaintiffs the benefit of every reasonable inference. *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 706, 717 (3d Cir. 1996); *Cendant I*, 76 F. Supp. 2d at 534. "[A] district court reviewing the sufficiency of a complaint has a limited role. In performing that role, the court determines not 'whether the plaintiffs will ultimately prevail,' but 'whether they are entitled to offer evidence to support their claims.'" *In re Lucent Techs., Inc. Sec. Litig.*, 217 F. Supp. 2d 529, 540 (D.N.J. 2002) (quoting *Langford v. City of Atl. City*, 235 F.3d 845, 847 (3d Cir. 2000)).[5]

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[5] As a consequence of these liberal pleading rules, courts grant motions to dismiss sparingly. *Pygatt v. Painters' Local No. 277, Int'l Bhd. of Painters & Allied Trades*, 763 F. Supp. 1301, 1307 (D.N.J. 1991).

B. Allegations in the Complaint Based on Confidential Informants' First-Hand Knowledge Satisfy the Pleading Requirements of the PSLRA

Defendants present the tired argument that plaintiffs have failed to plead literally "all facts" upon which allegations of the investigation of counsel are based. Defs.' Mem. at 6-10.[6] Defendants correctly cite to *Cal. Pub. Employees' Ret. Sys. v. Chubb*, 394 F.3d 126 (3d Cir. 2004), for the proposition that the Court need only focus on the "true facts" section of the Complaint with respect to this inquiry. *Id.* at 145. However, in *Chubb*, the Third Circuit rejected the literal "all facts" pleading standard defendants urge this Court to apply:

> We join the Second Circuit . . . when assessing the sufficiency of allegations made on information and belief pursuant to 15 U.S.C. § 78u-4(b)(1). . . . "***Reading 'all [facts]' literally would produce illogical results that Congress cannot have intended***. . . . Our reading of the provision focuses on whether the facts alleged are sufficient to support a reasonable belief as to the misleading nature of the statement or omission."

Id. at 146-47 (quoting *Novaks v. Kosaks*, 216 F.3d 300, 314-15 n.1 (2d Cir. 2000)).[7] As such, defendants' "all facts" argument is wide of the target.[8]

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[6] In the alternative, defendants ask the Court to strike ¶¶83-91, 97-101, 113-121 and 133 from the Complaint. Plaintiffs respectfully submit that the Court should deny defendants' alternative motion to strike.

[7] Emphasis added and citations are omitted throughout unless otherwise noted.

[8] Defendants' assertion, *i.e.* – that there is insufficient information from which to determine the sources of the allegations in ¶¶83-91, 97-101, 113-121 and 133 of the Complaint – is remarkable. *See* Defs.' Mem. at 8-9. For example, defendants'

With respect to the reliability of confidential sources, the Third Circuit inquiry "necessarily entails an examination of the detail provided by the confidential sources, the sources' basis of knowledge, the reliability of the sources, the corroborative nature of other facts alleged, including from other sources, the coherence and plausibility of the allegations, and similar indicia." *Chubb*, 394 F.3d at 147. Here, the Complaint sets forth detailed facts attributed to the confidential informants based on their first-hand knowledge, not "vague anecdotal information, hyperbole and rumors." Defs.' Mem. at 17. Notably, the Complaint contains reliable and detailed allegations of what defendants' state of mind was when they uttered their false and misleading statements. *See, e.g.*, ¶¶92-93, 104, 112, 129. Defendants' motion ignores these allegations of fact.

Defendants do, however, compare the factual detail presented by and about the confidential informants to the deficiencies found in *Chubb*. Defs.' Mem. at 10-21. However, in *Chubb*, the Third Circuit expressed the concern that "[p]laintiffs fail to

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position leads to the untenable conclusion that Exide's SEC filings (as a source identified at ¶¶84-86, 91, 97-98, 113-114 and 119) and GAAP and SEC rules (as sources identified at ¶¶87-88, 90, 97, 99-100 and 115-118) are disreputable sources of information. "[T]he Court concludes that Class Plaintiffs' allegations derived from reputable . . . sources and clearly identified as such in the [Complaint] are sufficient to meet the requirement of the PSLRA." *In re DaimlerChrysler AG Sec. Litig.*, 197 F. Supp. 2d 42, 81 (D. Del. 2002); *compare In re Silicon Graphics Sec. Litig.*, 183 F.3d 970, 985 (9th Cir. 1999) ("[The] complaint does not include . . . the sources of . . . information . . . ."). With respect to the remaining paragraphs defendants challenge (¶¶83, 101 and 120-121), these paragraphs are clearly transitional in nature or summaries of other well-pled allegations in the Complaint.

aver . . . when any of the [confidential sources] were employed" and "we are left to speculate whether the anonymous sources obtained the information they purport to possess by firsthand knowledge or rumor." *Chubb*, 394 F.3d at 148-49. In contrast to the facts as presented in *Chubb*, plaintiffs here have identified "when and in what capacity the confidential sources were employed by the Companies and how the former employees gained access to the information pled." *In re Royal Dutch/Shell Transp. Sec. Litig.*, 380 F. Supp. 2d 509, 561 (D.N.J. 2005). Paragraphs 92-95, 102-105, 107-112 and 122-132 contain a wealth of such detail.

The Complaint attributes to CI#1 facts concerning the continuation of the inventory problem at the Company during the Class Period and how that problem infected NATD – Exide's single largest reporting segment. ¶93. CI#1 is a former Executive Assistant to the President of NATD, who was employed by the Company throughout the Class Period until June 2005. *Id.* Thus, CI#1 is distinguishable from the employees in *Chubb*. *See, e.g.*, *Chubb*, 394 F.3d at 149-50. As CI#1 reported directly to the President of NATD, CI#1 can speak to the fact that Exide was accumulating excess and obsolete inventory at its largest division throughout the Class Period. *Id.* CI#1 was also in a position, therefore, to know that defendant Muhlhauser personally received the NATD "Weekly Report" ***that CI#1 personally prepared***, which report clearly communicated the fact that the NATD was continuing to accumulate excess and obsolete inventory during the Class Period. ¶¶93, 130.

CI#2 is a former Exide employee who simultaneously held the job titles of Export Compliance Officer, Billing Analyst and Customer Service Representative at the Company's Reading, Pennsylvania, facility. CI#2 worked at the Company for 15 years, including a large portion of the Class Period (May 2004 until her employment ended in December 2004). ¶107. CI#2 personally observed the failures of Exide's billing systems, customer complaints, and the lack of effective internal controls. *Id.* Defendants contest the adequacy of CI#2 asserting that there is nothing in the Complaint demonstrating that the informant had knowledge of any aspect of the Company outside the Reading, Pennsylvania, facility. Defs.' Mem. at 13. Defendants' argument, however, fails to discredit CI#2's testimony because it is corroborated by other witnesses with first-hand knowledge of Exide's operations outside of Reading (*e.g.*, CI#4 – internal control issues at Exide branches (¶¶105, 109); CI#5 – internal control issues related to the U.S. government contract (¶¶103-104); CI#8 – internal control issues company-wide (¶¶92, 112); and CI#9 – internal control issues at NATD (¶108)).

The Complaint attributes to CI#3 the fact that Exide's J.D. Edwards billing system failed to generate accurate and timely invoices. ¶124. CI#3 is a former Exide employee who was responsible for billing the Company's government contracts during the Class Period until October 2004, when she left the Company. *Id.* Defendants assert statements attributed to CI#3 run afoul of the PSLRA. Defs.' Mem. at 12. That is absurd. CI#3 was personally responsible for billing the government

contract at issue in this case. ¶124. Moreover, CI#3's testimony is clearly corroborated by information provided by CI#5 to the extent that the Company had no basis for supporting any numbers revenue-wise related to the government contract because of the lack of effective internal accounting and inventory controls. ¶103.

CI#4 worked at Exide during a portion of the Class Period (between December 2004 and August 2005) as a Regional Support Manager for Exide's branch stores. ¶96. According to CI#4, during the Class Period, Exide's distribution centers were shipping shoddy batteries to branch offices, the branch offices were incapable of accounting for the batteries they had on hand, and even the sub-par batteries the branch offices kept were insufficient in number to meet sales forecasts. ¶¶96, 105, 109. As a Regional Support Manager for Exide branches, CI#4 would be in a position to know these facts. *Chubb*, 394 F.3d at 149-50.

CI#5 is a former Government Sales Administrator, employed by Exide during a portion of the Class Period (between August 2004 and January 2005), who was responsible for monitoring the U.S. government contract at issue in this case. ¶102. CI#5 provided detailed first-hand knowledge of information concerning defendant Harvie's knowledge of the lack of internal controls at Exide and of the 18,000 battery shortage with respect to the U.S. government contract. ¶¶102-104, 129. Defendants attack CI#5 on the basis that CI#5 "only had exposure to a single customer of Exide." Defs.' Mem. at 13. Again, this argument is a *non-sequitor* because that one contract

of which CI#5 had personal, first-hand knowledge is the very government contract defendants lied about during the Class Period. ¶¶129, 136.

CI#6 is a former plant manager of Exide's Bristol, Tennessee, facility, who confirmed that during the Class Period the Bristol plant was "over-building" batteries and that Exide's sales and inventory forecasting was fundamentally flawed. ¶110. Defendants contend that CI#6 is not reliable because there are insufficient allegations to indicate whether the informant would have access to the information alleged. Defs.' Mem. at 13. CI#6 was in a position to know what he claims to know, given the fact that he was a manager at the Bristol, Tennessee, plant during the Class Period and personally observed what is alleged. ¶110. CI#6, therefore, is a reliable source. *Chubb*, 394 F.3d at 148.

CI#7 is a former "Lean Agent" for Exide. ¶95. CI#7 was responsible for implementing the Company's EXCELL lean manufacturing practices as an Exide employee between May 2003 until October 2004. *Id.* In addition, CI#7 was personally involved in the implementation of inventory reduction procedures during the Class Period. ¶¶95, 111. According to CI#7, during the Class Period, Exide's inventory control and processes were in need of improvement as it took weeks to get inventory-related data needed to accurately match production schedules. ¶111. Moreover, during the Class Period, CI#7 personally observed literally "tons" of excess and obsolete inventory piling up on the floors of Exide's Bristol, Tennessee, Fort Smith Arkansas, and Salina, Kansas, plants. ¶95. Defendants challenge CI#7's

testimony on the ground that the Complaint does not specify when CI#7 made his observations of the inventory problem. Defs.' Mem. at 16-17. Defendants are wrong. The Complaint specifically states that his observations were made while "trying to implement inventory reduction procedures during the Class Period." ¶95. Moreover, as with other witnesses, defendants disingenuously argue that the Complaint fails to connect inventory problems at the plant level to Exide as a whole (Defs.' Mem. at 16), even though Exide's Salina, Kansas, plant was the Company's largest battery manufacturing facility.

CI#8 is a former Financial and Treasury Analyst for Exide, who was employed by the Company between July 2001 and September 2004 (*i.e.*, during the Class Period). ¶92. Prior to the beginning of the Class Period, CI#8 was performing a company-wide analysis of the excess inventory problem at Exide. *Id.* As a former Financial and Treasury Analyst for Exide, CI#8 would absolutely be in a position to possess personal, first-hand knowledge of the inventory issue, the "Obsolete Inventory Reports" provided to defendant Muhlhauser, and that CI#8 repeatedly informed Muhlhauser that millions of dollars of inventory were required to be written off. *Id.* Defendants charge that CI#8's pre-Class Period information is insufficient because there are no facts connecting "otherwise irrelevant information to the relevant time period." Defs.' Mem. at 15-16. Defendants' argument ignores other well-plead allegations corroborating that the problem persisted (*i.e.*, inventory problem infected

NATD during the Class Period – ¶¶93; inventory problem at several plants and at the branch offices during the Class Period – ¶¶94-96).

CI#9 was employed at Exide during the Class Period as the Vice President of Finance at NATD between spring 2004 and November 2004. ¶¶108, 131. CI#9 corroborated that during the Class Period Exide and the NATD over-produced batteries because the Company's sales forecasts never materialized. ¶108. CI#9 further confirmed that the Company's internal and disclosure controls were inadequate during the Class Period. *Id.* CI#9 was clearly in a position to know this information being the Vice President of Finance of Exide's single largest operating segment.

In addition, the confidential informants' knowledge of facts regarding the fraud is corroborated by the defendants' post-Class Period admissions. For example, compare ¶136 (defendants' admission after the Class Period that Exide's EBITDA covenant violation was a result of writing off $4.5 million in obsolete inventories, a $6 million loss of absorbed overhead costs caused by failure to forecast inventory reductions accurately, and $1.5 to $2.0 million of a contract with a large customer) with ¶¶92-96 and 129 (confidential witnesses detailing a company-wide accumulation of "millions of dollars" of excess and obsolete inventory and the inability to satisfy the U.S. government's requirement contract for batteries). Similarly, compare ¶136 (defendants' admission after the Class Period that they were going to be "implementing a more structured forecasting methodology that better connects sales and production planning") with ¶¶102-112 (during the Class Period, it was patently

obvious that Exide's internal controls and procedures were so flawed that the Company was unable to accurately track inventory, track sales, and match inventory requirements to forecasted sales).

C. Plaintiffs Plead Falsity with the Requisite Particularity

The PSLRA requires that complaints specify (i) each statement alleged to have been misleading, (ii) the reason or reasons why the statement is misleading, and (iii) if an allegation regarding the statement or omission is pled on information and belief, the "'facts on which that belief is formed.'" *In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 276 (3d Cir. 2006) (quoting 15 U.S.C. §78u-4(b)(1)(B)). A "[c]omplaint sufficiently pleads claims of misrepresentation" where for "each alleged misrepresentation, plaintiffs have specified the statement as misleading, specified who made the statement, and given a detailed explanation as to why it is misleading." *Adams v. Amplidyne, Inc.*, No. 99-4468, 2000 U.S. Dist. LEXIS 21383, at *20-*21 (D.N.J. Oct. 24, 2000).[9]

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[9] Defendants misleadingly assert that Rule 9(b) "imposes a heightened pleading standard on Plaintiffs' allegations that 'has been rigorously applied in securities fraud cases.'" Defs.' Mem. at 6 (quoting *In re Rockefeller Ctr. Props. Sec. Litig.*, 311 F.3d 198, 216 (3d Cir. 2002)). However, defendants leave out the key qualification announced by the Third Circuit – the Rule's requirements are ***relaxed*** when, as here, defendants necessarily have superior access to information that would reveal a fraud. *Rockefeller*, 311 F.3d at 216. *See also In re NUI Sec. Litig.*, 314 F. Supp. 2d 388, 397 (D.N.J. 2004).

In accordance with the PSLRA and Third Circuit case law, the Complaint sets forth the necessary allegations of fact. The Complaint contains the "who, what, when and where" of each statement alleged to be false and/or misleading by identifying the alleged speaker(s), the content of each misrepresentation, its date, and where it appeared or was uttered. *See* ¶¶37-82. In addition, as further discussed below, the Complaint describes in detail how and why each statement was fraudulent when made. ¶¶84-134, 136.

1. Plaintiffs Sufficiently Plead Defendants' Statements Concerning Exide's Inventories and Net Income Were False and Misleading

The Complaint pleads sufficient facts to show that defendants' statements concerning Exide's inventories and net income were false and misleading when made. Throughout the Class Period, defendants reported the Company's inventory and net sales in press releases and SEC filings. ¶¶40, 48-49, 55, 57, 59, 70, 74. Before and throughout the Class Period Exide was suffering from a company-wide glut of obsolete inventory, including at its largest division, NATD (which represented nearly 40% of Exide's consolidated revenue and income), and defendants knew it. ¶¶92-97, 103.

Prior to the Class Period, defendant Muhlhauser received "Obsolete Inventory Reports," which unambiguously communicated that the entire Company was accumulating tens of millions of dollars of excess and obsolete inventory; a problem that was worsening over time. ¶¶92, 110. In addition, this excess and obsolete

inventory was being carried on Exide's books at "cost" in blatant violation of GAAP. ¶¶92-96. The inventory problem was so pervasive that Exide was forced to hire a consultant to aid the Company in its disposal. ¶92. Despite repeated warnings by the consultant and the Company's Financial and Treasury Analyst that the inventory required writing down, defendants refused to do so before and during the Class Period, until after Exide pocketed $350 million in the March 2005 bond offerings. ¶¶82, 92, 134-137.

Not only was Exide suffering a company-wide excess and obsolete inventory problem that required a write down before the Class Period, the same problem was crippling Exide's largest single business segment – NATD – during the Class Period. ¶93. Defendant Muhlhauser received the NATD "Weekly Report," which unequivocally communicated the fact that the segment was grossly missing its sales forecasts and, therefore, was similarly accumulating excess and obsolete inventory. *Id.*

Allegations concerning the excess and obsolete inventory problem at the Exide plants further establish that defendants' Class Period statements were false when made. For example, there was so much excessive inventory building up at the Bristol, Tennessee, Fort Smith, Arkansas, and Salina, Kansas, plants that it was heaping up on the floors. ¶¶94-95. Pursuant to GAAP, had defendants timely written off the $4.5 million in excess and obsolete inventory, Exide would have been forced to take a current period charge to earnings, thereby reducing its net income. ¶¶97-99.

At this stage in the litigation, the Court must accept plaintiffs' allegations as true and only give "credit [to] plaintiffs' allegations rather than defendants' responses."[10] *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1421 (3d Cir. 1997). Defendants attempt to disturb this basic principle of Rule 12(b)(6) jurisprudence by improperly advancing their own version of the facts. For instance, defendants attack the Complaint's well-pled allegations of falsity regarding Exide's inventory, claiming that Exide utilized "Fresh Start Accounting" upon emergence from bankruptcy. Defs.' Mem. at 25.[11] This is irrelevant. Regardless of the type of accounting defendants used, the Complaint unequivocally alleges that Exide suffered from inventory woes before the Class Period that carried over and worsened during

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[10] Defendants may not obtain dismissal of a complaint by asking the court to accept their version of the facts. *See Oran v. Stafford*, 226 F.3d 275, 286 n.5 (3d Cir. 2000); *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 100 (2d Cir. 2001) (holding that defendants' factual submission offered in exculpation at motion to dismiss stage are "best left to a later stage in the litigation"); *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) ("What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations.").

[11] "Fresh Start Accounting" requires that Exide would have had to have written off the excess inventory when it emerged from bankruptcy. *See generally* SOP 90-7 (Financial Reporting by Entities in Reorganization Under the Bankruptcy Code, November 19, 1990). However, the Complaint alleges that Exide failed to do so until May of 2005. ¶¶92-93. While defendants do not and cannot assert to the contrary, they nonetheless urge the Court to make the factual inference that the inventory was, in fact, "revalued" (*i.e.*, written off) upon Exide's emergence from bankruptcy. Defs.' Mem. at 25. This the Court cannot do. *See Oran*, 226 F.3d at 286 n.5.

the Class Period and that defendants knew of and intentionally refused to write down that inventory in violation of GAAP prior to May 2005. ¶¶84-100.

2. Plaintiffs Sufficiently Plead Defendants' Statements Concerning Exide's Disclosure Controls and Procedures Were False and Misleading

Throughout the Class Period, the Individual Defendants repeatedly represented to investors and the market that the Company maintained effective internal disclosure and accounting controls. ¶¶42-43, 51-52, 62-63, 76-77. However, on June 29, 2005, Exide did an "about-face," admitting that its disclosure controls procedures were actually not effective based on several significant "material weaknesses." ¶119. Exide further admitted that it had failed to maintain effective controls with respect to its inventory account reconciliations and business performance reviews during FY05. *Id.* Defendants do not even present an argument that the Complaint fails to properly allege falsity with respect to defendants' assurances about effective disclosure and accounting controls.[12]

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[12] Defendants assert that plaintiffs failed to plead falsity with the requisite particularity for "the four categories of statements about which they complain." Defs.' Mem. at 22. While they present arguments on three of those categories (restructuring, inventory and loan covenants), they present no argument about the fourth category, internal controls. *See id.* at 22-26. For reasons set out elsewhere in this brief, defendants' arguments about the particularity of the Complaint's falsity allegations on the other three categories are misguided and incorrect; their argument with respect to internal controls, however, is nonexistent.

The Complaint contains a myriad of other allegations establishing the falsity of defendants' Class Period statements concerning internal controls. Immediately before the Class Period, the Company's utter lack of effective controls was sorely evident as Exide had accumulated tens of millions of dollars of excess inventory as a result of the inability to adequately monitor the business (*i.e.*, conduct appropriate "business performance reviews"). ¶¶112, 119. During the Class Period, the Company lacked appropriate systems to enable Exide to determine whether it had the 23,000 batteries required pursuant to the U.S. government contract. ¶¶102, 129. Exide had no system in place to track the total number of batteries on hand (*i.e.*, 5,000 versus 23,000) at each location, how many were used by the government, or when and how many batteries were rotated in or out of inventory due to expiration issues (Exide's batteries have a 12 to 18-month shelf life). ¶102. In addition, the lack of an adequate inventory tracking system had existed at Exide for years, forcing the Company simply to fabricate the reported number of batteries on hand. *Id*. Because the Company's inventory numbers were so flawed, Exide had no reasonable basis for supporting revenues attributable to the U.S. government contract. ¶103. In December 2004, defendant Harvie admitted internally to the utter lack of effective controls at the same time he learned of the 18,000 missing government batteries. ¶104.

Moreover, throughout the Class Period, the Company's internal billing system – *i.e.*, the J.D. Edwards system – frequently failed to generate and transmit invoices to customers after product had shipped. ¶¶102, 123-126. This internal control problem

was exacerbated by the fact that Exide often failed to realize that it had not billed customers until months after shipping product, which required the manual creation of invoices. ¶107. This, in turn, led to customer dissatisfaction and billing disputes because customers service employees were wholly incapable of confirming whether a customer's order even left Exide's doors. *Id.*

Throughout the Class Period, NATD's forecasting capabilities were deeply flawed. ¶108. The inaccurate sales forecasts, in turn, created inaccurate inventory manufacturing projections. *Id.* Because Exide was forecasting greater sales volume then was ever attained, NATD was accumulating excess inventory. *Id.* NATD's former Vice President of Finance corroborated that NATD and Exide had been over-producing batteries during the Class Period. *Id.* At the Company's Bristol, Tennessee, manufacturing plant, Exide was similarly accumulating excessive amounts of unsalable batteries. ¶110.

During the Class Period, the Company was attempting to implement the EXCELL lean program to reduce excess inventory throughout the organization, but the program's objectives proved unworkable because of flawed forecasting. ¶111. Excess inventory was building up on the floors of Exide's plants. *Id.* The Company's inventory controls needed extreme improvement because it took weeks to get inventory-related data necessary to accurately manufacture orders. *Id.* The delay of this information made it impossible to execute "build-to-order" inventory initiatives

implemented pursuant to Exide's EXCELL lean programs. *Id.* Likewise, the Company's branches suffered from the same issues. ¶¶109-110.

3. Plaintiffs Sufficiently Plead that Defendants' Statements Concerning the Successful Restructuring of Exide Were False and Misleading

Throughout the Class Period, defendants touted that they were successfully restructuring Exide, by strengthening the Company's competitive position, simplifying and improving operations, reducing costs, and making quality and productivity improvements. ¶¶3, 37-39, 46, 48, 55, 58, 67, 71-73. The restructuring process at Exide, however, was an unmitigated failure, and that was apparent within Exide throughout the Class Period. ¶¶121-128.

In April 2004, the Company initiated a significant restructuring involving the closing of Exide's customer service and billing operation in Reading, Pennsylvania. ¶122. In order to realize significant cost savings and increased levels of customer service, the customer service and billing functions were transferred to Exide's facilities in Alpharetta, Georgia. *Id.* As a direct consequence of this "restructuring," however, the Company's costs increased and customer service suffered during the Class Period. *Id.* For instance, Exide's labor costs at the Alpharetta, Georgia facility increased by nearly 400% because it was now taking four employees to do the job that one Reading, Pennsylvania, employee was capable of performing before the restructuring. *Id.*

In addition, the Company's level of customer service deteriorated significantly during the Class Period. The Company's J.D. Edwards billing system failed to create timely and accurate invoices, causing large customers, such as the U.S. government and Volkswagen, to cancel their contracts with Exide in disgust. ¶¶124, 126. The J.D. Edwards billing system failed to price products correctly and failed to provide customers with appropriate promotions discounts. ¶125. Only making matters worse was the fact that the Alpharetta, Georgia, customer service employees lacked relevant customer service experience to deal with the many problems created by the J.D. Edwards system. ¶123.

The Company's EXCELL lean program – an additional restructuring initiative which was designed to improve manufacturing and reduce costs – was also an abysmal failure during the Class Period. ¶127. In reality, the EXCELL program resulted in higher, rather than lower, costs. *Id.* EXCELL lean employees were forced to work seven days a week in order to meet the requirements of the new program, which further increased the Company's labor costs. ¶¶127-128. In addition, implementation of EXCELL lean program principles was going "horribly" at the Company's facilities in Bristol, Tennessee, Fort Smith, Arkansas, Salina, Kansas, France, Poland, and Germany. ¶128.

4. Plaintiffs Sufficiently Plead Defendants' Material Omissions Concerning the Necessity of Writing Off a Large Contract with the United States Government

While defendants made affirmative upbeat representations about Exide's financial performance and prospects during the Class Period, they failed to inform investors that the U.S. government contract would require a material write down. Indeed, no later than December 2004, defendant Harvie learned that Exide only had 5,000 of the necessary 23,000 batteries on hand to satisfy the U.S. government battery requirement contract. ¶129.

5. Plaintiffs Sufficiently Plead Defendants' Statements Concerning Exide's Ability to Comply with Senior Credit Facility Covenants Were False and Misleading

The Complaint paints a compelling story of the true facts as they existed at Exide during the Class Period, which defendants concealed and withheld from unwitting investors and which contradicted defendants' public statements. The true facts concerning Exide's excess and obsolete inventory (¶¶84-100), ineffective internal and disclosure controls (¶¶101-120), failed restructuring initiatives (¶¶121-128), and failure to meet the terms of the U.S. government contract (¶129), combine to eliminate any rationale for defendants' representations to the market that the Company would comply with the Senior Credit Facility covenants (¶133). In fact, these undisclosed facts, which the Individual Defendants were fully aware of during the Class Period, contradicted their statements that Exide would be in compliance and made it obvious that Exide would violate the covenants. *Id.*; §III.C., *infra*.

D. The Complaint Sufficiently Alleges a Strong Inference of Scienter

To plead scienter under the PSLRA, plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. §78u-4(b)(2). In the Third Circuit, plaintiffs can meet this burden with facts that either """constitute strong circumstantial evidence of conscious misbehavior or recklessness""" or establish a """motive and opportunity to commit fraud.""" *Suprema Specialties*, 438 F.3d at 276; *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 534-35 (3d Cir. 1999). In connection with the Court's inquiry into sufficiency of averments of scienter, the "plaintiffs are entitled to the benefit of all reasonable inferences based on the detailed and specific allegations in their complaints." *Suprema Specialties*, 438 F.3d at 281; *see also Fla. State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645, 660 (8th Cir. 2001); *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 437 F.3d 588, 602 (7th Cir. 2006). The Complaint satisfies these requirements as to the Individual Defendants, and "[n]umerous courts have recognized that scienter sufficiently pled as to a company's agents may be imputed to the company itself." *In re Campbell Soup Co. Sec. Litig.*, 145 F. Supp. 2d 574, 597 (D.N.J. 2001).

Defendants present three challenges to the Complaint's allegations of scienter: (a) it fails to plead facts that the Individual Defendants had actual knowledge that their statements were false when made; (b) it fails to plead facts raising a strong inference

that defendants were reckless; and (c) it fails to plead that the Individual Defendants had the motive and opportunity to commit the alleged fraud. *See* Defs.' Mem. at 39-47. However, each of these arguments requires that defendants ignore and/or mischaracterize numerous well-pled allegations of scienter.[13]

1. The Complaint Sufficiently Alleges that Defendants Knew of Material, Undisclosed Facts Rendering Their Statements Misleading

Defendants' argument that the Complaint does nothing more than "simply alleg[e] that Defendants 'knew or should have known' of the alleged falsity of" their statements is without foundation. Defs.' Mem. at 41. Indeed, the Complaint specifically alleges that Individual Defendants were on notice of the myriad problems set out in the Complaint.

The Complaint alleges that prior to the Class Period, defendant Muhlhauser received "Obsolete Inventory Reports" from the Company's former Financial and Treasury analyst which communicated that Exide was accumulating tens of millions of dollars of obsolete and old inventory throughout the organization, and the amount was growing. ¶92. The "Obsolete Inventory Reports" communicated to defendant

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[13] Defendants claim that the Complaint must point to "documents to or from the Exide Defendants acknowledging the circumstances Plaintiffs insist they knew or should have known." Defs.' Mem. at 40. That is wrong. A pleading sufficiently alleges scienter if it "can show – ***by whatever means*** – that defendants 'did not have an honest belief in the truth of their statements.'" *In re IKON Office Solutions, Inc.*, 277 F.3d 658, 667 n.7 (3d Cir. 2002).

Muhlhauser the specific quantities of excess and obsolete inventory Exide was holding on a company-wide basis. *Id.* Exide's former Financial and Treasury Analyst and a consultant hired to assist the Company to rid itself of the excess inventory ***repeatedly emphasized to defendant Muhlhauser that the inventory must be written off***. *Id.* Yet Muhlhauser intentionally refused to do so until the end of the Class Period.

Defendant Muhlhauser's knowledge of the company-wide excess and obsolete inventory problem continued into the Class Period. ¶93. On a weekly basis during the Class Period, defendant Muhlhauser received the NATD "Weekly Report." *Id.* The reports pointed out that the Company's largest single reporting segment was continuing to accumulate excess inventory. *Id.* Indeed, the inventory problem was so severe that unsold batteries began to pile up on the floors of the Company's Bristol, Tennessee, Fort Smith, Arkansas, and Salina, Kansas, plants. ¶95. Unfortunately for unwitting investors, Exide failed to timely write off $4.5 million of this excess and obsolete inventory for over a year – despite Muhlhauser being informed of the problem.

Defendants ignore the factual allegations of Harvie's knowledge of: (a) the lack of adequate internal accounting and disclosure controls at Exide; and (b) the need to write down the U.S. government battery contract. During the Class Period, Exide was required to maintain a three-month supply of batteries, or a total of approximately 23,000, at various locations pursuant to the government's requirements. ¶129. In

December 2004, Exide's former Government Contract Administrator ***personally informed defendant Harvie*** that the Company only had 5,000 batteries on hand and thus could not account for 18,000 missing batteries. *Id.*

In addition, the failings of Exide's internal accounting and disclosure controls directly resulted in the write down of the U.S. government contract. Exide had no systems in place to track how many the batteries it had on hand, how many were used (for example, by the U.S. government as part of its requirements contract), or when and how many batteries were rotated in or out of inventory due to expiration issues. ¶102. According to former Exide employees, the lack of an adequate inventory tracking system existed for years at the Company. *Id.* This is not surprising, as in previous years, Exide had simply fabricated its inventory reports. *Id.* As such, the Company had absolutely no basis to determine the amount of revenues that could be properly recognized from this agreement. ¶103. In December 2004, at the same time he learned that Exide was 18,000 batteries short of the requirements under the government contract, Harvie made a striking admission concerning Exide's lack of effective internal inventory controls: "If that inventory is gone how can we possibly account for other materials?" ¶104. These allegations raise a strong inference that defendants Harvie and Exide ***knew*** that the Company's internal controls were essentially non-existent. Yet, the Individual Defendants repeatedly represented to the market that Exide's internal contracts were effective. ¶¶42, 51, 62, 76-77.

2. Defendants' False Statements Concern Issues "Core" to the Company, and About Which Defendants Repeatedly Spoke

In addition to the facts recited above, the Complaint establishes a strong inference of scienter because "facts critical to a business's core operations or an important transaction generally are so apparent that their knowledge may be attributed to the company and its key officers." *Epstein v. Itron, Inc.*, 993 F. Supp. 1314, 1326 (E.D. Wash. 1998). As this Court has noted: "[w]here the matter at issue is central to the 'core business' of the company, there is a strong inference that high-level employees, such as officers and directors, had knowledge of facts surrounding that matter." *Adams*, 2000 U.S. Dist. LEXIS 21383, at *22-*23. The Third Circuit noted this rule with approval in *Advanta*, and it has been applied by several courts in this Circuit.[14]

The topics about which defendants deceived the investing public were of critical importance to Exide. For example, the $600 million Senior Credit Facility that Exide obtained at the beginning of the Class Period was a fact critical to the business's

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[14] *See Advanta*, 180 F.3d at 539 (citing *In re Ancor Commc'ns*, 22 F. Supp. 2d 999 (D. Minn. 1998)); *Campbell Soup*, 145 F. Supp. 2d at 599; *In re Reliance Sec. Litig.* ("*Reliance I*"), 91 F. Supp. 2d 706, 724 (D. Del. 2000); *In re Aetna Inc. Sec. Litig.*, 34 F. Supp. 2d 935, 953 (E.D. Pa. 1999); *In re Unisys Corp. Sec. Litig.*, No. 99-5333, 2000 U.S. Dist. LEXIS 13500, at *20 (E.D. Pa. Sept. 21, 2000); *In re Cell Pathways, Inc., Sec. Litig.*, No. 99-752, 2000 U.S. Dist. LEXIS 8584, at *28 (E.D. Pa. June 21, 2000); *Spitzer v. Abdelhak*, No. 98-6475, 1999 U.S. Dist. LEXIS 19110, at *20 (E.D. Pa. Dec. 15, 1999) (RICO case adopting rule); *In re Tel-Save Sec. Litig.*, No. 98-CV-3145, 1999 U.S. Dist. LEXIS 16800, at *18 (E.D. Pa. Oct. 19, 1999).

core operations — indeed, to its continued survival. If the Company violated the Senior Credit Facility covenants, it would have resulted in default. *See* Tonrey Aff., Ex. C at 33. Here, the Individual Defendants repeatedly made representations to the investing public concerning the Company's inventory, net income and how these financial metrics related to Exide's purported ability to comply with the Credit Facility covenants (¶¶39-40, 45, 48-49, 54-55, 57, 59, 61, 65, 69-70, 72, 74-75, 79), when they had no basis to believe that Exide could do so.

The Court is justified in imputing knowledge of the true, but undisclosed facts to defendants in this action because the Senior Credit Facility was critical to the Company's survival as a going concern. To wit, on February 14, 2005, defendant Gargaro updated the public on Exide's "improved" financial condition: "We also mentioned last quarter we had obtained amendments to certain financial covenants with respect to adjusted EBITDA and leverage contained in our credit agreement." ¶72. Here, it is inconceivable that the Company's CFO (or the CEO, for that matter) would not know the true facts concerning Exide's EBITDA and leverage ratio when choosing to speak about amendments to the covenants dealing with those exact metrics. As such, the Individual Defendants, as the top officers of the Company, may be charged with the knowledge of the true, but undisclosed, facts concerning Exide purported ability (or lack thereof) to comply with the Leverage Ratio and EBITDA Covenants pursuant the Senior Credit Facility. *See, e.g.*, *Unisys*, 2000 U.S. Dist. LEXIS 13500, at *20 (individual defendants' "position[s] in the company give[] rise

to an inference of their contemporaneous knowledge" that significant transactions "were not irrevocable and were subject to contingencies").[15]

Likewise, Exide's inventory and U.S. government contract write down were a direct consequence of the fact that the Company's internal controls and accounting systems were flawed in their ability to either accurately forecast sales, match sales to inventory requirements, or account for inventory on hand. ¶¶101-120. Because the Company's ability to accurately track inventory was critical to the generation of accurate financial results and projections, knowledge of systemic control failures may be imputed to the Individual Defendants.[16] *See, e.g.*, *Danis v. USN Commc'ns, Inc.*, 73 F. Supp. 2d 923, 938 (N.D. Ill. 1999) ("high-level USN managers and directors . . . may be presumed to have been aware of . . . deficiencies in . . . provisioning, billing, and accounting systems, systems core to USN's existence" as well as "severe

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[15] *In re Commtouch Software Ltd.*, No. C 01-00719 WHA, 2002 U.S. Dist. LEXIS 13742, at *28 (N.D. Cal. July 24, 2002) ("it is unlikely that transactions of this scope would fly below the radar of top management . . . [t]o the contrary, these are exactly the sort of transactions one would expect these officers to scrutinize closely from Day One"); *Chalverus v. Pegasystems, Inc.*, 59 F. Supp. 2d 226, 235 (D. Mass. 1999) ("'facts critical to [a significant transaction] . . . are so apparent that their knowledge may be attributed to the company and its key officers'"); *Ancor*, 22 F. Supp. 2d at 1005 ("knowledge of the potential incompatibility, within the context of this highly significant [transaction], may be imputed to Defendants and supports a strong inference of scienter").

[16] Indeed, as set forth above, defendant Harvie essentially admitted that Exide had no internal controls. ¶104.

improprieties regarding the manner in which USN represented various figures, such as sales and revenue, in its financial documents").[17]

Defendants also knowingly misrepresented facts concerning Exide's reorganization of the Company post-bankruptcy. In fact, the purported rapid and successful reorganization of Exide after its emergence from bankruptcy was so important that defendants continually updated the market of its progress and status. ¶¶37-39, 46, 48, 55, 58, 67, 71, 73. Thus, the Individual Defendants may likewise be charged with knowledge of the failure to rapidly and successfully restructure Exide's operations after emergence from bankruptcy.

3. While Not Required to Plead Such Facts, the Complaint Sufficiently Alleges that Defendants Had Motive and the Opportunity to Commit Fraud

In further support of the strong inference that defendants' statements were made with fraudulent intent, the Complaint sets forth detailed facts indicating defendants had ample motive and opportunity to commit fraud.[18] *See GSC Partners CDO Fund*

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[17] *See also STI Classic Fund v. Bollinger Indus.*, No. 3-96-CV-823-R, 1996 U.S. Dist. LEXIS 21553, at *7 (N.D. Tex. Oct. 25, 1996) ("Based upon [individual defendants'] respective positions with the company, a strong inference may be drawn that they were knowledgeable about the methods and billing practices utilized by [defendant] which led to the over-stated sales and revenues . . . .").

[18] It is not disputed that the Individual Defendants, Exide's CEO and CFO, had the opportunity to commit fraud. *See generally Unisys*, 2000 U.S. Dist. LEXIS 13500, at *16-*18; *see also San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 813 (2d Cir. 1996) (finding "no doubt" that

v. Washington, 368 F.3d 228, 237 (3d Cir. 2004) ("'plaintiffs must assert a concrete and personal benefit to the individual defendants resulting from this fraud'"). Here, the Individual Defendants were motivated to make false and misleading statements to enable the Company to complete a $350 million senior notes and convertible securities offering. ¶¶80-82, 144.

On March 10, 2005, Exide announced that it would be offering $60 million of floating rate convertible senior subordinated notes in partial replacement of its previously-announced offering of senior notes. ¶80. On March 15, 2005, Exide priced $290 million of 10-1/2% senior notes and $60 million principal amount of convertible senior subordinated notes. ¶81. Unbeknownst to investors, Exide was already in material violation of its Senior Credit Facility leverage and EBITDA covenants. ¶82. Nonetheless, defendants maintained the illusion that Exide was performing satisfactorily just long enough to complete the $350 million offering. ¶7. A mere two months later, the house of cards collapsed and defendants admitted that Exide was in material violation of the Senior Credit Facility covenants. ¶¶79-82, 134-137. Not surprisingly, on October 5, 2005, Murray Capital Management, Inc. ("Murray Capital") sued Exide, Gargaro and Muhlhauser, claiming that it had been duped. ¶142. Murray Capital claimed that when it acquired $5 million of the notes

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defendants had the opportunity to manipulate stock price as they held the highest positions of authority and power in the company).

offered by Exide on March 15, 2005, defendants knew that Exide was in material violation of the Senior Credit Facility covenants. *Id.*

Defendants argue that "this alleged motive is nothing more than a corporate motive possessed by all officers and directors." Defs.' Mem. at 42-43. Here, the temporal proximity of the March 2005 note offering and defendants' revelation of Exide's true financial condition in May 2005 is highly suspect. ***Within two months of completing the $350 million offering, defendants admitted that Exide was in material violation of the covenants***. Indeed, the Individual Defendants had the requisite motive because their glowing misrepresentations concerning the Company's financial condition dramatically enhanced Exide's ability to raise desperately-needed cash. *See In re AT&T Corp. Sec. Litig.*, No. 00-5364 (GEB), 2002 U.S. Dist. LEXIS 22219, at *77 (D.N.J. Jan. 30, 2002) (motive sufficiently pleaded where defendants made false statements to "maintain investor interest" and thereby achieved "a successful IPO"); *In re Am. Bank Note Holographics Sec. Litig.*, 93 F. Supp. 2d 424, 445 (S.D.N.Y. 2000) (same).

E. Defendants' False Statements Are Not Protected Pursuant to the PSLRA's Safe Harbor Provision

Defendants seek the protection of the PSLRA safe harbor for their forward-looking statements. Defs.' Mem. at 27-37. However, while the PSLRA may shield some unknowingly false forward-looking statements accompanied by meaningful cautionary language, it does not immunize defendants for making knowingly false

statements or for failing to warn investors of contingencies that the defendants know have already occurred. In other words, the PSLRA is not a license to lie.

1. Many of the Statements Defendants Identify as Forward Looking Contain Statements of Present Fact

It is well-settled that statements containing existing facts are not forward looking and, therefore, not protected by the safe harbor. *See, e.g.*, *In re Indep. Energy Holdings PLC Sec. Litig.*, 154 F. Supp. 2d 741, 757 (S.D.N.Y. 2001). Defendants cite several paragraphs in the Complaint that contain language they deem either "highly qualified predictions" or "optimistic statements." Defs.' Mem. at 27. Defendants are incorrect in this assertion however, as the statements identified contain statements of present fact.

For instance, defendants assert that statements concerning Exide's business performance post-bankruptcy (¶¶37-39, 46-48, 55-56, 66-67, 71-73) are forward looking. This is false. Here, defendants repeatedly made false and misleading statements concerning the ***past or present*** state of Exide's financial condition, including:

- "***[T]he Company continues to streamline and simplify its . . . operations through a number of cost reduction, quality and productivity initiatives***";
- "***[W]e have made significant progress through our financial reorganization to . . . provide a sound foundation for future growth and profitability***";
- "***[W]e have made continued progress this quarter executing our restructuring and strategic growth initiatives . . . [and] [w]e have the***

financial foundation in place to support our future growth and profitability";

- ***Exide is "on plan and on budget" in its efforts to streamline the business***"; ***and***

- "***During the quarter, our businesses have continued to make progress in . . . operational improvements in inventory and receivables . . . .***"

See, e.g., ¶¶39, 46, 48, 55, 72. Statements concerning whether a company is "making progress," "has made progress," or is "on track to meet expectations" are statements of past or present business conditions that are not shielded by the PSLRA. *See In re Boeing Sec. Litig.*, 40 F. Supp. 2d 1160, 1169 (W.D. Wash. 1998); *In re Secure Computing Corp.*, 184 F. Supp. 2d 980, 990 (N.D. Cal. 2001). *See also In re CIGNA Corp Sec. Litig.*, No. 02-8088, 2005 U.S. Dist. LEXIS 35524, at *33 (E.D. Pa. Dec. 23, 2005) (finding actionable statement "'first of all, we are on track with our own schedule'").

Likewise actionable are defendants' Class Period statements detailed in ¶¶37-38 ("[t]he reorganization process has . . . resolve[d] financial issues" and "the Company implemented . . . cost reduction initiatives"); ¶47 ("we are pleased with the foundation we've laid for future growth"); ¶56 ("[t]he Company is well positioned to expand . . . aided in large part by its successful emergence from Chapter 11"); and ¶67 ("our cost reduction programs for the first half are on schedule"). These statements also contain false and misleading statements regarding past or present facts.

2. Defendants' Statements Are Not Accompanied by Meaningful Cautionary Language

The PSLRA requires forward-looking statements to be accompanied by "'meaningful cautionary statements'" in order for safe harbor protection to apply.

> The cautionary language should be "directly related to the alleged misrepresentations" . . . . Cautionary language must be "extensive and specific." . . . "[A] vague or blanket (boilerplate) disclaimer which merely warns the reader that the investment has risks will ordinarily be inadequate to prevent misinformation. To suffice, the cautionary statements must be substantive and tailored to the specific future projections, estimates or opinions in the prospectus which the plaintiffs challenge."

GSC, 368 F.3d at 243 n.3. Here, defendants' forward-looking statements were not accompanied by meaningful cautionary language, but rather mere boilerplate. Defs.' Mem. at 31-33. For instance, such language failed to protect investors from being misinformed about how Exide's intentional refusal to write down obsolete inventory would affect the Company's ability to comply with the Senior Credit Facility covenants. *GSC*, 368 F.3d at 241-43 n.3.

Further, a defendant may not present cautionary language as a defense when aware that the risks being cautioned against have already happened. *In re Viropharma, Inc., Sec. Litig.*, No. 02-1627, 2003 U.S. Dist. LEXIS 5623, at *29 (E.D. Pa. Apr. 7, 2003). *See also In re MobileMedia Sec. Litig.*, 28 F. Supp. 2d 901, 930 (D.N.J. 1998) ("Warnings of possible adverse events are insufficient to make omissions of present knowledge of certain future events legally immaterial."). In this case, defendants' cautionary language is insufficient. Defendants quote various

general investment risks which they assert transpired and caused Exide to violate the Senior Credit Facility covenants. Defs.' Mem. at 34-35.

While defendants may have warned against general investment risks, the fact remains that the covenants were broken due to defendants' intentional fraud, which risk was never disclosed to investors. ¶¶84-133. Defendants never cautioned investors that ***they knew*** Exide had already determined that millions of dollars of excess inventory was required to be written down, but for which they refused to perform a write down; that ***they knew*** Exide had already determined that it was unable to comply with the terms of its U.S. government contract; or that defendants ***were fully aware*** during the Class Period that the Company's internal disclosure and accounting controls were non-existent. ¶¶84-132. Finally, defendants never warned the market that ***they knew*** they had no basis at all to represent to investors that the Company "will comply" with the Senior Credit Facility covenants. ¶¶84-133, 142. Defendants' concealment of these facts that had already occurred while deceptively warning that they may occur is actionable fraud. *See Westinghouse*, 90 F.3d at 710 (""""to warn that the untoward may occur when the event is contingent is prudent; to caution that it is only possible for the unfavorable events to happen when they have already occurred is deceit""") (quoting *Rubenstein v. Collins*, 20 F.3d 160, 171 (5th Cir. 1994), which reiterated the standard announced in *Huddleston v. Herman & MacLean*, 640 F.2d 534, 544 (5th Cir. 1981), *aff'd in relevant part*, 459 U.S. 375 (1983)).

3. Defendants' Statements Were Knowingly False or Misleading When Made and Therefore Not Protected by the Safe Harbor

Likewise, "the safe harbor will not apply if the statement was made with 'actual knowledge' that the statement was false or misleading." *Advanta*, 180 F.3d at 536. *See also In re Cambrex Corp. Sec. Litig.*, No. 03-CV-4896 (WJM), 2005 U.S. Dist. LEXIS 25339, at *23 (D.N.J. Oct. 27, 2005) ("the safe harbor is not available when the forward-looking statements are made by or with the approval of an executive officer of that entity who had actual knowledge that the statement was false or misleading").

Here, defendants knew that their repeated statements concerning the Company's ability to "comply with [the Senior Credit Facility] covenants for the foreseeable future," based on current company forecasts and plans, were false or misleading when made. ¶¶45, 54, 61, 65, 75, 84-133. In addition, the Complaint pleads in detail that the Company's internal controls were so grossly deficient that the Company did not have the ability to accurately forecast sales or inventory production levels and that the Individual Defendants knew that to be the case. ¶¶101-120. It is axiomatic, therefore, that the Individual Defendants simply had no rational basis to make such statements concerning compliance with the covenants during the Class Period. *See, e.g.*, *Burlington*, 114 F.3d at 1427 ("[i]f [management] discloses the information before it is convinced of its certainty, management faces the prospect of liability"); *In re Veritas Software Corp. Sec. Litig.*, No. 04-831-SLR, 2006 U.S. Dist. LEXIS 32619, at

*20 (D. Del. May 23, 2006) ("[n]o manner of cautionary language can cure false statements knowingly made"). Thus, defendants should be held liable for uttering their false and misleading statements concerning Exide's purported ability to comply with the Senior Credit Facility covenants.

F. Defendants' False Statements Concerned Information Important to Investors and Therefore Are Not Inactionable "Puffery"

Defendants wrongly argue that key misstatements alleged in the Complaint are immaterial as a matter of law and thus inactionable. Defs.' Mem. at 37-39. Whether a fact is material depends on whether "'there is a substantial likelihood that a reasonable shareholder would consider it important.'" *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988). Regardless of what defendants urge this Court to conclude, "[m]ateriality is ordinarily an issue left to the factfinder and is therefore not typically a matter for Rule 12(b)(6) dismissal." *In re Adams Golf, Inc. Sec. Litig.*, 381 F.3d 267, 274-75 (3d Cir. 2004).

> ("The emphasis on a fact-specific determination of materiality militates against a dismissal on the pleadings.") "Only if the alleged misrepresentations or omissions are so ***obviously unimportant*** to an investor that reasonable minds cannot differ on the question of materiality is it appropriate for the district court to rule that the allegations are inactionable as a matter of law."

Id. (emphasis in original).

Moreover, the materiality of statements can only be determined in context. In *Lucent*, defendants made false statements about "customers' loyalties, which, in fact,

had waned" and told investors that demand for its products ""remains robust"" and its products were enjoying "'strong customer acceptance.'" *Lucent*, 217 F. Supp. 2d at 556, 558-59. The defendants there argued that such generalized positive comments were inactionable puffery. The court disagreed, noting that each of defendants' statements must be reviewed "in light of the context in which it was made." *Id.* at 558.

Defendants' initial argument, that their statements expressing comfort with Exide's ability to comply with the covenants in its Senior Credit Facility should be regarded as mere "puffery," defies all logic. *See* Defs.' Mem. at 36-37 & n.7. Failure to meet those covenants could result in default which would have required Exide to further restructure its operations. ¶35; Tonrey Aff., Ex. C at 33. Accordingly, Exide's compliance with the Senior Credit Facility covenants was of the utmost importance to the Company and its investors. The market's reaction to news that the Company ***failed*** to meet two of those covenants is conclusive evidence that investors regarded compliance as material. On May 16 and May 17, 2005, when defendants finally disclosed the negative true facts about Exide's EBITDA miss and resulting violations of the Senior Credit Facility covenants, the price of the Company's common stock lost approximately 60% of its value. ¶¶134-137. When a stock is traded in an efficient market, "'the materiality of disclosed information may be measured post hoc by looking to the movement, in the period immediately following disclosure, of the price

of the firm's stock.'" *In re Merck & Co. Inc. Sec. Litig.*, 432 F.3d 261, 269 (3d Cir. 2005) (quoting *Oran*, 226 F.3d at 282).

Defendants' other arguments concerning materiality suffer the same defects. Defendants argue that their statements concerning Exide's future prospects post-bankruptcy were also "inactionable puffery." Defs.' Mem. at 36-37 & n.7. To the contrary, defendants statements concerning those topics were extremely material to investors. The statements in question include the following:

- "***The reorganizational process has enabled us to resolve financial issues***";
- "***Through operational restructuring initiatives and our EXCELL [program] . . . , we have improved product quality, reduced costs . . . [and] increased service levels to our customers***";
- "***We have made continued progress this quarter executing our restructuring . . . initiatives***";
- ***We are "pleased to report" Exide's "progress" in successfully implementing the fiscal 2005 restructuring plan***;
- ***Exide was "on plan and on budget" in its efforts to streamline and simplify the business***; and
- "***[B]ased on our updated forecasts and plans, we will comply with these covenants for the foreseeable future***."

¶¶37-39, 45-46, 48, 54-55, 58, 65-67, 71-73, 75. The materiality of these statements is apparent when context is considered, as required by *Lucent*. Exide had just emerged from bankruptcy. The success of its restructuring and streamlining initiatives, which might have been less important to a firm with an unblemished fiscal track record, were critical to Exide and to the Company's investors, who were banking

on the Company's ability to solve the problems that had led it into bankruptcy in the first place. Defendants' Class Period statements reassuring investors that Exide was successfully restructuring its operations and implementing cost reduction initiatives were also directly related to whether the Company would remain in compliance with the Senior Credit Facility EBITDA covenant. *See* ¶¶37-39, 45, 48, 54-55, 57, 65-67, 71-75.

Defendants finally argue that any misstatements concerning their net income and inventory were immaterial as a matter of law, by virtue of a comparison of the inventory and contract write downs to Exide's "annual earnings." Defs.' Mem. at 38-39. Reliance on a single quantitative factor to determine materiality is error. *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 162-63 (2d Cir. 2000) (reversing district court determination that misrepresentations concerning only 1.7% of company's revenue were immaterial as a matter of law). "[Q]uantifying, in percentage terms, the magnitude of a misstatement is only the beginning of the analysis . . .; it cannot appropriately be used as a substitute for a full analysis of all relevant considerations." SEC Staff Accounting Bulletin No. 99 – Materiality (17 C.F.R. §211). *See also TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 450 (1976) (determinations of materiality require "delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts").

Here again, context is critical. Defendants would have the Court ignore the fact that defendants themselves reported that the inventory problems at issue were material to their failure to comply with their Senior Credit Facility's covenants:

> Under our credit agreement our minimal EBITDA requirement for the quarter is 130 million . . . .
>
> ***Several unanticipated or unusual items impacted our preliminary results during the quarter in the range of 15 to 20 million. Those items include inventory write-offs of approximately $4.5 million . . . .***
>
> ***We are implementing a more structured forecasting methodology that better connects sales and production planning . . . [and] we have recorded adjustments of approximately 1.5 to $2 million to reconcile pricing and commercial items . . . with . . . a large customer in North America*** . . . .

¶136. Additionally, defendants reported that they failed to forecast inventory reductions accurately, leading to a $6 million loss of absorbed overhead costs. *Id*. *See also* ¶134. Again, upon disclosure of this information, the Company's stock price slid over 60%, conclusively establishing its materiality. *Merck*, 432 F.3d at 269 (quoting *Oran*, 226 F.3d at 282).

This Circuit has clearly held that defendants do not escape liability simply by claiming their statements were mere optimistic expressions of opinion. *See In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 368 (3d Cir. 1993) ("We have squarely held that opinions . . . may be actionable misrepresentations if the speaker does not genuinely and reasonably believe them."); *Cambrex*, 2005 U.S. Dist. LEXIS 25339, at *18; *In re Bristol-Myers Squibb Sec. Litig.*, No. 00-1990 (SRC) 2005 U.S.

Dist. LEXIS 18448, at *105 (D.N.J. Aug. 17, 2005). As established above, the statements ***were*** material, and defendants could not have believed them. Accordingly, they cannot escape liability by labeling them "puffery" or "opinion."

G. Defendants' "Group Pleading" Argument Should Be Rejected

Defendants put forth the wildly inaccurate assertion that "none of the allegedly false and misleading statements can be attributed to Gargaro, Muhlhauser or Harvie." Defs.' Mem. at 45-47.[19] To the contrary, the Complaint points to the specific statements made by each Individual Defendant during the Class Period. ¶¶37-40, 42, 44, 46-49, 51, 53, 55-56, 58, 60, 62-64, 67, 69-74, 76-78. Accordingly, the group-pleading doctrine is not necessary to sustain plaintiffs' claims. *See, e.g.*, *In re Marsh & McLennan Cos., Sec. Litig.*, No. 04 Civ. 8144(SWK), 2006 WL 2057194, at *21 (S.D.N.Y. July 20, 2006) (group pleading doctrine unnecessary to finding of liability for defendants who personally signed SEC filings).

To the extent the Court decides to address the issue of "group pleading," the vast majority of courts within the Third Circuit have found it applicable after passage

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[19] Defendants incorrectly assert that Muhlhauser cannot be held liable for statements made after announcing his resignation on October 12, 2004. Defs.' Mem. at 45. Through February 14, 2005, well beyond the date he claims to have become silent, defendant Muhlhauser signed Sarbanes-Oxley certifications submitted with the Company's SEC filings, participated in investor conference calls and made statements in press releases. ¶¶58, 62-64, 67, 71, 73, 76-78. Indeed, Muhlhauser remained as Exide's CEO until April 1, 2005.

of the PSLRA. *See, e.g.*, *DaimlerChrysler*, 197 F. Supp. 2d at 85 ("a majority [of courts have] conclud[ed] that the group pleading doctrine has survived the PSLRA"); *In re Honeywell Int'l Sec. Litig.*, 182 F. Supp. 2d 414, 429 (D.N.J. 2002); *In re U.S. Interactive, Inc. Sec. Litig.*, No. 01-CV-522, 2002 U.S. Dist. LEXIS 16009, at *14-*16 (E.D. Pa. Aug. 23, 2002); *In re Reliance Sec. Litig.*, 135 F. Supp. 2d 480, 502-03 (D. Del. 2001); *Aetna*, 34 F. Supp. 2d at 949.

H. The Complaint Sufficiently Alleges a Section 20(a) Claim

Defendants' argument that the Complaint fails to sufficiently allege a claim pursuant to §20(a) of the Exchange Act should be rejected. "The ultimate determination of whether defendants were controlling persons involves questions of fact not to be resolved at the pleading stage . . . ." *In re Cendant Corp. Litig.* ("*Cendant II*"), 60 F. Supp. 2d 354, 379 (D.N.J. 1999). In order to properly plead control person liability, the Complaint must allege: (1) an actionable primary violation (§10(b) or Rule 10b-5 in this case); (2) that defendants had the potential to control the primary violator (Exide); and (3) "'culpable participation'" in the fraud by defendants. *See Suprema Specialties*, 438 F.3d at 284 & n.16; *Tel-Save*, 1999 U.S. Dist. LEXIS 16800, at *19; *Derensis v. Coopers & Lybrand Chartered Accountants*, 930 F. Supp. 1003, 1013 (D.N.J. 1996); *In re Midlantic Corp. S'holder Litig.*, 758 F. Supp. 226, 236-37 (D.N.J. 1990). The heightened pleading requirements of Rule 9(b) do not apply to §20(a) control person allegations. *Tel-Save*, 1999 U.S. Dist. LEXIS 16800, at *19.

The Complaint sufficiently alleges primary violations of §10(b) and Rule 10b-5 by Exide as well as by the Individual Defendants themselves. *See* discussion *supra*. Defendants' positions in the Company are sufficient to allege control. *E.g.*, *Cendant II,* 60 F. Supp. 2d at 379; *Midlantic*, 758 F. Supp. at 236 (simple allegations that defendants were top officers and directors sufficient to allege control). Since the Complaint specifically alleges that each of the Individual Defendants made materially false and misleading statements concerning Exide (¶19(a)-(c)), the requirement of "culpable participation" is satisfied. *P. Schoenfeld Asset Mgmt. LLC v. Cendant Corp.*, 142 F. Supp. 2d 589, 623-24 (D.N.J. 2001).

IV. CONCLUSION

For the reasons set forth above, plaintiffs respectfully request that the Court deny defendants' motion to dismiss in its entirety.[20]

DATED: August 7, 2006

Respectfully submitted,

COHN LIFLAND PEARLMAN
HERRMANN & KNOPF LLP
PETER S. PEARLMAN

/s Peter S. Pearlman
PETER S. PEARLMAN

[20] Should the Court grant any part of defendants' motion, plaintiffs request leave to amend. *Burlington*, 114 F.3d at 1434-35.

Park 80 Plaza West-One
Saddle Brook, NJ 07663
Telephone: 201/845-9600
201/845-9423 (fax)

LITE DePALMA GREENBERG
& RIVAS, LLC
JOSEPH J. DePALMA
SUSAN D. PONTORIERO
Two Gateway Center, 12th Floor
Newark, NJ 07102-5003
Telephone: 973/623-3000
973/623-0211 (fax)

Co-Liaison Counsel

LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
ARTHUR C. LEAHY
TRIG R. SMITH
GREER SPATZ
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

SCHATZ & NOBEL, P.C.
ANDREW M. SCHATZ
JEFFREY S. NOBEL
MARK P. KINDALL
One Corporate Center
20 Church Street, Suite 1700
Hartford, CT 06103
Telephone: 860/493-6292
860/493-6290 (fax)

Co-Lead Counsel for Plaintiffs

GAINEY & McKENNA
THOMAS J. McKENNA
295 Madison Avenue, 4th Floor
New York, NY 10017
Telephone: 212/983-1300
212/983-0383 (fax)

Additional Counsel for Plaintiffs

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