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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

AVIVA PARTNERS LLC, Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. EXIDE TECHNOLOGIES, et al., Defendants.	No. 3:05-cv-03098-MLC-JJH **(Consolidated)**

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DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS

WILENTZ, GOLDMAN & SPITZER (EK8586)
A Professional Corporation
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge, New Jersey 07095
(732) 636-8000

Of Counsel:
EDWARD T. KOLE
JAMES E. TONREY, JR.

-- and --

KATTEN MUCHIN ROSENMAN LLP
525 W. Monroe St.
Chicago, IL 60661
(312) 902-5200

Of Counsel & On the Brief:
DAVID H. KISTENBROKER
CARL E. VOLZ

Attorneys for Defendants

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INTRODUCTION

Plaintiffs -- certain stockholders of Exide Technologies ("Exide" or the "Company") -- allege that Exide, its former CEO Craig Muhlhauser ("Muhlhauser"), former CFO J. Timothy Gargaro ("Gargaro") and former Controller Ian Harvie (the "Individual Defendants" and collectively with Exide the "Exide Defendants" or "Defendants") violated §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 by making false statements about Exide's financial condition and prospects.[1] As explained herein, Plaintiffs' Consolidated Amended Complaint ("Complaint" or "Compl. at __") fails to state any claim against any of the Defendants and should be dismissed in its entirety, with prejudice.

BACKGROUND

Plaintiffs complain about four categories of statements allegedly made by Defendants between May 5, 2004 and May 17, 2005: (1) statements in the Company's press releases and conference calls about the Company's ongoing restructuring initiatives (Compl. ¶¶ 37-39, 46-48, 55-56, 58, 67, 71-73); (2) the statement of Exide's auditor in Exide's June 29, 2004 Form 10-K for fiscal 2004 that Exide's financial results conformed with Generally Accepted Accounting

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[1] Plaintiffs purport to state a claim on behalf of purchasers of Exide's common stock between May 5, 2004 and May 17, 2005. This Court has not certified Plaintiffs' proposed class, and Defendants do not concede the veracity of Plaintiffs' class allegations. *See In re NUI Sec. Litig.*, 314 F. Supp. 2d 388, 395 n.1 (D.N.J. 2004).

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Principles ("GAAP") and Exide's statement that its inventories were "stated at the lower of cost or market" (*id.* at ¶¶ 41, 50); (3) statutory certifications from Exide's public filings (*id.* at ¶¶ 42-44, 49, 51-53, 60, 62-64, 76-78); and (4) the statement, repeated by Exide in substantially the same form throughout the putative class period, that "while there can be no assurances, the Company believes ... based upon its updated financial forecasts and plans, that it will comply with the covenants contained in its Credit Agreement for the foreseeable future."[2] (*Id.* at ¶¶ 45, 54, 61-62 65, 66, 75.)

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[2] The Exide Defendants include true and correct copies of the documents from which Plaintiffs have excerpted the statements about which they complain as Exhibits A through R to the Affidavit of James Tonrey filed herewith. The documents referenced in the Complaint include Exide's May 5, 2004 press release (Exhibit A, hereinafter "May 5 Release"); Exide's June 29, 2004 press release (Exhibit B, hereinafter "June 29 Release"); Exide's Form 10-K for fiscal year 2004 (Exhibit C, hereinafter "'04 Form 10-K"); the official transcript from Exide's July 1, 2004 investor conference call (Exhibit D, hereinafter "July 1 Call"); Exide's August 12, 2004 press release (Exhibit E, hereinafter "August 12 Release"); Exide's Form 10-Q for the first quarter of fiscal year 2005 (Exhibit F, hereinafter "1Q'05 Form 10-Q"); the official transcript from Exide's August 12, 2004 investor conference call (Exhibit G, hereinafter "August 12 Call"); Exide's October 12, 2004 press release (Exhibit H, hereinafter "October 12 Release"); Exide's November 15, 2004 press release (Exhibit I, hereinafter "November 15 Release"); Exide's Form 10-Q for the second quarter of fiscal year 2005 (Exhibit J, hereinafter "2Q'05 Form 10-Q"); the official transcript from Exide's November 16, 2004 investor conference call (Exhibit K, hereinafter "November 16 Call"); Exide's February 9, 2005 press release (Exhibit L, hereinafter "February 9 Release"); Exide's February 14, 2005 press release (Exhibit M, hereinafter "February 14 Release"); the official transcript from Exide's February 14, 2005 investor conference call (Exhibit N, hereinafter "February 14 Call"); Exide's Form 10-Q for the third quarter of fiscal year 2005 (Exhibit O, hereinafter "3Q'05 Form 10-Q"); Exide's Form 8-K filed on February 28, 2005 (Exhibit P, hereinafter

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Plaintiffs allege these statements are false and misleading because: (1) Defendants "intentionally or recklessly overstated the Company's inventories and net income (and understated its net loss) by failing to properly account for excess & obsolete inventory" (*id.* ¶¶ 84-100); (2) the Company had ineffective internal controls and procedures (*id.* ¶¶ 101-120); (3) the Company's restructuring efforts were not succeeding (*id.* ¶¶ 121-128) and its recent emergence from bankruptcy had not "positioned" it for "success" (*id.* ¶¶ 130-132); (4) Defendants were concealing that Exide needed to write off approximately $1.4 to $2.8 million in connection with a contract with the U.S. Government (*id.* ¶ 129); and (5) all of the foregoing "made it clear" Exide would violate its loan covenants. (*Id.* ¶ 133.)

Plaintiffs then try to claim that the public revelation on May 16 and 17, 2005 of these alleged facts caused the price of Exide stock to fall and its shareholders to suffer "millions of dollars in damages." (*Id.* ¶¶ 134-141.) A review of the documents from which Plaintiffs draw these allegations reveals that Plaintiffs' putative "true facts" bear only the most remote, if any, relation to the reasons Exide actually ended up violating its loan covenants. (Compare *id.* with May 16,

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"Form 8-K"); Exide's March 10, 2005 press release (Exhibit Q, hereinafter "March 10 Release"); and Exide's March 15, 2005 press release (Exhibit R, hereinafter "March 15 Release").

As this Court has previously recognized, it may properly consider the entirety of these documents on a motion to dismiss where, as here, they are incorporated by reference into the Complaint. *See NUI*, 314 F. Supp. 2d at 395-96 n.2.

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2005 Press Release and May 17, 2005 Transcript.) As Gargaro explained during the May 17, 2005 Investor Conference Call, the Company's loss was made up in part of several "unanticipated or unusual items" that impacted the Company's results by between $15 to $20 million, including:

- "$4.5 million related to obsolescence adjustments and physical inventories which were a result of the year-end process," of which "2 million was the result of noncash obsolescence charges in Europe resulting from ongoing SKU reduction efforts and discontinued product lines." (May 17, 2005 Conference Call at 3.)
- A reduction in inventories in the fourth quarter that exceeded forecasts -- including a more than $30 million reduction in March alone -- which caused a $6 million loss of absorbed overhead cost. (*Id.*)
- Sarbanes-Oxley costs that were $5.5 million higher than anticipated. (*Id.*)
- Adjustments of $1.5 to $2 million "to reconcile pricing and commercial items in accordance with contractual provisions applying to a large customer in North America." (*Id.* at 3-4.)

Significantly, the third item on this list -- higher-than-expected Sarbanes-Oxley costs -- is not mentioned in the Complaint at all. Also missing from the Complaint is the reason for the poor quarter and concomitant covenant violations: the Company's poor operating performance. (*See id.* at 4.) In the portion of the May 17, 2005 Investor Conference Call immediately following the portion Plaintiffs quote in the Complaint, Gargaro explains the adverse business conditions that led to an additional $20 million impact on the Company's operations for the quarter:

- $4 million due to unfavorable volume mix and lower demand in certain markets;
- $8 million from unrecovered lead costs;

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- $5 million for purchase-price variances related to other commodities used in Exide's manufacturing processes; and
- $3 million due to increased distribution, freight and logistics costs.

(*Id.*) Plaintiffs do not mention these issues in the Complaint and do not even hint as to the existence of other, more significant reasons for the poor quarter and resulting covenant violations, thus giving the impression that the three "unanticipated or unusual items" they identify in the Complaint were the sole reasons therefor. In fact, the very documents upon which Plaintiffs rely to support the allegations in their Complaint -- the ones excerpted under the caption "The Truth Emerges" --establish that these three items make up no more than one-third of the total $38 million identified by the Company as having contributed to the poor quarter and the resulting covenant violations.

ARGUMENT

I. PLAINTIFFS' SECTION 10(b) CLAIM SHOULD BE DISMISSED PURSUANT TO RULE 12(b)(6), RULE 9(b) AND THE PSLRA.

To state a cause of action under Section 10(b), a plaintiff must plead that the defendants (1) made a false or misleading statement or omission; (2) of a material fact; (3) with scienter; (4) upon which the plaintiff relied; and (5) which proximately caused the plaintiff's injuries. *See, e.g., In re NUI Sec. Litig.*, 314 F. Supp. 2d 388, 398 (D.N.J. 2004) (citing *Semerenko v. Cendant Corp.*, 223 F.3d 165, 174 (3d Cir.2000)). Although this Court must assume the truth of Plaintiffs' well-pleaded allegations and all reasonable inferences therefrom, the Court need

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not assume the truth of "bald assertions or legal conclusions" or "legal conclusions draped in the guise of factual allegations." *In re Rockefeller Ctr. Prop., Inc. Sec. Litig.*, 311 F.3d 198, 216 (3d Cir. 2002). Moreover, Rule 9(b) imposes a heightened pleading standard on Plaintiffs' allegations that "has been rigorously applied in securities fraud cases." *Id.* (citation omitted). Pursuant to Rule 9(b), Plaintiffs must, at a minimum, "allege all of the essential factual background that would accompany 'the first paragraph of any newspaper story' -- that is, the 'who, what, when, where and how' of the fraud at issue." *Id.* at 217 (citations omitted).

In addition to Rule 9(b), Plaintiffs' claims must also satisfy the substantially heightened pleading requirements of the Private Securities Litigation Reform Act ("PSLRA"). 15 U.S.C. § 78u-4 *et seq.*; *see also California Pub. Employees Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 145 (3d Cir. 2004) ("[I]n enacting the ... PSLRA, Congress expressly intended to substantially heighten the existing pleading requirements.") (internal citations omitted). In other words, the PSLRA "imposes another layer of factual particularity" to Plaintiffs' allegations, requiring Plaintiffs "to set forth the details of allegedly fraudulent statements or omissions, including who was involved, where the events took place, when the events took place, and why any statements were misleading." *Rockefeller Ctr.*, 311 F.3d at 217. Plaintiffs here cannot meet their burden.

A. PLAINTIFFS DO NOT ALLEGE FALSITY WITH THE SPECIFICITY REQUIRED BY RULE 9(b) AND THE PSLRA.

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Since Plaintiffs' claims are based on "information and belief" (*see* Compl., Preamble), the PSLRA requires them to "state with particularity ***all facts*** upon which [their] belief is formed."[3] 15 U.S.C. §78u-4(b)(1) (emphasis added). Plaintiffs fail to do so and their Complaint should be dismissed. *See* 15 U.S.C. §78u-4(b)(3)(A).

There are numerous allegations in Plaintiffs' Complaint for which they do not state *any* of the facts upon which the allegations -- *i.e.* Plaintiffs' "belief" -- are based, from the broad and utterly unsupported allegations in the Introduction (Compl. ¶¶ 2, 7, 9) to the boilerplate allegations about the Individual Defendants' job responsibilities (*id.* ¶¶ 21-21) to the simplistic and self-serving characterizations of supposedly applicable accounting principles. (*Id.* ¶¶ 97, 99-

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[3] To the extent Plaintiffs mean to avoid this requirement by declaring in the preamble to their Complaint that they base their claims on "the investigation of plaintiffs' counsel" and on interviews of "former Exide employees and others familiar with the Company's operations" (Compl., Preamble), they will be disappointed. Courts in this Circuit have consistently considered claims based upon the "investigation of counsel" to be the "functional equivalent of allegations made upon information and belief" and subjected those claims to the same rigorous requirements of the PSLRA. *See In re Party City Sec. Litig.*, 147 F. Supp. 2d 282, (D.N.J. 2001); *see also Carney v. Cambridge Tech. Partners, Inc.*, 135 F. Supp. 2d 235, 247 (D. Mass. 2001) ("Given [the legislative history of the PSLRA] and the provisions of the PSLRA overall, ... plaintiffs in securities fraud cases ... cannot escape the conclusion that Congress intended that allegations of fraud based on 'investigation of counsel' be considered the equivalent of allegations made on information and belief.").

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100). Neither these allegations, nor the dozens of others in the Complaint that are bereft of *any* factual support, pass muster under the PSLRA.

But the Court need not engage in such a painstaking analysis of every word of Plaintiffs' Complaint to determine whether it comports with §78u-4(b)(1) of the PSLRA. As the Third Circuit Court of Appeals indicated in *California Public Employees' Retirement System v. Chubb*, 394 F.3d 126 (3d Cir. 2004), the inquiry can and should focus on the "true facts" allegations -- those allegations which purportedly show *why* defendants' statements were false and misleading and that defendants knew those statements were false and misleading when they were made. *Id.* at 145.

Here, 51 paragraphs of the Complaint make up Plaintiffs' "true facts" allegations. (Compl. ¶¶ 83-133.) Of these, Plaintiffs explicitly plead that they base 27 of these paragraphs on information provided by unnamed former employees. (*Id.* ¶¶ 92-96, 102-112, 122-132.) The remaining 24 paragraphs implicitly are based on information from the unnamed former employees or on investigation of counsel. (*Id.* ¶¶ 83-91, 97-101, 113-121, 133.)

1. PLAINTIFFS' ALLEGATIONS MADE ON INVESTIGATION OF COUNSEL DO NOT SATISFY THE PSLRA.

For the 24 paragraphs of "true facts" allegations that are not explicitly based on information from unnamed former employees, one of three things must be true: (a) the allegations are actually based on information from unnamed former

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employees but Plaintiffs have chosen not to say so; (b) the allegations have no basis at all; or (c) the allegations are based solely on the investigation of Plaintiffs' counsel. If either (a) or (b) is true it is axiomatic that the allegations would run afoul of §78u-4(b)(1) and Plaintiffs' claims should be dismissed.

While the Third Circuit has not analyzed whether allegations based solely on an investigation of counsel that consisted of nothing more than a review of the public statements and filings (Compl., Preamble), satisfy the PSLRA's requirement that a plaintiff plead ***all facts*** upon which their allegations are based, the courts that have considered the issue, including District Courts within the Third Circuit, have uniformly held that such allegations do not satisfy the PSLRA. *See, e.g., Tracinda Corp. v. DaimlerChrysler AG*, 197 F. Supp. 2d 42, 81 (D. Del. 2002) (dismissing complaint under the PSLRA because the plaintiffs did "not sufficiently compl[y] with the PSLRA requirements for pleading allegations based upon information and belief" where the plaintiffs failed to connect "the sources ... cite[d] in the [complaint's] introductory paragraph ... with the allegations of misconduct"); *In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970, 985 (9th Cir. 1999) ("In the absence of such specifics, we cannot ascertain whether there is any basis for the allegations."); *Carney v. Cambridge Tech. Partners, Inc.*, 135 F. Supp. 2d 235, 247 (D. Mass. 2001) (rejecting as insufficiently particularized allegations based on an investigation of counsel that involved analysis of "publicly-available news articles

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and reports; ... public filings ...; press releases issued by defendants; and other matters of [the] public record"); *Coates v. Heartland Wireless Commc'n, Inc.*, 26 F. Supp. 2d 910, 917 (N.D. Tex. 1998) (allegations did not satisfy PLSRA where preamble stated "allegations were based on information and belief gained through investigation conducted by counsel, a review of public filings, news articles, press releases and other publicly available representations"). In light of the wisdom and weight of these authorities, Defendants respectfully request that the Court dismiss Plaintiffs' claims for failure to comply with the PSLRA. In the alternative, Defendants request that the 24 offending paragraphs be stricken pursuant to Rule 12(f) of the Federal Rules of Civil Procedure.

2. PLAINTIFFS' ALLEGATIONS MADE ON INFORMATION FROM FORMER EMPLOYEES DO NOT SATISFY THE PSLRA.

The crux of Plaintiffs' theory of falsity is based on information allegedly obtained from former Exide employees. Like their allegations based on information and belief, Plaintiffs' allegations based on information allegedly obtained from former Exide employees fail to satisfy the PSLRA's requirement that they state with particularity "all facts" upon which they are based.

When a securities fraud plaintiff bases her information and belief allegations on information from confidential informants, she must provide sufficient allegations of fact "to support the ***probability*** that a person in the position occupied by the source would ***possess the information alleged***." *In re Bio-Tech Gen. Corp.*

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Sec. Litig., 380 F. Supp. 2d 574, 591 (D.N.J. 2005) (emphasis added). The Third Circuit recently made clear that, to satisfy the PSLRA, Plaintiffs' confidential informant allegations must provide sufficient facts to allow the Court to analyze: (1) the basis of the source's knowledge; (2) the reliability of the source; (3) the corroborative nature of any other facts alleged; and (4) the plausibility of the source's information:

> [A]ssessing the particularity of allegations made on information and belief 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.

California Pub. Employees, 394 F.3d at 147. In other words, the allegations must "support the probability that the source possess[es] the information alleged."[4] *Id.* at 155.

a. PLAINTIFFS' RELIANCE ON FORMER LOCAL EMPLOYEES TO ALLEGE COMPANY-WIDE FRAUDULENT CONDUCT DOES NOT SATISFY THE PSLRA.

To allege company-wide fraudulent conduct, Plaintiffs rely exclusively on information allegedly received from former employees of a single plant, branch or

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[4] Significantly, the Third Circuit mandates an analysis of each of Plaintiffs' confidential informant allegations on an individual informant-by-informant basis; Plaintiffs must provide sufficient allegations of fact for each individual informant. *California Pub. Employees*, 394 F.3d at 155; *see also Rockefeller Ctr.*, 311 F.3d at 224 (rejecting the plaintiff's argument that particularity can be established by looking at the allegations as a whole because "fraud allegations should be analyzed individually ...").

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division of Exide. However, allegations that conclusorily extrapolate a confidential informant's knowledge of a single unit of a company to the company as a whole are insufficiently particular to survive a motion to dismiss. *See, e.g.*, *California Pub. Employees*, 394 F.3d at 148 (holding that a plaintiff fails to satisfy the PSLRA where the plaintiff "heavily rel[ies] on former [local branch office] employees ... for information concerning [the defendant's] business on a national scale"). Plaintiffs must provide factual allegations that would reveal how a branch or division employee would have information beyond the branch or division in which the employee worked. *See id.* at 149 (The plaintiffs' failure to allege "how or why such [low-level, locally sited former employees] would have knowledge that expanded beyond" their area of employment fails to satisfy the PSLRA). This Plaintiffs fail to do.

Indeed, Plaintiffs' "true facts" are replete with allegations attributed to former North American employees of Exide with alleged exposure to, or knowledge of, limited North American branches or divisions or limited North American business operations. Confidential Informant ("CI") #1 is alleged to be a former Executive Assistant to the President of Exide's North American Transportation Division. (Compl. ¶ 93.) CI# 2 is alleged to be a former Customer Service Representative at Exide's Reading, Pennsylvania facility. (*Id.* ¶ 107.) Plaintiffs do not identify CI #3's position, choosing instead to allege that he/she

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had "responsibility for invoicing" only Exide's government contracts. (*Id.* ¶ 124.) CI #4 is a former "Regional Support Manager" who "dealt with Exide's branch offices." (*Id.* ¶ 96.) CI #5, like CI #3, only had exposure to a single customer of Exide, as he/she is alleged to be a former "Government Sales Administrator." (*Id.* ¶ 102.) CI #6 is alleged to be a former Production Manager from a single Exide plant in Bristol, Tennessee. (*Id.* ¶ 94.) CI #9 is alleged to be a former Vice President of Finance for Exide's North American Transportation division. (*Id.* ¶ 108.)

As to each informant, the Complaint is devoid of any allegations of fact demonstrating how the informant could possess information outside of his/her area of responsibility or how the branch or division employees could possess information about Exide as a whole. For example, Plaintiffs provide no factual allegations that CI #1 -- a former executive assistant -- would have any information related to any division other than the single North American division in which the informant worked, nor do Plaintiffs demonstrate that an executive assistant is qualified to extrapolate a division's failure to meet sales goals into company-wide excess and obsolete inventory. Nor do Plaintiffs allege any facts demonstrating that CI #2 would have information regarding any aspect of Exide other than customer service responsibilities handled at the Reading, Pennsylvania facility. Plaintiffs similarly provide no facts regarding how CI #3 would have knowledge

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about any of Exide's non-governmental customers, or any factual allegations demonstrating what "responsibility" CI #3 actually had.[5]

This lack of factual specificity pervades all of Plaintiffs' confidential informant allegations. As a result, Plaintiffs' numerous allegations regarding alleged confidential informants are insufficiently particular to satisfy the PSLRA. *See, e.g.*, *California Pub. Employees*, 394 F.3d at 150-51 (affirming dismissal of securities claims because the plaintiff "fail[ed] to explain how local employees who specialize in lines other than standard commercial would have obtained specific nationwide statistics regarding the standard commercial business."); *see also In re Career Educ. Corp. Sec. Litig.*, No. 03 C 8884, 2006 WL 999988, at *4 (N.D. Ill. Mar. 28, 2006) ("[The confidential informants] provided statements that require knowledge beyond the areas of their job duties .... In the absence of allegations [supporting the probability that such information was available to these witnesses], plaintiff has failed to [satisfy] the PSLRA."); *City of Austin Police Ret.*

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[5] Other than their allegation that CI #3 was a former Exide employee "until she left the Company in October 2004" (Compl. ¶ 124), Plaintiffs completely fail to provide any allegations demonstrating the position CI #3 allegedly held at the time she learned the alleged information, to say nothing of any other factual allegations from which the Court could assess the reliability of CI #3. The Court is left to speculate how a former employee "responsible for invoicing" government contracts during only a portion of the Class Period could possess information related to Exide as a whole. *See, e.g.*, *California Pub. Employees*, 394 F.3d at 148 ("Plaintiffs' failure to make these allegations is also significant because we are left to speculate whether the anonymous sources obtained the information they purport to possess by firsthand knowledge or rumor.").

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Sys. v. ITT Educ. Serv. Inc., 388 F.Supp. 2d 932, 945 (S.D. Ind. 2005) ("The court is unable [to] draw [an inference of fraud concerning the defendant's business on a national scale] ... based on confidential witness[es] who all were employed at local facilities."); *The Sorkin, LLC v. Fischer Imaging Corp.*, No. 03-CV-00631, 2005 WL 1459735, at *9 (D. Colo. June 21, 2005) (Allegations from a confidential informant relating to a local problem do not establish a corporate trend or pattern of misconduct.).

b. PLAINTIFFS' ALLEGATIONS CONCLUSORILY ALLEGE THAT EVENTS OCCURRING OUTSIDE THE CLASS PERIOD OCCURRED DURING THE CLASS PERIOD.

In addition to their conclusory extrapolation of branch- or division-level information to Exide as a whole, Plaintiffs also conclusorily extrapolate information related to time periods outside the Class Period to the Class Period. The Third Circuit's decision in *California Public Employees*, however, makes clear that a source's information that is not related to the relevant Class Period is insufficiently particular to satisfy the PSLRA unless the plaintiff provides sufficient allegations of fact connecting otherwise irrelevant information to the relevant time period. *See, e.g., California Pub. Employees*, 394 F.3d at 154. Once again, Plaintiffs' Complaint is devoid of the requisite factual specificity.

Indeed, Plaintiffs allege that ***prior to*** the Class Period, CI #8 "perform[ed] an analysis of obsolete and old inventory for the entire Company" and had determined

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that Exide had "accumulated millions of dollars in excess and obsolete inventory." (Compl. ¶ 92.) But rather than allege any facts connecting CI#8's pre-Class Period "analysis" to the Class Period, Plaintiffs simply conclude that Exide "continued to carry this excess and obsolete inventory ... into and during the Class Period" and "accumulate[d] more." (*Id.* ¶ 93.) The only allegation Plaintiffs offer to make the necessary connection is the insufficiently particularized allegation that CI#1 stated that Exide's North American Transportation division never met its sales forecasts. But, "[c]obbling together a litany of inadequate allegations does not render those allegations particularized in accordance with Rule 9(b) or the PSLRA." *Id.* at 155.

Similarly, Plaintiffs allege that CI #7 -- a former "Lean Agent" from May 2003 through October 2004 (Compl. ¶ 95) -- "personally observed literally 'tons' of excess inventory at the Bristol, Fort Smith and Salina plants." (*Id.* ¶ 111.) Based on this alleged personal observation, Plaintiffs conclusorily allege that Exide as a whole accumulated the excess inventory "because of inaccurate forecasting." (*Id.*) But Plaintiffs do not allege when during his employment CI #7 observed the alleged excess inventory, nor do they allege facts connecting the alleged excess inventory to the alleged "inaccurate forecasting," nor do they allege facts connecting the alleged excess inventory at these three plants to Exide as a whole. As a result, the Court is left to speculate whether he observed this excess inventory prior to the Class Period or during it. *See, e.g., id.* at 151 (rejecting the plaintiffs'

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confidential informant allegations where the "[p]laintiffs failed to plead the dates on which [the allegedly fraudulent activity took place], rendering it impossible to determine the relationship between [the alleged fraudulent conduct] and the [defendants' statements].").

c. PLAINTIFFS' RELIANCE ON VAGUE ANECDOTAL INFORMATION, HYPERBOLE AND RUMORS FROM UNIDENTIFIED THIRD PARTIES FAILS TO SATISFY THE PSLRA.

Interspersed throughout the "true facts" paragraphs of Plaintiffs' complaint are confidential informant allegations that amount to nothing more than vague anecdotal information, insufficiently particularized hyperbole or rumors from unidentified third parties. For example, Plaintiffs allege that CI #7 personally observed "***tons***" of excess inventory. (Compl. ¶¶ 95, 111) (emphasis added). CI #6 allegedly observed "***more batteries*** in the warehouse than [Exide] was shipping out." (Compl. ¶¶ 94, 110) (emphasis added). CI #8 stated that "Exide had accumulated ***millions of dollars*** in excess and obsolete inventory." (*Id.* ¶ 112) (emphasis added). CI #1 allegedly stated that "each new executive brought about a ***brand new series of regroupings and restructurings***." (*Id.*) (emphasis added). According to CI #9, "Exide's finance and accounting departments experienced a ***great deal*** of turnover ...." (*Id.*) (emphasis added). And, according to CI #8, "employee moral was ***extremely low*** and most of the ***experienced, talented*** people had left the company ...." (*Id.* ¶ 132) (emphasis added).

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Plaintiffs' vague anecdotal references to "tons" of inventory, "more batteries," "millions of dollars," "brand new series of regroupings and restructurings," "a great deal of turnover," "extremely low" morale and the loss of "experience [and] talented" employees are insufficiently particularized. *See California Pub. Employees*, 394 F.3d at 153 (affirming dismissal of securities fraud claims because the plaintiff's confidential informant allegations failed to "identify the data, or source of data, used to arrive at its calculations ... [or] provide any particulars regarding the amount by which reserves were distorted, or how much revenue was improperly recognized"); *see also Career Educ. Corp.*, 2006 WL 999988, at *5 (imprecise allegations such as "many" or "several" "lack the specificity necessary for demonstrating the probability that the witnesses had access to the information about which they provided statements or that these incidents had any effect on defendants' statements and omissions."); *Austin Police Ret. Sys.*, 388 F. Supp. 2d at 945 (vague language such as "many", "most", "more", "a substantial portion" or "it was common" are insufficient under the PSLRA because "[s]uch language does not provide a meaningful basis to quantify even roughly the effect of the alleged local misconduct on the company's national numbers, and hence on the company's public statements made during the class period.").

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Plaintiffs offer no factual allegations quantifying the turnover and excess inventory or documenting the "constantly changing" executives. Plaintiffs allege no facts to demonstrate the "regroupings and restructurings," employee "morale" or to identify the experienced talented employees that had left Exide. At best, these vague allegations amount to nothing more than anecdotes that require the Court to speculate as to their plausibility and reliability. *California Pub. Employees*, 394 F.3d at 156 ("[A]necdotal examples of profitable customers lost or policies renewed at flat or slightly raised rates does not demonstrate that the rate initiative was failing.").

An even more glaring weakness in Plaintiffs' confidential informant allegations is their reliance on hyperbole to create the appearance of pervasive improprieties occurring on a global scale. CI #9 allegedly stated that "Exide over-produced batteries because the Company's forecasted sales ***never*** materialized." (Compl. ¶ 108) (emphasis added). Likewise, Plaintiffs allege CI #4 stated that Exide's "branches ***never*** met sales forecasts" and that "there were ***always fewer*** batteries at the branches than Exide's inventory records indicated." (Compl. ¶¶ 105, 109) (emphasis added). Regardless of the inherent inconsistency in simultaneously alleging that Exide's financial reporting was inaccurate because its inventories were too high, and that its internal controls were inadequate because its inventories were too low, Plaintiffs' hyperbolic allegations of "never" and

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"always" are insufficient to satisfy the PSLRA. *Id.* at 155 (allegations that the fraudulent conduct "was ***well known*** within [the defendant]" and that the represented initiatives "would have ***very little*** positive effect" held insufficiently particular under the PSLRA) (emphasis added). These allegations, without more, amount to nothing more than bold assertions that the Third Circuit has flatly rejected. *Id.* at 152-53 (characterizing the plaintiffs' confidential informant's allegation that "***the majority*** of [the defendant's] branch offices were manipulating reserves, as nothing more than a "bold assertion" insufficiently particularized to satisfy the PSLRA) (emphasis added).

Finally, Plaintiffs' confidential informant allegations that rely on unidentified former employees through which the identified informant acquired the alleged information is insufficient under the PSLRA. *See, e.g., id.* at 148 (rejecting confidential informant allegations that require the Court "to speculate whether the anonymous sources obtained the information they purport to possess by firsthand knowledge or rumor"). For example, Plaintiffs allege that CI #5 stated that "it was impossible to keep track of the number of batteries on hand as Exide had no system in place at each location to track how many batteries were on hand ...." (Compl. ¶ 102.) Plaintiffs hope to extrapolate CI #5's alleged knowledge of Exide's government contracts to Exide as a whole because "CI #5 was [allegedlyl] informed by coworkers that this system, or more accurately the lack thereof, had

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existed for years ...." (*Id.*) Thus, Plaintiffs' allegations necessarily require the Court "to speculate whether [CI #5] obtained the information ... by firsthand knowledge or rumor." *California Pub. Employees*, 394 F.3d at 148; *see also id.* at 155 ("Generic and conclusory allegations based upon rumor or conjecture are undisputedly insufficient to satisfy the heightened pleading standard of [the PSLRA].").

3. Plaintiffs Fail to Plead with Particularity why the Statements about which They Complain were False and Misleading.

Plaintiffs' failure to allege particularized facts supporting their confidential informant allegations is grounds for dismissal in and of itself because it prevents Plaintiffs from demonstrating with the particularity required by the PSLRA and Rule 9(b) "why" the statements about which they complain were false and misleading when made. *California Pub. Employees*, 394 F.3d at 145 ("Plaintiffs' 'true facts' allegations, ... purportedly demonstrate *why* Defendants' various [statements] were materially false and misleading.") (emphasis in original). The particularity requirement of the PSLRA extends that of Rule 9(b) and "requires plaintiffs to set forth the details of allegedly fraudulent statements or omissions, including who was involved, where the events took place, when the events took place and why the statements were misleading." *Rockefeller Ctr.*, 311 F.3d at 218. Significantly, "courts must analyze each statement at issue to determine whether

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each alleged misrepresentation is pled with the requisite particularity." *NUI*, 314 F. Supp. 2d at 399; *see also Rockefeller Ctr.*, 311 F.3d at 224 ("[F]raud allegations should be analyzed individually ..."). As demonstrated below, Plaintiffs fail to plead with anything close to the requisite particularity why the four categories of statements about which they complain are false.

a. PLAINTIFFS DO NOT PLEAD WITH THE REQUIRED PARTICULARITY THAT DEFENDANTS' STATEMENTS ABOUT EXIDE'S RESTRUCTURING WERE FALSE AND MISLEADING.

The first category of statements about which Plaintiffs complain are those in the Company's press releases and conference calls about the Company's ongoing restructuring initiatives. (Compl. ¶¶ 37-39, 46-48, 55-56, 58, 67, 71-73.) Plaintiffs allege that in these statements Defendants were claiming to be "successfully restructuring Exide -- by strengthening Exide's competitive position, streamlining, simplifying and improving its operations, and reducing costs, while making quality and productivity improvements" but that, in fact, "such restructuring was a complete failure." (*Id.* ¶ 121.)

But then, in a pattern that repeats itself throughout the Complaint, Plaintiffs purport to support their global, hyperbolic assertions with anecdotes of alleged isolated problems from individual plants, branches or offices attributed to former employees who have no basis for their assertions. Plaintiffs allege there were increased costs and decreased quality in customer service and billing when Exide's

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Reading, Pennsylvania facility was closed and the functions transferred to Exide's new Alpharetta, Georgia facility (*id.* ¶ 122); a billing system that was "frequently" unable to properly perform customer invoicing (*id.* ¶ 123-126); and the company's LEAN program that was not "successfully executed" and was "going horribly" at three Exide plants in the United States. (*Id.* ¶ 127-128.) Such allegations do not satisfy the PSLRA's requirement that Plaintiffs state with particularity why the statements are false.

First, the assertions are so vague and indeterminate that they are practically meaningless -- *e.g.*, "deteriorated significantly," "frequently unable to perform" (Compl. ¶ 123); "numerous other errors," "gave product away for free many times" (*id.* ¶ 125); LEAN implementation "was going 'horribly.'" (*Id.* ¶128.) *See, e.g.*, *supra* at § I.A.2.c. Second, even assuming the problems were pleaded with sufficient particularity, anecdotal evidence of problems in one part of a company cannot support an inference that those problems existed in the rest of the company and thus that statements about the company as a whole are false and misleading. *See supra* at § I.A.2.a. Here, Plaintiffs deliberately seem to avoid pleading publicly available facts that would have allowed the Court to understand just how large a company Exide is, and thus how insignificant the problems alleged by Plaintiffs' confidential informants are in the grand scheme of things.

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Plaintiffs point to alleged problems with the implementation of the LEAN program at plants in Bristol, Tennessee, Fort Smith, Arkansas and Salina, Kansas (Compl. ¶¶ 95, 111, 128), but do not say what division those plants were in, how many other plants were in that division or the United States or even what products were manufactured at the plants -- though this is information their confidential informants could have provided. Even more troubling is the fact that Plaintiffs plead no facts whatsoever about Exide's operations in Europe, where the company generates 60.2% of its net sales (versus 39.8% in North America) ('05 Form 10-K at 29) and 60.9% of its gross profit (versus 39% in North America) (*id.* at 30), and incurs 51.7% of its expenses (versus 32.6% in North America). (*Id.* at 31.) In fact, the only time Plaintiffs even acknowledge in the Complaint that Exide has European operations is in the utterly baseless and patently insufficient allegation from CI #7 that at plants in France, Poland and Germany, "the implementation of lean principles was going 'horribly.'" (Compl. ¶ 128.)

It is simply impossible to tell from the Complaint whether the alleged problems exist in 1%, 25% or 75% of the company -- and this appears to be exactly what Plaintiffs intend. But such needless ambiguity is antithetical to the PSLRA; Plaintiffs must provide more than a few stories from isolated outposts of a multinational corporation to successfully plead that statements about the company as a whole are false and misleading. *See supra* at §§ I.A.2.a.-c.

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b. **PLAINTIFFS DO NOT PLEAD WITH PARTICULARITY WHY STATEMENTS ABOUT EXIDE'S INVENTORY VALUATION WERE FALSE AND MISLEADING.**

Plaintiffs attempt to show that Defendants' statements that Exide carried its inventory at the "lower of cost or market" were false and misleading by relying heavily on CI #8, a former employee who claims that before the class period Exide had a large amount of "excess and obsolete" inventory which it was not carrying at the lower of cost or market. (Compl. ¶ 92.) Plaintiffs then rely upon four other former employees -- none of whom appear to have had any responsibility for or knowledge of Exide's finance or accounting functions -- to attempt to show that Exide continued to have a large quantity of excess and obsolete inventory throughout the class period which Plaintiffs conclude was never carried it at the lower of cost or market. (*Id.* ¶¶ 93-96.)

Again, though, Plaintiffs engage in sleight-of-hand to try to satisfy their pleading burden. CI#8's statements about how Exide valued its inventory before the Class Period (*e.g.*, while the company was still in bankruptcy), are irrelevant to how the company valued its inventory after it emerged because the company revalued all of its assets -- including its inventory -- under Fresh Start Accounting when it emerged from bankruptcy. ('04 Form 10-K at 22, F-7.) Exide's filings make clear that results from prior periods cannot be compared to results under Fresh Start Accounting in part because of the change in the value of the company's

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assets upon emergence. (*Id.*) Here, Plaintiffs do not even acknowledge this sea-change in the valuation of Exide's assets brought about by its emergence from bankruptcy, let alone plead any facts to explain how observations about pre-emergence valuation of inventory could have anything to do with post-emergence revaluation under Fresh Start Accounting. *See supra* at § I.A.2.b.

Plaintiffs are left, then, with their quartet of confidential informants who claim that during the Class Period -- at least in their local geographic location -- the company missed sales forecasts, built more batteries than it shipped and had "tons" of excess inventory. (Compl. ¶¶ 93-96.) But Plaintiffs do not allege any facts to support the intended inference that the supposed problems were happening in other parts of the Company or their conclusory assertions that this inventory was "impaired" and should have been written down, but was not. (*Id.* ¶ 97.) This failure to plead facts with particularity that demonstrate why the statements were false and misleading is fatal to Plaintiffs' claims.

c. PLAINTIFFS DO NOT PLEAD WITH PARTICULARITY WHY DEFENDANTS' PREDICTIONS THAT EXIDE WOULD SATISFY ITS LOAN COVENANTS WERE FALSE AND MISLEADING WHEN MADE.

Finally, Plaintiffs claim that Defendants' statements that Exide believed it would satisfy its loan covenants were false and misleading because all of the other supposed "adverse events" set forth in the Complaint "made it clear to Defendants that Exide was going to violate" its loan covenants. (Compl. ¶ 133.) As

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Defendants have demonstrated herein, however, Plaintiffs have not pleaded the existence of the supposed "adverse events" the particularity required by Rule 9(b) and the PSLRA, so Plaintiffs cannot now rely upon those allegations to support their claim that the instant statements were false and misleading when made.

Even if these allegations had been pleaded with sufficient particularity, Plaintiffs' claims still fail because they do not plead particularized facts sufficient to show that the adverse conditions to which they allege -- an inventory write-down and a contract adjustment that amounted to no more than $6.5 million against net sales of $2.5 billion and gross profit of more than $412 million ('05 Form 10-K at 22) -- would have lead anyone to believe the Company was going to violate its loan covenants. Absent some particularized factual allegations to explain why such a miniscule number caused -- or should have caused -- Defendants to expect Exide to violate its loan covenants, Plaintiffs' claims cannot proceed.

B. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED WITH PREJUDICE PURSUANT TO RULE 12(B)(6) AND THE PSLRA BECAUSE THE STATEMENTS ARE PROTECTED BY THE PSLRA'S SAFE-HARBOR.

Plaintiffs complain about Exide's highly qualified predictions that, based on its then-current financial forecasts and plans, it believed it would comply with the loan covenants of its Senior Credit Facility (Compl. ¶¶ 45, 54, 58, 61, 65, 75), and Exide's optimistic statements regarding Exide's prospects for future performance

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post-bankruptcy. (*Id.* ¶¶ 37-39, 46-48, 55-56, 66-67, 71-73.) But these statements, which were repeated essentially verbatim by the Exide Defendants several times between May 5, 2004 and May 15, 2005, are protected by the PSLRA's safe harbor and, thus, are not actionable as a matter of law.

The PSLRA created a "safe harbor" for forward-looking statements, *see* 15 U.S.C. § 78u-5(c), which protects a person who makes a forward-looking statement that turns out to be incorrect. Pursuant to the safe-harbor, the maker of a forward-looking statement cannot be held liable if the statement is identified as forward looking and accompanied by meaningful cautionary language, *see id.* § 78u-5(c)(1)(A)(i), or if the statement is immaterial. *See id.* at § 78u-5(c)(1)(A)(ii).[6]

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[6] The PSLRA's safe harbor also protects oral forward-looking statements where a statement, in addition to being identified as forward-looking and containing meaningful cautionary language, also: (i) are "accompanied by an oral statement that additional information concerning factors that could cause actual results to materially differ from those in the forward-looking statement is contained in a readily available written document, or portion thereof"; (ii) "identifies the document, or portion thereof, that contains the additional information about those factors relating to the forward-looking statement"; and (iii) where the information contained in that document is itself sufficient cautionary language. 15 U.S.C. § 78u-5(c)(2).

Moreover, and as discussed more fully *infra*, even if the statements do not qualify for protection under Section 78u-5(c)(1)(A), a person making a forward looking statement may not be held liable under Section 10(b) unless the plaintiff pleads and proves that person actually knew that the statement was false or misleading at the time it was made. *See id.* § 78u-5(c)(1)(B); *Key Equity Investors, Inc. v. Sel-Leb Mktg. Inc.*, No. 04 CV 1675, 2005 WL 3263865, at *7 (D.N.J. Nov. 30, 2005) ("[E]ven if not accompanied by meaningful cautionary language, liability may only be imposed for a forward-looking statement if the plaintiff can demonstrate the statement was made with actual knowledge of its falsity.").

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As demonstrated below, the safe-harbor requirements were satisfied in every instance in which the Exide Defendants stated that they believed Exide would satisfy its loan covenants; and Exide's optimistic statements about its future prospects post restructuring are protected under the immaterial prong of the safe-harbor. As a result, the PSLRA's safe harbor precludes liability based on such statements.

1. DEFENDANTS' STATEMENTS THAT THE COMPANY BELIEVED IT WOULD SATISFY ITS LOAN COVENANTS ARE FORWARD LOOKING

The Exide Defendants' statements that they believed Exide would satisfy the loan covenants "for the foreseeable future" are quintessential forward-looking statements -- statements about expectations for future economic performance. *See* 15 U.S.C. § 78u-5(i)(1)(C) (defining forward-looking statement as "a statement of future economic performance, including any such statement contained in a discussion and analysis of financial conditions by the management"); *see also GSC Partners CDO Fund v. Washington*, 368 F.3d 228, 242 (3d Cir. 2004) (quoting 15 U.S.C. 78u-5c(4)(i)(1)(A) and finding that predictive statements on the likelihood of future events are "classic forward-looking statement[s]").

2. THE STATEMENTS WERE IDENTIFIED AS FORWARD LOOKING.

The Exide Defendants also specifically identified these statements as forward-looking. Exide's Forms 10-Q specifically inform that:

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> Except for historical information, this report may be deemed to contain "forward-looking" statements. The Company desires to avail itself of the safe harbor provisions of the Private Securities Litigation Reform Act of 1995 (the "Act") and is including this cautionary statement for the express purpose of availing itself of the protection afforded by the Act.
>
> Examples of forward-looking statements include, but are not limited to (a) projections of revenues, cost of raw materials, income or loss, earnings or loss per share, capital expenditures, growth prospects, dividends, the effect of currency translations, capital structure and other financial items, (b) statements of plans of and objectives of the Company or its management or Board of Directors, including the introduction of new products, or estimates or predictions of actions by customers, suppliers, competitors or regulating authorities, (c) statements of future economic performance and (d) statements of assumptions, such as the prevailing weather conditions in the Company's market areas, underlying other statements and statements about the Company or its business.

(3Q'05 Form 10-Q at 50; 2Q'05 Form 10-Q at 45; 1Q'05 From 10-Q at 38; '04 Form 10-K at 3.) The November 15 and February 14 Releases also identify statements regarding Exide's expectations as forward-looking:

> This press release may be deemed to contain "forward-looking" statements. The Company desires to avail itself of the safe harbor provisions of the Private Securities Litigation Reform Act of 1995 (the "Act") and is including this cautionary statement for the express purpose of availing itself of the protection afforded by the Act.
>
> Examples of forward-looking statements include, but are not limited to (a) projections of revenues, cost of raw materials, income or loss, earnings or loss per share, capital expenditures, growth prospects, dividends, the effect of currency translations, capital structure and other financial items, (b) statements of plans of and objectives of the Company or its management or Board of Directors, including the introduction of new products, or estimates or predictions of actions by customers, suppliers, competitors or regulating authorities, (c)

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> statements of future economic performance and (d) statements of assumptions, such as the prevailing weather conditions in the Company's market areas, underlying other statements and statements about the Company or its business.

(February 14 Release at 2-3; November 15 Release at 2-3.) Finally, the conference call about which Plaintiffs complain identified the statement to be forward-looking:

> Let me remind you that certain statements on this call may constitute forward-looking statements as defined by the Securities Litigation Reform Act of 1995. As such, they involve known and unknown risks, uncertainties and other factors that may cause the actual or expected results of the Company to be materially different from any results expressed or implied by such forward-looking statements. These factors are enumerated in further detail in the Company's most recent Form 10-Q, filed yesterday with the U.S. Securities and Exchange Commission.

(November 16 Call at 2; *see also* February 14 Call at 3.)

3. THE STATEMENTS WERE ACCOMPANIED BY MEANINGFUL CAUTIONARY LANGUAGE WHICH WARNED OF THE VERY RISKS WHICH ULTIMATELY MATERIALIZED.

Finally, all of the forward-looking statements about which Plaintiffs complain were accompanied by meaningful and extensive cautionary language that triggered the protections of the PSLRA's safe harbor. The Press Releases about which Plaintiffs complain state:

> The Company cautions each reader of this press release carefully to consider those factors hereinabove set forth, because such factors have, in some instances, affected and in the future could affect, the ability of the Company to achieve its projected results and may cause actual results to differ materially from those expressed herein.

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(February 14 Release at 2; November 15 Release at 3.) The Press Releases also provide a detailed list of potential risks, including: (1) the "ability to implement business strategies and restructuring plans; (2) "unseasonable weather"; (3) Exide's "debt and debt service requirements which may restrict the Company's operational and financial flexibility ... "; (4) "significant fluctuations in market price" of lead; (5) market competitiveness; (6) "the substantial management time and financial and other resources needed for [Exide's] consolidation ... ;" (7) risks arising from operating in foreign markets "such as disruption of markets, changes in import and export laws, currency restrictions and currency exchange rate fluctuations;" (8) "exposure to fluctuations in interest rates on its variable rate indebtedness;" and (9) the "ability to obtain appropriate amendments to its senior credit agreement." (February 14 Release at 2; November 15 Release at 3.)

The Forms 10-Q about which Plaintiffs complain also provide detailed cautionary language warning of known and unknown risks that could impact the achievability of the forward-looking statements:

> Factors that could cause actual results to differ materially from these forward looking statements include, but are not limited to, the following general factors such as: (i) the Company's ability to implement business strategies and restructuring plans, (ii) unseasonable weather (warm winters and cool summers) which adversely affects demand for automotive and some industrial batteries, (iii) the Company's substantial debt and debt service requirements which may restrict the Company's operational and financial flexibility, as well as imposing significant interest and

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> financing costs, … (vi) the fact that lead, a major constituent in most of the Company's products, experiences significant fluctuations in market price and is a hazardous material that may give rise to costly environmental and safety claims, … (ix) risks involved in foreign operations such as disruption of markets, changes in import and export laws, currency restrictions, currency exchange rate fluctuations and possible terrorist attacks against U.S. interests, ... (xi) general economic conditions, (xii) the ability to acquire goods and services and/or fulfill labor needs at budgeted costs, ... and (xvi) the Company's ability to comply with the provisions of Section 404 of the Sarbanes Oxley Act of 2002.
>
> Therefore, the Company cautions each reader of this Report carefully to consider those factors hereinabove set forth, because such factors have, in some instances, affected and in the future could affect, the ability of the Company to achieve its projected results and may cause actual results to differ materially from those expressed herein.

(3Q'05 Form 10-Q at 50; 2Q'05 Form 10-Q at 45; 1Q'05 Form 10-Q at 38; '04 Form 10-K at 3.)

Finally, the Conference Call about which Plaintiffs complain warned participants of known and unknown risks that could impact the achievability of the forward-looking statements:

> Let me remind you that certain statements on this call may constitute forward-looking statements as defined by the Securities Litigation Reform Act of 1995. As such, they involve known and unknown risks, uncertainties and other factors that may cause the actual or expected results of the Company to be materially different from any results expressed or implied by such forward-looking statements. These factors are enumerated in further detail in the Company's most recent 10-Q, filed yesterday with the [SEC].

(November 16 Call at 2.)

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Courts in this District have previously found that cautionary language virtually identical to that used by Exide is sufficient to invoke the safe-harbor provisions of the PSLRA and preclude liability. *See, e.g., In re Party City Sec. Litig.*, 147 F. Supp. 2d 282, 309-10 (D.N.J. 2001); *see also Rombach v. Chang*, 355 F.3d 164, 173 (2d Cir. 2004) (affirming the district court's dismissal because optimistic statements pertaining to company's future performance and its ability to integrate newly acquired businesses were "protected by the 'bespeaks caution' doctrine and the PSLRA's safe harbor"); *In re Cross Media Mktg. Corp. Sec. Litig.*, 314 F. Supp. 2d 256, 267-69 (S.D.N.Y. 2004) (dismissing Section 10(b) claim because the statements "forward-looking statements based on current expectation of management but involve certain risks and uncertainties" and "actual results, performance or achievement could differ materially from the results, performance or achievements projected" were protected by the bespeaks-caution doctrine and the PSLRA's safe harbor).

Indeed, some of the risks about which Exide warned are precisely the events that Plaintiffs allege ultimately caused Exide to violate its EBITDA covenant, namely: (1) unfavorable volume mix and lower demand in certain markets; (2) unrecovered lead costs; (3) purchase-price variances related to other commodities; (4) increased distribution, freight and logistics costs; and (5) increased Sarbanes-Oxley compliance costs. (Compl. ¶¶ 78, 82-85.) In other words, Exide's

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"warnings and cautionary language directly address the substance of the statement[s] [Plaintiffs] challenge." *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 548 (8th Cir. 1997). Because Exide repeatedly and directly disclosed the very risks that ultimately caused it not to meet the prior expectations, the misrepresentations about which Plaintiffs complain are protected under the PSLRA and, thus, are inactionable as a matter of law. *See Halperin v. Ebanker USA.com, Inc.*, 295 F. 3d 352, 360 (2d Cir. 2002) (holding that where cautionary language addresses the relevant risk directly, the statement is not misleading for purposes of liability under the Exchange Act).

4. DEFENDANTS' OPTIMISTIC STATEMENTS REGARDING EXIDE'S FUTURE PROSPECTS POST-BANKRUPTCY ARE IMMATERIAL AND PROTECTED UNDER THE PSLRA'S SAFE HARBOR.

Plaintiffs' allegations also challenge the Exide Defendants' optimistic statements regarding the Company's prospects for future success post-bankruptcy. (Compl. ¶¶ 37-39, 46-48, 55-56, 66-67, 71-73.) However, such general statements of optimism or opinion -- sometimes known as "puffery" -- are widely regarded as immaterial and thus also protected under the PSLRA's safe harbor. *See* 15 U.S.C. § 78u-5(c)(1)(A)(ii); *see also In re Burlington Coat Factory Sec. Litig.*, 114 F. 3d 1410, 1427 (3d Cir. 1997) (holding vague statements of optimism and hope predicting the continuance of a positive financial trend immaterial as a matter of law); *In re Nice Sys., Ltd. Sec. Litig.*, 135 F. Supp.2d 551, 580 (D.N.J. 2001)

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("General, non-specific statements of optimism or hope even if arguably misleading, do not give rise to a securities claim because they are not material ...").

Indeed, statements virtually identical to the Exide Defendants' hopeful statements regarding Exide's post-restructuring future prospects are just the sort of vaguely optimistic predictions courts routinely find to be immaterial. *See, e.g., In re Advanta Sec. Litig.*, 180 F.3d 525, 537-38 (3d Cir. 1999) (statement that "[d]espite industry-wide pressure ..., [the defendant] continued to produce better-than-industry measures and achieved excellent growth and returns" immaterial); *Burlington Coat*, 114 F.3d at 1427 (statement that "company believed it could continue to grow net earnings" immaterial); *Nice Sys.*, 135 F. Supp. 2d at 579-80 (statements that the company (1) "will enjoy another year of continuous growth;" (2) "continues to benefit from its technological leadership and strong competitive position;" (3) is "focusing on the call center market which is expected to grow significantly; (4) has an "improved position in the ... market;" and (5) has a "leading position in the ... market [because of the company's] dominance" immaterial); *In re Milestone Scientific Sec. Litig.*, 103 F. Supp. 2d 425, 458 (D.N.J. 2000) (statement that "[the company is] very pleased with the amount of orders we

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have ... so far and expect even more orders in the ensuing months" inactionable puffery).[7]

C. Exide's Alleged Misstatements Related to Inventory Valuation and the Single Alleged Omission About Which Plaintiffs Complain are Immaterial as a Matter of Law.

Finally, Plaintiffs complain that the Exide Defendants falsely overstated Exide's inventory during the Class Period and failed to disclose that Exide "would have to write off approximately $1.4 to $2.8 million on a contract it had with the United States government." (Compl. ¶¶ 84-100, 129.) It is well established that only a misstatement or omission of a ***material*** fact creates liability under Section 10(b). *See* 17 C.F.R. § 240.10b-5(b) (making it unlawful for any person "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made in the light of the circumstances under which they were made, not misleading"); *In re Ikon Office Solutions, Inc.*, 277 F.3d 658, 666 (3d Cir. 2002) ("To state a valid claim under section 10(b) and Rule 10b-5, a plaintiff must show that the defendant [] made a misstatement or an omission of a material fact.").

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[7] For similar reasons, Defendants' statements that Exide was "well-positioned" and "comfortable" with its ability to satisfy its covenants and take advantage of lead pricing strategies (Compl. ¶¶ 66-67) are similarly inactionable puffery. *See, e.g., In re Caere Corp. Sec. Litig.*, 837 F. Supp. 1054, 1058 (N.D. Cal. 1993) ("[W]ell-positioned" for growth inactionable puffery); *In re Abbott Lab. Sec. Litig.*, 813 F. Supp. 1315, 1319 (N.D. Ill. 1992) ("[W]ell-positioned" to compete successfully in the marketplace inactionable).

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An omitted fact is material only if "there [is] a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." *In re Home Health Corp. of Am., Inc. Sec. Litig.*, No. 98-834, 1999 WL 79057, at *5 (E.D. Pa. Jan 29, 1999) (citing *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988)). Although "the question of materiality must be considered on a case-by-case basis," *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 714 n.14 (3d Cir. 1996), "[where] the alleged ... 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." *Home Health Corp.*, 1999 WL 79057, at *5.

Defendants' alleged failure to disclose the need to write-down $1.4-$2.8 million on a contract with the U.S. government is immaterial because no reasonable investor would view a write-down representing only 0.2998% - 0.5996% of Exide's annual net loss of $466,923,000 ('05 Form 10-K at 22) to significantly alter the total mix of information available. *See, e.g., Burlington Coat*, 114 F.3d at 1427 (agreeing that a "minor drop of a few percent" is not material); *Westinghouse*, 90 F.3d at 715 (affirming district court's determination that write-down amounting to 0.54% of the defendants' quarterly net income was

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immaterial); *NUI*, 314 F. Supp. 2d at 410 (concluding that an adverse earnings impact of 5% or greater is material).

For similar reasons, the Exide Defendants' allegedly false statements regarding inventory valuation are also immaterial. As Plaintiffs themselves allege, when disclosed, the inventory write-off amounted to only $4.5 million. (Compl. ¶ 136.) Of that, a full $2 million "was the result of noncash obsolescence charges ***in Europe***, resulting from ongoing SKU reduction efforts and discontinued product lines." (*Id.*) (emphasis added). Thus, at best, even assuming *arguendo* the truth of their allegations, the allegedly over-valued inventory about which Plaintiffs complain amounted to no more than $2.5 million. (*Id.*) Again, no reasonable investor would view a write-down of only 0.5354% of Exide's annual earnings (loss) to be material.

D. PLAINTIFFS FAIL TO PLEAD WITH THE REQUISITE PARTICULARITY THAT DEFENDANTS ACTED WITH THE NECESSARY SCIENTER.

1. PLAINTIFFS FAIL TO PLEAD FACTS GIVING RISE TO A STRONG INFERENCE THAT DEFENDANTS HAD ACTUAL KNOWLEDGE THEIR STATEMENTS WERE FALSE WHEN MADE.

Under the PSLRA, forward-looking statements -- even those not protected by the safe harbor -- are only actionable if a plaintiff pleads and proves facts giving rise to a strong inference the defendant had actual knowledge the statements were false when made. *See* 15 U.S.C. § 78u-5(c)(1)(B); *see also Party City*, 147 F. Supp. 2d at 310 (PSLRA requires plaintiff to plead forward-looking statements

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were made with actual knowledge of their falsity); *Key Equity Investors*, 2005 WL 3263865, at *7 (same). A plaintiff must "state with particularity facts giving rise to a strong inference of fraudulent intent." 15 U.S.C. § 78u-4(b)(2) (emphasis added). Thus, Plaintiffs here must plead particular facts giving rise to a strong inference that Defendants had actual knowledge that: (1) their stated expectations that Exide would satisfy its loan covenants were unreasonable when formulated; and (2) their optimistic statements regarding Exide's post-bankruptcy future were false. Plaintiffs cannot rely on allegations that Defendants were reckless. *See, e.g., Nice Sys.*, 135 F. Supp. 2d at 573 ("[To determine whether a forward-looking statement may be deemed false,] the court must examine whether the speaker at the time [the statement] was made, (1) actually believed the statement to be accurate, or whether (2) there is a factual or historical basis for that belief.") (emphasis added).

The Complaint is devoid of facts that could give rise to such a strong inference of actual knowledge. Plaintiffs do not, for example, point to documents to or from the Exide Defendants acknowledging the circumstances Plaintiffs insist they knew or should have known. *See, e.g., Burlington Coat*, 114 F.3d at 1429 ("[The plaintiff] "bear[s] the burden of pleading factual allegations, not hypotheticals, sufficient to reasonably allow the inference that the forecast was made with either (1) an inadequate consideration of the available data or (2) the

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use of unsound forecasting methodology."). Plaintiffs cannot satisfy the PSLRA's particularity requirement by simply alleging that Defendants "knew or should have known" of the alleged falsity of the forward-looking statements. *Party City*, 147 F. Supp. 2d at 310 (plaintiffs may not rest on bare inferences that a defendant "must have had knowledge of the facts"). Yet, this is all Plaintiffs allege. (Compl. ¶ 133 ("[I]t [was] clear to defendants that Exide was going to violate such covenants"); ¶ 157 ("[A]t the time each of those forward-looking statements was (sic) made, the particular speaker knew that the particular forward-looking statement was false...").) Such conclusory allegations are insufficient to adequately plead scienter. *Burlington Coat*, 114 F.3d at 1429 ("To adequately state a claim under the federal securities laws, it is not enough merely to identify a forward-looking statement and assert as a general matter that the statement was made without a reasonable basis."); *Milestone Scientific*, 103 F. Supp. 2d at 464 ("Plaintiffs have not met [their] burden ... when the complaint does not identify, much less allege, any facts to support the conclusory allegation that Defendants had actual knowledge of the falsity of the forward-looking statements.").

2. PLAINTIFFS FAIL TO PLEAD FACTS GIVING RISE TO A STRONG INFERENCE THAT DEFENDANTS WERE RECKLESS.

Plaintiffs' allegations would be insufficient to give rise to a strong inference of scienter even if they only needed to plead recklessness. In the Third Circuit, a plaintiff can plead the requisite strong inference "either by (a) alleging facts to

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show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *GSC Partners*, 368 F.3d at 237. Plaintiffs fail to do either.

a. PLAINTIFFS FAIL TO PLEAD PARTICULARIZED FACTS GIVING RISE TO A STRONG INFERENCE THAT DEFENDANTS HAD A STRONG MOTIVE TO COMMIT FRAUD.

Plaintiffs' allegations of motive are not sufficiently particularized to satisfy their pleading requirements. The Third Circuit has previously held that "motives generally possessed by most corporate directors and officers do not suffice; instead, plaintiffs must assert a concrete and personal benefit to the individual defendants resulting from [the] fraud." *GSC Partners*, 368 F.3d at 237 (*quoting Kalnit v. Eichler*, 264 F.3d 131, 139 (2d Cir. 2001)) (emphasis added); *see also Nice Sys.*, 135 F. Supp.2d at 583 ("Motive entail[s] concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged." (citation and internal quotations omitted).

The only motive Plaintiffs allege is that "Defendants were ... motivated to ... enable the Company to complete (i) an offering of $290 million worth of its 10-1/2% senior notes and (ii) a $60 million Floating Rate Convertible Senior Subordinated Notes offering." (Compl. ¶ 144.) This alleged motive, however, is nothing more than a corporate motive possessed by all officers and directors -- the

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desire to create "the appearance of corporate profitability, [and] the success of [the offering]." *Chill v. General Elec. Co.*, 101 F.3d 263, 268 (2d Cir. 1996). Indeed, the Third Circuit has previously rejected as insufficient motive allegations virtually identical to Plaintiffs. *See GSC Partners*, 368 F.3d at 237 (holding that allegations that management intentionally and fraudulently inflated stock price to complete a merger are insufficient); *see also San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 813-14 (2d Cir.1996) (finding a "desire to maintain a high [corporate] credit rating" insufficient). Thus, Plaintiff fails to plead with the requisite particularity that Defendants had a legally cognizable motive to commit fraud.

b. PLAINTIFFS FAIL TO PLEAD FACTS CONSTITUTING STRONG CIRCUMSTANTIAL EVIDENCE OF RECKLESSNESS.

The only remaining avenue by which Plaintiffs could plead scienter would be by alleging particular facts constituting strong circumstantial evidence that Defendants were reckless. To survive dismissal by pleading recklessness, a securities fraud plaintiff must allege that the defendant's conduct was more than "merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *GSC Partners*, 368 F.3d at 239. Moreover, where a

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plaintiff relies on allegations of recklessness -- as opposed to motive and opportunity -- to plead fraudulent intent, "the strength of the circumstantial allegations must be correspondingly greater." *Id.* at 238 (emphasis added).

Plaintiffs file to make any such allegations. Rather, they allege only that "[D]efendants acted with scienter" because they "knew that the public documents and statements issued or disseminated in the name of the Company were materially false and misleading" and that "by virtue of their receipt of information reflecting the true facts ..., their control over, and/or receipt and/or modification of [the] allegedly materially misleading misstatements ... participated in the fraudulent scheme alleged ..." (Compl. ¶¶ 143, 163-64.) Such boilerplate allegations are as insufficient to establish recklessness as they are to establish actual knowledge. "Simply referring to a series of public statements and then alleging, in a general and conclusory manner, that those disclosures were false or misleading is insufficient." *GSC Partners*, 368 F.3d at 240; *see also Advanta*, 180 F.3d at 539 (finding "conclusory assertions that defendants acted knowingly as well as blanket statements that defendants must have been aware ... by virtue of their positions within the company" insufficient to plead scienter); *Nice Sys.*, 135 F. Supp. 2d at 586 (noting that liability may not be imposed on the basis of subsequent events and corporate officials need not be clairvoyant, and "are only responsible for revealing those material facts reasonably available to them.").

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E. PLAINTIFFS CANNOT RELY ON THE GROUP PLEADING DOCTRINE TO IDENTIFY "WHO" MADE THE ALLEGED MISSTATEMENTS WITH THE PARTICULARITY REQUIRED UNDER THE PSLRA.

When a securities complaint is brought against multiple defendants, the complaint must attribute to each defendant at least one misstatement. *See, e.g., In re Royal Dutch/Shell Transport Sec. Litig.*, 380 F. Supp. 2d 509, 558 (D.N.J. 2005); *Copland v. Grumet*, 88 F. Supp. 2d 326, 331 (D.N.J. 1999). Here, none of the allegedly false and misleading statements can be attributed to Gargaro, Muhlhauser or Harvie. As an initial matter, a company's alleged misstatements cannot be attributed to an officer or director before he joined or after he left the company's employ. *See Berry v. Valence Tech., Inc.*, 175 F.3d 699, 706-07 (9th Cir. 1999) (dismissing claims against former CEO and holding that in the absence of any allegations that he had continued operational involvement in the company, former CEO could not be held liable for statements made after his retirement).

Exide announced Muhlhauser's resignation from the Company on October 12, 2004, and he stopped signing Exide's public filings and certifications as of that date. (Compl. ¶¶ 56, 60.) Similarly, Gargaro did not sign any public filing or certification prior to November 12, 2004. (*Id.* ¶¶ 42, 44, 49, 51, 53, 56.) Accordingly, at a minimum, those statements made after Muhlhauser left Exide and before Gargaro began signing the public filings and certifications cannot be attributed to them.

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Moreover, Plaintiffs cannot rely on the group pleading doctrine to satisfy the PSLRA's requirements that they identify "who" made the alleged misstatements or omissions. The group pleading doctrine permits a plaintiff to presume statements issued by a company were the product of the collective work of the individuals with direct involvement in the everyday business of the company. *See, e.g., In re PDI Sec. Litig.*, No. 02-CV-0211, 2005 WL 2009892, *24 (D.N.J. Aug. 17, 2005). Plaintiffs seek to invoke this doctrine by alleging that "[i]t is appropriate to treat the Individual Defendants as a group for pleading purposes and to presume that the false, misleading and incomplete information conveyed in the Company's public filings ... are the collective actions of the narrowly-defined group of defendants ...." (Compl. ¶ 21.) Plaintiffs' reliance on this doctrine to satisfy their pleading obligations is misplaced.

While the Third Circuit has not considered whether the group pleading doctrine survived passage of the PSLRA, the ***vast majority*** of District Courts within this Circuit have concluded that it did not. *See, e.g., Bio-Tech. Gen.*, 380 F. Supp. 2d at 584 ("[T]his Court concludes that the PSLRA has abolished group pleading"); *PDI*, 2005 WL 2009892, at *24; *In re DVI, Inc. Sec. Litig.*, No. 03-5336, 2005 WL 1307959, *7 (E.D. Pa. May 31, 2005) (collecting cases); *P. Schoenfeld Asset Mgmt. LLC v. Cendant Corp.*, 142 F. Supp. 2d 589, 620 (D.N.J.

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2001); *Marra v. Tel-Save Holdings, Inc.*, No. 98-3145, 1999 WL 317103, at *5 (E.D.Pa. May 18, 1999); *Home Health Corp.*, 1999 WL 79057, at *21.

As these and numerous other courts have concluded, the group pleading doctrine is at odds with the PSLRA's plain language and pleading requirements. *See, e.g., PDI*, 2005 WL 2009892, at *24 ("[A]pplication of the group pleading doctrine 'would circumvent the PSLRA's heightened pleading requirements...'") Thus, Plaintiffs' allegations are insufficiently particular to satisfy their pleading obligations.

II. PLAINTIFFS' SECTION 20(a) CLAIM IS INSUFFICIENT AS A MATTER OF LAW.

To state a claim under Section 20(a) of the Exchange Act, a securities plaintiff "must plead facts showing: (1) an underlying violation by the company; and (2) circumstances establishing defendant's control over the company's actions." *NUI*, 314 F. Supp. 2d at 400; *see also Wilson v. Bernstock*, 195 F. Supp. 2d 619, 633 (D.N.J. 2002). Plaintiffs fail to allege either.

First, as Defendants demonstrate above, Plaintiffs fail to establish a primary violation of Section 10(b). This failing in and of itself mandates dismissal of Plaintiffs' Section 20(a) claim against the Individual Defendants. *See Rockefeller Ctr.*, 311 F.3d at 211 ("[I]t is well-settled that controlling person liability is premised on an independent violation of the federal securities laws."); *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 279 (3d. Cir. 1992) ("[O]nce all predicate section

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10(b) claims are dismissed, there are no allegations upon which section 20(a) liability can be based.").

Second, Plaintiffs' fail to allege facts demonstrating the Individual Defendants' control of Exide or each other. *See, e.g., In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 285 (3d Cir. 2006) ("With regard to Section 20(a), we have observed that '[t]he text of the statute plainly requires the plaintiff to prove not only that one person controlled another person, but also that the 'controlled person' is liable under the Act.'"). To demonstrate control over a primary violator, a plaintiff must show "the defendant had actual power or influence over the allegedly controlled person." *In re MobileMedia Sec. Litig.*, 28 F. Supp. 2d 901, 940 (D.N.J. 1998). Moreover, "the PSLRA requires that a claim under Section 20(a) state with particularity the circumstances of ... the defendants' control ...." *In re Digital Island Sec. Litig.*, 223 F. Supp. 2d 546, 561 (D. Del. 2002) (emphasis added).

Other than their conclusory allegations that the Individual Defendants are "presumed to have had the power to control" because "of their high level positions," Plaintiffs plead no facts suggesting the Individual Defendants possessed actual control over Exide or each other. (Compl. ¶¶ 170-71) Courts routinely hold that conclusory allegations like Plaintiffs' that are based on nothing more than the defendants' status as officers or directors are insufficient to allege control under

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Section 20(a) with the particularity required by the PSLRA. *See, e.g., Digital Island*, 223 F. Supp. 2d at 562 (finding the plaintiff's allegations that "due to their Board or managerial positions" to be insufficient to "plead the control prong of a Section 20(a) claim."); *In re NAHC, Inc. Sec. Litig.*, No. 00-4020, 2001 WL 1241007, at *19 (E.D.Pa. Oct. 21, 2001) ("Plaintiffs' claim that individual Defendants were the Company's officers and directors, were involved in the Company's day-to-day affairs and had access to detailed information regarding segments and lines of business of Company's operations were legally conclusory and inadequate to meet the particularity requirements of the PSLRA."); *In re Livent, Inc. Sec. Litig.*, 78 F. Supp. 2d 194, 221 (S.D.N.Y. 1999) ("Officer or director status alone does not constitute control.") (collecting cases). Thus, Plaintiffs fail to demonstrate any of the elements necessary for control person liability against the Individual Defendants, and their Section 20(a) claim should be dismissed.

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CONCLUSION

For each and all of the foregoing reasons, Plaintiffs' claims against Defendants Exide Technologies, J. Timothy Gargaro, Ian Harvie and Craig Muhlhauser should be dismissed with prejudice.

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WILENTZ, GOLDMAN & SPITZER
A Professional Corporation

By: s/Edward T. Kole
Edward T. Kole (EK8586)
James E. Tonrey, Jr. (JT0961)
90 Woodbridge Center Drive
Woodbridge, NJ 07095-0958

KATTEN MUCHIN ROSENMAN LLP
David H. Kistenbroker
Carl E. Volz
525 West Monroe Street
Chicago, IL 60661

Attorneys for Defendants