**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**

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

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

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In their Opposition to Defendants' Motion to Dismiss ("Opposition" or "Opp. at __") Plaintiffs studiously avoid addressing the substance of the arguments Defendants raise in their Memorandum in Support of their Motion to Dismiss ("Memorandum" or "Mem. At __") and instead try to defeat Defendants' Motion by invoking dubious interpretations of and/or exceptions to well-established pleading standards, exhaustively rehashing and embellishing upon the allegations in their Complaint and insisting ardently that the latter satisfies the former. However, Plaintiffs' Complaint is plainly deficient and Defendants respectfully submit the Court should dismiss the Complaint in its entirety, with prejudice.

## I. PLAINTIFFS MISREPRESENT THE STANDARDS WHICH THE COURT SHOULD APPLY TO DEFENDANTS' MOTION.

In their Opposition Plaintiffs attempt to minimize the pleading burdens they face by employing the arguments that have become *de rigueur* in response to every motion to dismiss a claim for securities fraud: that the PSLRA has not really changed the pleading standards for securities fraud (Opp. at 14), that the Court must accept all of their allegations as true (*id.* at 26) and that the stringent pleading requirements of Rule 9(b) should be relaxed because Plaintiffs do not have access to the information that would permit them to properly allege securities fraud. (*Id.* at 23, n.9.)

First, there is no doubt that the PSLRA significantly increased the pleading requirements plaintiffs must satisfy to survive a motion to dismiss and modified

the traditional analysis of a motion to dismiss under Rule 12(b)(6). This Court has observed that the PSLRA "mandates more particularized pleading," *In re NUI Sec. Litig.*, 314 F. Supp 2d 388, 397 (D.N.J. 2004), and the Third Circuit has stated that the PSLRA "imposes another layer of factual particularity to allegations of securities fraud...which Congress expressly intended to substantially heighten the existing pleading requirements." *California Public Employees' Retirement System v. Chubb Corp.*, 394 F.3d 126, 144-45 (3d Cir. 2004).

Second, even under a traditional Rule 12(b)(6) analysis, courts are required to accept as true only those *factual* allegations that are *well-pled*; they need not accept as true "unsupported conclusions and unwarranted inferences", *see Doug Grant, Inc. v. Greate Bay Casino Corp.*, 232 F.3d 173, 184 (3d Cir. 2000), or allegations that are contradicted by the very documents from which they are purportedly drawn. *See Warburton v. Foxtons, Inc.*, No. 04-2474, 2005 WL 1398512, at *4 (D.N.J. June 13, 2005) (court need not accept as true allegations contradicted by the documents upon which claims are based) (citations omitted); *In re PDI Sec. Litig.*, No. 02-CV-0211, 2005 WL 2009892, at *21 (D.N.J. Aug. 17, 2005) ("When allegations contained in a complaint are contradicted by the document it cites, the document controls.")

Third, Plaintiffs attempt to avoid the stringent pleading requirements of Rule 9(b) by invoking what they call the "key qualification" to the exacting

requirements of Rule 9(b) -- that "the Rule's requirements are relaxed when, as here, defendants necessarily have superior access to information that would reveal a fraud." (Opp. at 23 n.9 (citing *In re Rockefeller Ctr. Props. Sec. Litig.*, 311 F.3d 198, 216 (3d Cir. 2002).) But Plaintiffs cannot claim the benefits of this "key qualification" because they do not allege in the Complaint that there was information to which they purportedly lacked access, what that information was, or the nature and scope of their efforts to obtain that information. *See In re Tellium, Inc., Sec. Litig.*, No. Civ. A. 02CV5878FLW, 2005 WL 1677467, *11 (D. N.J. June 30, 2005) (rejecting plaintiffs claim for a relaxed application of Rule 9(b) where plaintiffs failed to "accompany their boilerplate statement that information was in [d]efendants' exclusive control with a statement of facts upon which that assertion was based.")

## II. PLAINTIFFS CANNOT BASE THEIR CLAIMS ON STATEMENTS WHICH DID NOT -- AND COULD NOT -- HAVE CAUSED THEM ANY HARM.

In their Opposition, Plaintiffs barely address and wholly fail to rebut Defendants' demonstration that the majority of the statements about which Plaintiffs complain have no ascertainable connection to the losses they claim to have suffered when Exide's stock price fell on May 17 and 18, 2005.

Plaintiffs' only response is to state dismissively that "the law... requires only that the Complaint allege that defendants' wrongful conduct was a substantial factor in plaintiffs' losses." (Opp. at 13, n.4 (citing *Semerenko v. Cendant Corp.*,

223 F.3d 165, 187 (3d Cir. 2000).) Plaintiffs then claim that their loss causation allegations "more than satisfy that standard." (*Id.*)

It is true that *Semerenko* requires plaintiffs to plead that the alleged misstatements were a "substantial cause of the inflation in the price of a security and in its subsequent decline in value", *id.* at 186-87, but Plaintiffs' allegations, when considered alongside the documents upon which they are based, fail to establish how three out of the four categories of statements about which they complain could have been a "substantial cause" of the decline in the value of Exide's stock. As explained in the Memorandum, Plaintiffs claim to have suffered damages when Exide's stock price fell on May 17 and 18, 2005, when "the nature and extent of defendants'" alleged fraud was "revealed to investors and the market" in the May 16 Press Release and May 17 Conference Call. (Compl. ¶ 150.) In other words, the things Plaintiffs claim that Defendants allegedly wrote or said on May 16 and 17 -- when Plaintiffs claim Defendants revealed the alleged fraud -- caused Exide's stock to drop.

As a matter of simple logic, then, those things that were *not* said or written on May 16 and 17 *could not* have caused the stock to drop. Nowhere in the May 16 Press Release or the May 17 Conference Call is there any suggestion that Exide's restructuring initiatives were failing, that Exide had not been carrying its inventory at the lower of cost or market, or that the company's previous Sarbanes-

Oxley certifications were false. In fact, *no one* has ever said such things -- except the Plaintiffs in their Complaint. Since none of these things were said in the company's communications on May 16 and 17 or at any other time, it is inconceivable how such alleged statements could have caused the value of Exide's stock to decline on May 17 and 18. Even if Plaintiffs could plead and prove that Defendants' statements on these subjects during the class period were false and misleading (which they cannot, as demonstrated in the Memorandum and below), they cannot recover under the securities laws based upon these statements. *See Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 345-46 (2005) (plaintiffs must plead and prove that misrepresentation or other fraudulent conduct caused inflation of stock price *and* an economic loss resulting from the curative statement). The only statements or omissions that remain to be considered, then, are those that relate to the May 16 Press Release or May 17 Conference Call: (a) Defendants' statement that Exide believed it could satisfy its loan covenants for the foreseeable future (Compl. ¶¶ 45, 54, 61-62, 65, 66, 75); and (b) Defendants' alleged failure to disclose that Exide needed to write off approximately $1.4 to $2.8 million in connection with a U.S. Government contract. (*Id.* at ¶ 129.) As explained in the Memorandum and herein, Plaintiffs cannot state a cause of action based on these or any other

statements by Defendants.[1]

## III. PLAINTIFFS' CONFIDENTIAL INFORMANT ALLEGATIONS DO NOT SATISFY THE PSLRA.

In their Opposition, Plaintiffs spend two pages arguing against a legal position Defendants did not take in their Memorandum and seven pages rehashing, and often embellishing, the quasi-factual allegations from their Complaint. (Opp. at 15-23.) But Plaintiffs never substantively address -- let alone rebut -- Defendants' demonstration that Plaintiffs' allegations based on confidential informants do not satisfy the PSLRA because: (a) all of the confidential informants are former employees of just one branch of Exide but are being used by Plaintiffs in ostensible support of allegations of company-wide conduct (*Compare* Opp. at 15-22 *with* Mem. at 11-14); (b) several informants are used to support allegations related to alleged conduct that occurred before the class period but which lacks any reasonable connection to events during the class period (*Compare* Opp. at 15-22 *with* Mem. at 15-17); and (c) the confidential informant allegations amount to nothing more than vague anecdotal information, insufficiently

[1] Plaintiffs claim that Defendants do not advance a loss causation argument in their Memorandum and state that if Defendants "attempt to make an argument in their reply brief" they "reserve the right to address it fully thereafter." (Opp. at 13, n.4.) While Defendants believe they appropriately raised the argument in their Memorandum they certainly would not begrudge Plaintiffs the opportunity to address the matter further -- if only to see how Plaintiffs might argue that the allegations in their Complaint support the inference that alleged statements that were never made to the investing public somehow caused investors to sell their Exide stock.

particularized hyperbole or rumors from third parties. (*Compare* Opp. at 15-22 *with* Mem. at 17-21.) Plaintiffs' response to these arguments is to insist that allegations about supposed conditions at discrete locations in the Transportation North America Division really *do* infer that that those conditions existed throughout the rest of the company, that their allegations about pre-class conduct *are* connected to conduct during the class period and that vague and/or hyperbolic statements used by their confidential informants are concise and accurate depictions of what those informants saw or heard while working at Exide. (Opp. at 17-22.) Because Plaintiffs' arguments do not address the merits of Defendants' motion, Defendants submit Plaintiffs' claims should be dismissed, with prejudice, for failing to comply with §78u-4(b)(1) of the PSLRA.

## IV. PLAINTIFFS' ALLEGATIONS DO NOT GIVE RISE TO A STRONG INFERENCE THAT ANY DEFENDANT HAD THE REQUISITE SCIENTER.

### A. PLAINTIFFS' ALLEGATIONS DO NOT GIVE RISE TO A STRONG INFERENCE OF ACTUAL KNOWLEDGE.

Plaintiffs do not dispute that with regard to the forward looking statements about which they complain they must plead facts that give rise to a strong inference that Defendants had actual knowledge the statements were false when they were made. (*Compare* Mem. at 39-41 *with* Opp. at 34-36.) Nor do they dispute that the crux of their claims -- the oft-repeated statement that Exide believed it would satisfy its loan covenants for the foreseeable future -- is a

forward looking statement. (*Id.*) Instead, they attempt to show that the allegations in the Complaint raise a strong inference that Muhlhauser and Harvie *knew* Exide would not satisfy its loan covenants at the end of fiscal year 2005 (which ended March 31, 2005) when Exide made the statement on June 29, August 12 and November 15-16[2], 2004 and February 14, 2005. (Compl. ¶¶ 45, 54, 61, 65-66, 75, respectively.) Plaintiffs' attempt fails.

### 1. PLAINTIFFS' ALLEGATIONS ABOUT MUHLHAUSER DO NOT RAISE A STRONG INFERENCE OF ACTUAL KNOWLEDGE.

Plaintiffs argue Muhlhauser knew Exide would violate its loan covenants at the end of fiscal 2005 because he allegedly received: (a) Obsolete Inventory Reports in early 2004 (before the class period) showing the company allegedly had "tens of millions of dollars" of obsolete inventory by early 2004 and (b) sales reports throughout the class period for the Transportation North America Division supposedly showing the division was continuing to accumulate excess inventory. (Opp. at 34-35 (citing Compl. ¶¶ 92-93).)

But as Defendants explained in the Memorandum, these allegations do not give rise to a strong inference even that Muhlhauser knew the company had excess

[2] The only individual Defendant to actually utter the statement was Gargaro, during Exide's investor conference call on November 16, 2005. (Compl. ¶ 66.) However Plaintiffs do not even try to argue that Gargaro had actual knowledge that the statement -- or any other of Defendants' forward looking statements -- was false. (*See* Opp. at 34-36.) Therefore even if the Court determines that Plaintiffs state a cause of action against other Defendants based on their forward looking statements, it should find that no such cause of action is stated against Gargaro.

or obsolete inventory during the class period, let alone that Exide would violate its loan covenants at the end of fiscal 2005. (Mem. at 39-41.)

First, Exide revalued all of its assets -- including its inventory -- as part of its Fresh Start Accounting upon emergence from bankruptcy; therefore the tens of millions of dollars of obsolete inventory that supposedly existed before the company emerged from bankruptcy -- and before the class period -- are irrelevant to the state of inventory *during* the class period. (Mem. at 25.) Plaintiffs do not address the substantive argument, claiming instead that Defendants' reference to the revaluation of Exide's inventory is an attempt to improperly advance Defendants' own version of the facts. (Opp. at 26.) But it is not a matter of Defendants asking the Court to accept their version of the facts, it is a matter of the Court not being required to accept inferences that are unreasonable or are contradicted by documents upon which the claims are based. (*Supra* at 2.) Here the inference Plaintiffs seek to draw is both unreasonable (*e.g.*, if Exide had accumulated "tens of millions of dollars" in obsolete inventory before the class period and that amount grew throughout the class period, why did Exide only write off $4.5 million in inventory at the end of fiscal 2005?) and contradicted by the documents from which Plaintiffs' claims are drawn. (Mem. at 25.) Hence the Court need not and should not accept as true Plaintiffs' conclusory allegations that

an obsolete inventory problem that allegedly existed before the company emerged from bankruptcy continued and grew throughout the class period.

Second, Plaintiffs' allegation that Muhlhauser knew the company was going to violate its loan covenants because he received weekly sales reports from Transportation North America during the class period which supposedly showed that the division "never" met its sales forecasts is specious. Plaintiffs never bother to quantify by how much Transportation North America missed its forecasts -- something they presumably could have done with the assistance of their administrative assistant/confidential informant -- and offer no allegations whatever to support their conclusory assertions that missed sales forecasts at Transportation North America meant increased obsolete inventory for that division or, more importantly, for the rest of the company.

Even if the inferences Plaintiffs seek to draw from the allegations in the Complaint were not unreasonable, unsupported and/or contradicted by the documents from which they are drawn, Plaintiffs still failed totally to raise a strong inference that Muhlhauser *knew* Exide would violate its loan covenants at the end of fiscal 2005 -- and simple math proves the point. During the May 17 Conference Call, when Plaintiffs allege the "true facts" were revealed, Gargaro announced that the company expected Exide's EBITDA for fiscal 2005 to be between $100 and $107 million, or between $15 and $22 million below the required $122 minimum

EBITDA covenant. (Compl. ¶ 136.) As Defendants explained in the Memorandum, Exide violated the minimum EBITDA covenant because it earned approximately $38 million less than expected due to a combination of "unanticipated or unusual items" and adverse business conditions. (Mem. at 3-5.) Without the $38 million adverse impact, then, Exide would have earned between $138 and $145 million. But the allegations to which Plaintiffs point to try to raise a strong inference that Muhlhauser knew Exide would violate its loan covenants account for a maximum adverse impact of $4.5 million; writing off that amount would have resulted in EBITDA of between $133.5 and $140.5 million. Therefore, even if Muhlhauser knew about this supposedly long-standing problem with obsolete inventory he nevertheless would have been more than justified in believing that Exide would satisfy its $122 million EBITDA covenant.

**2. Plaintiffs' Allegations About Harvie Do Not Raise A Strong Inference of Actual Knowledge.**

Plaintiffs argue Harvie had actual knowledge that the company would violate its loan covenants and that the Company's internal controls were "virtually non-existent" because he was allegedly informed in December, 2004, that the company was 18,000 batteries short of what was required for a U.S. Government contract and allegedly asked "If that inventory is gone how can we possibly account for other materials?". (Opp. at 35-36.)

First, Plaintiffs simply cannot establish that Harvie actually knew the Company would violate its minimum EBITDA covenant at the end of fiscal 2005 by claiming he was informed the Company was 18,000 batteries short on a single government contract in December, 2004. Even if he was so informed, it does not necessarily follow that the company would have to write anything off -- it is just as likely that the Company would have provided the batteries from some other source or reached some other accommodation with the government. But even if Harvie was actually aware of the need to write down the $1.4-$2.8 million in December, 2004, this does not mean he knew the Company was going to violate its minimum EBITDA covenant at the end of fiscal 2005. As demonstrated with regard to Muhlhauser, *supra*, even if Harvie thought the company would need to write off the full $2.8 million Plaintiffs allege, he still would have had a reasonable basis to believe that Exide would exceed the minimum EBITDA covenant by at least $13.2 million.

Second, Plaintiffs' attempt to infer from Harvie's alleged reaction to news about the missing batteries that he somehow knew the internal controls of the Company as a whole were "virtually non-existent" is patently unreasonable. In fact, to infer *anything* about Harvie's opinion about the state of the internal controls of the entire company from his alleged reaction to an alleged issue with a single contract in one of the company's four divisions is unreasonable, if not

absurd. Plaintiffs must plead facts that raise a *strong* inference of actual knowledge and have utterly failed to do so.

### B. PLAINTIFFS' ALLEGATIONS DO NOT GIVE RISE TO A STRONG INFERENCE OF RECKLESSNESS.

#### 1. PLAINTIFFS' ALLEGATIONS DO NOT GIVE RISE TO A STRONG INFERENCE THAT DEFENDANTS HAD A MOTIVE TO COMMIT FRAUD.

Rather than address the cases cited by Defendants in their Memorandum, Plaintiffs simply insist the individual Defendants were motivated to make false and misleading statements in order to enable Exide to complete its bond offering which Plaintiffs claim was necessary to raise "desperately-needed cash." (Opp. at 41-42.) As Defendants explained in their Memorandum, the successful completion of a bond offering is a motive possessed by all corporations and does not create a strong inference of fraud under the PSLRA. (Mem. at 42-43.)

As the court recently commented in *Wilson v. Bernstock*, 195 F. Supp.2d 619, 634 (D.N.J. 2002), "Courts have [] held that 'a company's desire to maintain a high bond or credit rating' does not 'qualify as a sufficient motive for fraud . . . because if scienter could be pleaded on that basis alone, virtually every company in the United States that experiences a downturn in stock price could be forced to defend securities fraud actions.'" *Id.* (quoting *San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Co., Inc.*, 75 F.3d 801, 814 (2d Cir.1996)); *see also Klein v. Autek Corp.*, 147 Fed. Appx. 270, 278 (3d Cir. 2005)

("to the extent that the Plaintiffs allege that [the defendant] was motivated by a desire to obtain capital from the securities investment to cover corporate expenses or debt, a motive so generic that almost every corporate officer in [the defendant's] position would possess it, the Plaintiffs' argument must fail as a matter of law.").[3]

### 2. PLAINTIFFS' ALLEGATIONS DO NOT GIVE RISE TO A STRONG INFERENCE DEFENDANTS WERE RECKLESS

Finally, Plaintiffs claim the allegations in their Complaint raise a strong inference that Defendants were reckless because the statements all relate to Exide's core business operations and "it is inconceivable" that Defendants would have spoken about these subjects without knowing the true facts about Exide's operations. (Opp. at 37-38.)

But Plaintiffs' "core issues" approach is anathema to the heightened pleading standards of the Rule 9(b) and the PSLRA, as interpreted by the courts of this Circuit. *See, e.g., In re Suprema Spec., Inc. Sec. Litig.*, 438 F.3d 256, 282 (3d 2006) ("A pleading of scienter sufficient to satisfy Rule 9(b) may not rest on a bare inference that a defendant 'must have had' knowledge of the facts or 'must have

[3] The cases upon which Plaintiffs rely in support of their argument, *In re AT&T Corp. Sec. Litig.*, No. 00-5364 (GEB), 2002 U.S. Dist. LEXIS 22219, at *77-79 (D.N.J. Jan. 30, 2002) and *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 93 F. Supp. 2d 424, 431 (S.D.N.Y. 2000) are distinguishable. In both cases the companies were conducting initial public offerings to complete specific corporate projects; Plaintiffs here do not allege that the proceeds of Exide's bond offering were earmarked for any purpose other than to pay down debt and increase liquidity. (*See* Opp. 40-42.)

known' of the fraud given his or her position in the company"); *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 539 (3d 1999) ("Generalized imputations of knowledge do not suffice, regardless of the defendants' positions within the company."). It should not be surprising, then, that the scienter standards employed in the case upon which Plaintiffs' "core issues " approach rests, *Epstein v. Itron, Inc.*, 993 F. Supp. 1314, 1326 (E.D. Wash. 1998), have been abrogated. *See In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970 (9th Cir. 1999). Since the "core issues" approach is inconsistent with the applicable law of this circuit, the Court should refuse to apply it in this case.

## V. PLAINTIFFS DO NOT PLEAD FALSITY WITH THE PARTICULARITY REQUIRED BY THE PSLRA AND RULE 9(b).

Plaintiffs' attempts to show that they have pleaded falsity with the requisite particularity generally mirror and are as deficient as their attempts to defend their scienter allegations, described above. Defendants maintain that the arguments set forth in their Memorandum demonstrate Plaintiffs have failed to plead the statements about which they complain are false and misleading with the particularity required by Rule 9(b) and the PSLRA (Mem. at 21-27) and that Plaintiffs' attempts to demonstrate otherwise in their brief (Opp. at 23-32) are unavailing and Defendants will not re-argue those points herein.

With regard to Plaintiffs' argument that they adequately allege Defendants' statements about the adequacy of Exide's internal controls were false and

misleading because they allege a systemic, worldwide failure of Exide's internal controls, (*id.* at 27-29), Plaintiffs are once again mistaken. As Defendants demonstrated in the Memorandum, Plaintiffs allege only isolated control problems at a small number of plants in one division of the company. (Mem. at 21-26.) Plaintiffs do not allege any facts to suggest that the alleged problems existed anywhere else in the Company; their claim that the entire company's internal controls were "virtually nonexistent" is therefore nothing more than an unfounded, unreasonable extrapolation of existing allegations. (*Id.*) Plaintiffs' claims about Exide's internal controls, then, boil down to the assertion that the statements were false when they were made because Exide disclosed in its June 2005 10-K that "its disclosure control procedures were actually not effective." But simply because a statement later turns out to be incorrect does not mean that the statement was false when made. *See In re Westinghouse Sec. Litig.*, 90 F.3d 696, 711-12 (3d Cir. 1996) (rejecting as "fraud by hindsight" pleading plaintiffs' allegation that defendant's statements about the adequacy of its internal controls were false when made simply because the controls were later determined to be inadequate).

Indeed, the 10-K excerpt Plaintiffs cite strongly supports the *opposite* inference. That statement, which controls the conclusory allegations of the Complaint, makes clear that the evaluation which led the company to conclude that its disclosure controls were ineffective occurred *after* the end of the fiscal 2005.

(Compl. ¶ 119.) Thus, it is far more reasonable to infer from Plaintiffs' allegations that Defendants first learned about Exide's disclosure control shortcomings only *after* the end of fiscal year 2005, when the Company conducted an inquiry into the issue, than at the time Defendants allegedly made the statements about which Plaintiffs complain.

## VI. PLAINTIFFS DO NOT REBUT DEFENDANTS' DEMONSTRATION THAT MANY STATEMENTS ABOUT WHICH PLAINTIFFS COMPLAIN ARE IMMATERIAL OR PUFFERY.

Plaintiffs fail to address head-on Defendants' arguments that the dollar amounts in the statements or alleged omission regarding the government contract about which Plaintiffs complain are so small as to be immaterial as a matter of law (Mem. at 39) and that many of the statements about which Plaintiffs complain are nothing more than inactionable puffery. (*Id.* at 37-38.) With regard to the first of these arguments, Plaintiffs claim materiality is an "issue left to the factfinder" and not subject to Rule 12(b)(6) dismissal. (Opp. at 48.) While it might be improper in some cases for the court to determine on a motion to dismiss that a statement is immaterial as a matter of law, Defendants maintain that this is not such a case. As demonstrated in the Memorandum the Court can, and in this case should, conclude that the dollar amounts at issue in the statements or omission regarding the government contract about which Plaintiffs complain are immaterial as a matter of law. (Mem. at 39.) With regard to Defendants' puffery argument, Plaintiffs ignore

the cases cited in the Memorandum holding that statements nearly identical to many of those in the Complaint were inactionable puffery (*id.* at 37-38) and instead insist that when the statements are considered in context they cannot be considered puffery. (Opp. at 48-49.) But the courts in the cases cited in the Memorandum considered the context of the statements they reviewed, too, and still found them to be inactionable puffery. (Mem. at 37-38.) This Court should do the same.

## VII. PLAINTIFFS DO NOT PLEAD WHO MADE THE STATEMENTS ABOUT WHICH THEY COMPLAIN WITH THE PARTICULARITY REQUIRED BY THE PSLRA.

In the Memorandum Defendants demonstrated that each of the Individual Defendants cannot be held responsible for each and every allegedly misleading statement about which Plaintiffs complain because: (a) Plaintiffs do not plead with the particularity required by the PSLRA that each Defendant is legally responsible for each statement; and (b) Plaintiffs' explicit invocation of the Group Pleading Doctrine in the Complaint (*see* Compl. ¶ 21) cannot overcome this flaw because the doctrine did not survive the passage of the PSLRA. (Mem. at 45-47.)

In their Opposition, Plaintiffs argue they do not need to resort to the Group Pleading Doctrine because they identify with particularity the specific statements allegedly made by each Individual Defendant during the Class Period or, in the alternative, that the doctrine survived the PSLRA. (Opp. at 53-54.) Defendants do not disagree that each of the allegedly false and misleading statements in the

Complaint is allegedly attributed to at least one of the Defendants. What Defendants do dispute is that a claim can be stated against the Individual Defendants for statements that were not explicitly attributed to them individually simply because Plaintiffs invoked the Group Pleading Doctrine in the Complaint. (Mem. at 45.) Therefore, to the extent Plaintiffs seek to hold the Defendants responsible as a group for each and every one of the allegedly false and misleading statements about which Plaintiffs complain, Defendants respectfully submit that the Court should follow the authorities cited in their Memorandum (*id.* at 45-47), conclude that the Group Pleading Doctrine did not survive the PSLRA, and hold that Plaintiffs cannot state a claim against any Individual Defendant based on alleged statements not explicitly attributed to that Individual Defendant in the Complaint.[4]

## VIII. THE COURT SHOULD DISMISS THE COMPLAINT WITH PREJUDICE.

In a footnote to their Opposition, Plaintiffs request leave to amend their claims if the Court is inclined to dismiss their Complaint. (Opp. at 55 n.20) Defendants respectfully submit that the Court should reject Plaintiffs' request as untimely and inadequate. *See Lake v. Arnold*, 232 F.3d 360, 374 (3d Cir. 2000)

[4] Plaintiffs argue with regard to their §20(a) claim that since they have adequately alleged primary violations of §10(b) against Defendants they have also adequately alleged violations of §20(a). (Opp. at 54-55.) For the reasons set forth herein and in the Memorandum, Defendants maintain that Plaintiffs' Complaint does not state a claim under §10(b) *or* § 20(a). (Mem. at 47-49.)

("[Plaintiffs'] failure to provide a draft amended complaint [is] an adequate basis on which the court could deny the plaintiff's request"); *see also Ramsgate Court Townhome Ass'n v. West Chester Borough*, 313 F.3d 157, 161 (3d Cir. 2002) (finding no error to ignore plaintiff's request to amend where request consisted of a single sentence in opposition brief and plaintiff never filed a motion to amend, or provided the court with a proposed amended complaint).

## 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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