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Briefs and Other Related Documents

In re **Exide** TechnologiesBkrtcy.D.Del.,2006.
United States Bankruptcy Court,D. Delaware.
In re **EXIDE** TECHNOLOGIES et al., Debtors.
No. 02-11125-KJC.

April 3, 2006.

Background: Chapter 11 debtor sought court approval of its decision to **reject** integrated asset purchase and trademark licensing agreement.

Holdings: The Bankruptcy Court, Kevin J. Carey, J., held that:

(1) agreement qualified as "executory contract," as that term is used in Bankruptcy Code;

(2) debtor would be allowed to **reject** agreement, as representing appropriate exercise of business judgment by debtor; and

(3) rejection by debtor of its exclusive trademark licensing agreement would terminate licensee's ability to use mark and result in estate's reacquiring right to use trademark in whatever capacity or market debtor had previously been barred from doing so.

Motion granted.

West Headnotes

[1] Bankruptcy 51  **3116**

51 Bankruptcy
51IX Administration
51IX(C) Debtor's Contracts and Leases
51k3115 Effect of Acceptance or Rejection
51k3116 k. Partial Assumption; Burdens and Benefits. Most Cited Cases
Debtor's executory contract must be assumed or rejected in toto, and may not be bifurcated into those parts that will be rejected and those that will not. 11 U.S.C.A. § 365.

[2] Bankruptcy 51  **3116**

51 Bankruptcy
51IX Administration
51IX(C) Debtor's Contracts and Leases
51k3115 Effect of Acceptance or Rejection
51k3116 k. Partial Assumption; Burdens and Benefits. Most Cited Cases
All of the executory contracts that comprise an integrated agreement between debtor and other nondebtor party must either be assumed or rejected, since they all make up one contract. 11 U.S.C.A. § 365.

[3] Bankruptcy 51  **3117**

51 Bankruptcy
51IX Administration
51IX(C) Debtor's Contracts and Leases
51k3117 k. Proceedings. Most Cited Cases
Burden of proof is on party seeking to **reject** debtor's contract to demonstrate that contract is executory. 11 U.S.C.A. § 365.

[4] Bankruptcy 51  **3106**

51 Bankruptcy
51IX Administration
51IX(C) Debtor's Contracts and Leases
51k3105 Contracts Assumable; Assignability
51k3106 k. Executory Nature in General. Most Cited Cases
Contract is "executory," within meaning of bankruptcy statute governing debtor's executory contracts and unexpired leases, when obligation of both the debtor and the other party to contract are so far unperformed that failure of either to complete performance would constitute a material breach excusing performance of the other. 11 U.S.C.A. § 365.

[5] Bankruptcy 51  **3106**

51 Bankruptcy
51IX Administration
51IX(C) Debtor's Contracts and Leases
51k3105 Contracts Assumable; Assignability
51k3106 k. Executory Nature in General. Most Cited Cases
Time for testing whether there are material unperformed obligations on both sides, as required for contract to qualify as "executory contract" under bankruptcy statute governing debtor's executory contracts and unexpired leases, is time bankruptcy petition was filed. 11 U.S.C.A. § 365.

[6] Bankruptcy 51  **3106**

51 Bankruptcy
51IX Administration
51IX(C) Debtor's Contracts and Leases
51k3105 Contracts Assumable; Assignability
51k3106 k. Executory Nature in General. Most Cited Cases
To determine whether Chapter 11 debtor's contract contained material unperformed obligations on petition date, as required for contract to qualify as "executory contract," bankruptcy court had to consider contract principles under New York law, the relevant nonbankruptcy law that was designated by parties in choice of law provision. 11 U.S.C.A. § 365.

[7] Contracts 95  **317**

95 Contracts
95V Performance or Breach
95k317 k. Effect of Breach in General. Most Cited Cases
Under New York contract law, obligation is "material" if breach of the same would justify other party to suspend his own performance or defeat the purpose of entire transaction.

[8] Contracts 95  **317**

95 Contracts
95V Performance or Breach
95k317 k. Effect of Breach in General. Most Cited Cases
Under New York law, contractual obligation is "material" if it relates to root or essence of contract.

[9] Contracts 95  **317**

95 Contracts
95V Performance or Breach
95k317 k. Effect of Breach in General. Most Cited Cases
Under New York law, in order for contractual obligation to qualify as "material" obligation, it must be material at time agreement is executed.

[10] Bankruptcy 51  **3106**

51 Bankruptcy
51IX Administration
51IX(C) Debtor's Contracts and Leases
51k3105 Contracts Assumable; Assignability
51k3106 k. Executory Nature in General. Most Cited Cases
Integrated asset purchase and trademark licensing agreement between Chapter 11 debtor and a prepetition purchaser of its industrial **battery** division, pursuant to which purchaser had ongoing obligation to use debtor's trademark only within industrial **battery** business and to maintain quality of any **batteries** that it sold under this trademark, and debtor had ongoing obligation to maintain registration for trademark, to prosecute all substantial claims of infringement, and to continue to make contributions to employee pension plans, qualified as "executory contract," as that term is used in Bankruptcy Code. 11 U.S.C.A. § 365.

[11] Bankruptcy 51  **3106**

51 Bankruptcy
51IX Administration
51IX(C) Debtor's Contracts and Leases
51k3105 Contracts Assumable; Assignability
51k3106 k. Executory Nature in General. Most Cited Cases
Exclusive remedies clause in integrated asset purchase and trademark licensing agreement between Chapter 11 debtor and prepetition purchaser of its industrial **battery** division related solely to claims for

indemnification and did not affect either party's ability to terminate agreement for other party's breach of its remaining material obligations thereunder or prevent agreement from qualifying as "executory contract," as that term is used in Bankruptcy Code. 11 U.S.C.A. § 365.

[12] Contracts 95 278(.5)

95 Contracts
95V Performance or Breach
95k278 Performance of Conditions
95k278(.5) k. In General. Most Cited Cases
Under New York law, while contracting party's failure to fulfill condition excuses performance by other party whose performance is so conditioned, it is not, without independent promise to perform that condition, a breach of contract, which subjects nonfulfilling party to liability for damages.

[13] Contracts 95 218

95 Contracts
95II Construction and Operation
95II(E) Conditions
95k218 k. Nature and Scope in General. Most Cited Cases
Under New York law, whether particular term of agreement imposes duty or is merely a condition is matter of contract interpretation.

[14] Bankruptcy 51 3106

51 Bankruptcy
51IX Administration
51IX(C) Debtor's Contracts and Leases
51k3105 Contracts Assumable; Assignability
51k3106 k. Executory Nature in General. Most Cited Cases
Under integrated asset purchase and trademark licensing agreement between Chapter 11 debtor and prepetition purchaser of its industrial **battery** division, purchaser's ongoing obligation to use debtor's trademark only within industrial **battery** business and to maintain quality of any **batteries** that it sold under this trademark were not mere "conditions" but material unperformed "obligations" of purchaser, which helped to make parties' contract "executory," where purchaser agreed affirmatively to maintain quality standards for trademark and debtor devoted some effort to monitoring quality of **batteries** that purchaser produced, and where purchaser, to extent it used debtor's trademark, agreed to do so only in accordance with terms of agreement. 11 U.S.C.A. § 365.

[15] Bankruptcy 51 3106

51 Bankruptcy
51IX Administration
51IX(C) Debtor's Contracts and Leases
51k3105 Contracts Assumable; Assignability
51k3106 k. Executory Nature in General. Most Cited Cases
Royalty-free, exclusive right to use Chapter 11 debtor's trademark on **batteries** that it manufactured, which prepetition purchaser of debtor's industrial **battery** division received under integrated agreement between parties, was in nature of "license" rather than of "closed sale," for purpose of deciding whether parties' agreement was still "executory" on petition date, where debtor retained ownership of and control over use of trademark, required purchaser to maintain quality of mark, and prohibited purchaser from transferring or sublicensing mark without debtor's consent. 11 U.S.C.A. § 365.

[16] Bankruptcy 51 3106

51 Bankruptcy
51IX Administration
51IX(C) Debtor's Contracts and Leases
51k3105 Contracts Assumable; Assignability
51k3106 k. Executory Nature in General. Most Cited Cases
Generally, license agreement is "executory contract," as that term is used in the Bankruptcy Code. 11 U.S.C.A. § 365.

[17] Bankruptcy 51 3111

51 Bankruptcy
51IX Administration
51IX(C) Debtor's Contracts and Leases
51k3110 Grounds for and Objections to Assumption, Rejection, or Assignment
51k3111 k. "Business Judgment" Test in General. Most Cited Cases
Propriety of decision to **reject** debtor's executory

contract is governed by "business judgment" standard. 11 U.S.C.A. § 365.

[18] Bankruptcy 51  **3111**

51 Bankruptcy
51IX Administration
51IX(C) Debtor's Contracts and Leases
51k3110 Grounds for and Objections to Assumption, Rejection, or Assignment
51k3111 k. "Business Judgment" Test in General. Most Cited Cases
Under "business judgment" standard employed by court in ruling on request to **reject** debtor's executory contract, court must examine whether reasonable business person would make similar decision under similar circumstances; standard is not difficult one to satisfy, and requires only a showing that rejection will benefit estate. 11 U.S.C.A. § 365.

[19] Bankruptcy 51  **3111**

51 Bankruptcy
51IX Administration
51IX(C) Debtor's Contracts and Leases
51k3110 Grounds for and Objections to Assumption, Rejection, or Assignment
51k3111 k. "Business Judgment" Test in General. Most Cited Cases
Under "business judgment" standard employed by court in ruling on request to **reject** debtor's executory contract, court may not substitute its own judgment for that of debtor. 11 U.S.C.A. § 365.

[20] Bankruptcy 51  **3111**

51 Bankruptcy
51IX Administration
51IX(C) Debtor's Contracts and Leases
51k3110 Grounds for and Objections to Assumption, Rejection, or Assignment
51k3111 k. "Business Judgment" Test in General. Most Cited Cases
Chapter 11 debtor would be allowed to **reject** executory asset purchase and trademark licensing agreement, in order to secure for estate the benefits of again being able to use mark in all markets, thereby eliminating customer confusion and securing for debtor the benefits of brand unification, where debtor had conducted extensive analyses and considered benefits and harms of rejection, where licensee's alleged $67 million rejection damages claim was speculative at best and, as compared with unsecured claims of roughly $900 million, would not significantly diminish dividend to unsecured creditors in any event, and where decision to **reject** had support of unsecured creditors' committee. 11 U.S.C.A. § 365.

[21] Bankruptcy 51  **3117**

51 Bankruptcy
51IX Administration
51IX(C) Debtor's Contracts and Leases
51k3117 k. Proceedings. Most Cited Cases
Sales forecasts which were prepared by corporate Chapter 11 debtor's employees based on debtor's own internal data, regarding likely effects on debtor's business if debtor was able to reacquire right to use trademark from licensee and succeeded in its efforts at brand unification, were relevant and could be considered by court in deciding whether debtor had exercised requisite business judgment in deciding to **reject** licensing agreement, notwithstanding that much of information in reports had been redacted on confidentiality grounds.

[22] Bankruptcy 51  **2163**

51 Bankruptcy
51II Courts; Proceedings in General
51II(B) Actions and Proceedings in General
51k2163 k. Evidence. Most Cited Cases
Questions concerning reliability, accuracy or completeness of document go to weight of evidence, not to its admissibility.

[23] Bankruptcy 51  **3117**

51 Bankruptcy
51IX Administration
51IX(C) Debtor's Contracts and Leases
51k3117 k. Proceedings. Most Cited Cases
Sales forecasts which were prepared by corporate Chapter 11 debtor's employees based on debtor's own internal data, regarding likely effects on debtor's business if debtor was able to reacquire right to use trademark from licensee and succeeded in its efforts at brand unification, were admissible under "business records" exception to hearsay rule in proceeding to decide whether debtor exercised requisite business judgment in electing to **reject** licensing agreement,

where testimony of debtor's officers established that it was part of debtor's routine practice to conduct kind of analyses contained in these forecasts, that information contained in forecasts was recorded at or near time it was obtained, and that information was reliable. Fed.Rules Evid.Rule 803(6), 28 U.S.C.A.

[24] Bankruptcy 51 2163

51 Bankruptcy
51II Courts; Proceedings in General
51II(B) Actions and Proceedings in General
51k2163 k. Evidence. Most Cited Cases
Documents created expressly for purpose of litigation do not fall within "business records" exception to hearsay rule, as lacking requisite indicia of reliability and trustworthiness. Fed.Rules Evid.Rule 803(6), 28 U.S.C.A.

[25] Bankruptcy 51 2163

51 Bankruptcy
51II Courts; Proceedings in General
51II(B) Actions and Proceedings in General
51k2163 k. Evidence. Most Cited Cases
"Business records" exception to hearsay rule does not require that foundation evidence for admission of business records be provided by actual custodian of records; rather, other qualified witnesses are permitted to lay foundation, and the group of those who may fall within this rubric is broad. Fed.Rules Evid.Rule 803(6), 28 U.S.C.A.

[26] Bankruptcy 51 2163

51 Bankruptcy
51II Courts; Proceedings in General
51II(B) Actions and Proceedings in General
51k2163 k. Evidence. Most Cited Cases
To be qualified to lay foundation for admission of evidence under "business records" exception to hearsay rule, witness need only have familiarity with business' record-keeping practices and be able to attest (1) that declarant in the records had personal knowledge to make accurate statements; (2) that declarant recorded statements contemporaneously with actions which were subject of reports; (3) that declarant made record in regular course of the business activity; and (4) that such records were regularly kept by business. Fed.Rules Evid.Rule 803(6), 28 U.S.C.A.

[27] Bankruptcy 51 3110.1

51 Bankruptcy
51IX Administration
51IX(C) Debtor's Contracts and Leases
51k3110 Grounds for and Objections to Assumption, Rejection, or Assignment
51k3110.1 k. In General. Most Cited Cases
Impact of potential rejection damages claim on estate is relevant in determining appropriateness of decision to **reject** debtor's executory contract. 11 U.S.C.A. § 365.

[28] Bankruptcy 51 3110.1

51 Bankruptcy
51IX Administration
51IX(C) Debtor's Contracts and Leases
51k3110 Grounds for and Objections to Assumption, Rejection, or Assignment
51k3110.1 k. In General. Most Cited Cases
In reviewing Chapter 11 debtor's decision to **reject** executory contract, bankruptcy court need not determine exact amount of other party's rejection damages claim, but need only determine whether this rejection damages claim will be so large as to make debtor's decision to **reject** contract unreasonable. 11 U.S.C.A. § 365.

[29] Bankruptcy 51 3110.1

51 Bankruptcy
51IX Administration
51IX(C) Debtor's Contracts and Leases
51k3110 Grounds for and Objections to Assumption, Rejection, or Assignment
51k3110.1 k. In General. Most Cited Cases
Burden or impact that rejection of debtor's executory contract will have on nondebtor party is not factor to be considered in determining propriety of decision to **reject** contract. 11 U.S.C.A. § 365.

[30] Bankruptcy 51 3110.1

51 Bankruptcy

51IX Administration
51IX(C) Debtor's Contracts and Leases
51k3110 Grounds for and Objections to Assumption, Rejection, or Assignment
51k3110.1 k. In General. Most Cited Cases
That Chapter 11 debtor's decision to **reject** its executory contract had support of unsecured creditors' committee was significant factor weighing in favor of permitting rejection. 11 U.S.C.A. § 365.

[31] Bankruptcy 51  **3115.1**

51 Bankruptcy
51IX Administration
51IX(C) Debtor's Contracts and Leases
51k3115 Effect of Acceptance or Rejection
51k3115.1 k. In General. Most Cited Cases
Rejection by Chapter 11 debtor-licensor of its exclusive trademark licensing agreement would terminate licensee's ability to use mark and result in estate's reacquiring right to use trademark in whatever capacity or market debtor had previously been barred from doing so by licensing agreement; trademark was not "intellectual property," as that term was used in provision of the Bankruptcy Code according special rights to licensees upon debtor-licensor's rejection of license to use intellectual property. 11 U.S.C.A. § § 101(35A), 365(n).

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OPINION [FN1]

FN1. This Opinion constitutes the findings of fact and conclusions of law required by Fed.R.Bankr.P. 7052. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § § 1334 and 157(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(1) and (b)(2)(A) and (O).KEVIN J. CAREY, Bankruptcy Judge.

INTRODUCTION

Exide Technologies, Inc. and its affiliated debtors, as debtors and debtors in possession in the above-captioned matter (collectively "**Exide**"), seek approval from this Court to **reject** certain agreements entered into with **EnerSys**, Inc. ("**EnerSys**").[FN2] **EnerSys** vigorously opposes **Exide's** decision to **reject**, contending that the agreements are not executory and that even if they are, **Exide** did not exercise proper business judgment in making such decision. After an arduous and lengthy pre-trial period, hearings were held on March 3, 4, 5, 12, 17, 25, 26 and 31, 2004, to consider **Exide's** rejection of the agreements.

FN2. Upon the Debtor's motion (Docket No. 17), the Court entered an Order (by my predecessor in this case, The Honorable John C. Ackerd) (Docket No. 62) establishing a procedure for rejection of executory contracts, pursuant to which **Exide** now has filed the four Notices of Rejection (Docket Nos. 1614, 1615, 1617 and 1618). For ease of reference, these Notices will be referred to collectively as **Exide's** "Motion" or "Motion to **Reject**."
At the time **Exide** entered into the agreements with **EnerSys**, **Exide's** name was **Exide** Corporation. However, after it merged with GNB Technologies, Inc. in 2000, **Exide** changed its name to **Exide** Technologies. **EnerSys** was known as Yuasa **Battery** (America), Inc. at the time the agreements were executed. Sometime afterward, Yuasa **Battery** (America), Inc. changed its name to Yuasa-**Exide**, Inc. and merged with Yuasa, Inc. in 1998. Yuasa, Inc. survived the merger and in 2000 changed its name to **EnerSys**. For the purposes of this Opinion, the terms **Exide** and **EnerSys** will include their predecessors when applicable.

For the reasons set forth below, I will approve **Exide's** decision to **reject** the agreements.

BACKGROUND

In 1991, **Exide** entered into a series of agreements with **EnerSys** for the sale of substantially all of **Exide's** industrial **battery** division. The parties executed over twenty-three agreements as part of the transaction. The following four agreements are at the heart of this dispute: (1) the Trademark and Trade Name License Agreement, dated June 10, 1991 ("Trademark License"), (2) the Asset Purchase Agreement, dated June 10, 1991, (3) the Administrative Services Agreement, dated June 10, 1991, and (4) a letter agreement, dated December 27, 1994 (collectively, all four are referred to herein as the "Agreement").[FN3] I ruled previously that the Agreement is a fully integrated, unambiguous document. *See* 11/20/03 Tr. 25:23-26:4; 3/12/04 Tr. 3:18-4:22.

FN3. **Exide** also sought to **reject** two other agreements, (I) the Administrative Services Agreement dated April 1, 1992, and (ii) the Miscellaneous Services Agreement dated April 1, 1992. **Enersys** did not oppose **Exide's** rejection of the Miscellaneous Services Agreement and withdrew its objection to rejection of the 1992 Administrative Services Agreement. **EnerSys** asserts that neither of these two agreements remain in effect and that neither is related to the 1991 transaction. **EnerSys** Trial Brief at 3, n. 3.

As part of the transaction, **EnerSys** paid in excess of $135 million at closing. In exchange for such payment, **EnerSys** received various assets, including manufacturing plants, equipment and certain intellectual***228** property rights. Certain **Exide** employees in the industrial **battery** division became **EnerSys** employees.

Exide owns a trademark that it used in connection with its transportation **battery** business (the "**Exide** mark").[FN4] **Exide** wanted to continue to use the **Exide** mark outside of the industrial **battery** business. Conversely, **EnerSys** wanted to use the **Exide** mark in the industrial **battery** business. To accommodate the needs of both parties, **Exide** granted **EnerSys** a perpetual, exclusive, royalty-free license to use the **Exide** mark in the industrial **battery** business. This way, **Exide** retained ownership of the mark and could use it outside the industrial **battery** business and **EnerSys** could use the mark exclusively within the industrial **battery** business. The license of the **Exide** mark was subject to certain conditions and could be terminated as set forth in the Agreement.

FN4. For purposes of this Opinion, reference to the "**Exide** mark" includes those marks licensed to **Enersys** under the Agreement, as well as the trade name "**Exide**".

For almost a decade following the closing of the transaction, the parties enjoyed a relatively amicable business relationship. In the year 2000, the parties agreed to the early termination of a ten-year non-competition agreement, which termination allowed **Exide** to re-enter the industrial **battery** business. Shortly after the non-competition agreement was terminated, **Exide** re-entered the industrial **battery** business when it purchased GNB Industrial **Battery** Company.

Prior to re-entering the industrial **battery** business, **Exide's** strategic goal was to unify its corporate image, including all of its brands that it used on the various products that **Exide** produced. The single name and mark that **Exide** wanted to use was "**Exide**." Its corporate name was **Exide** and **Exide** believed that there was significant goodwill attached to that name. However, **EnerSys** had the exclusive right to use the **Exide** mark in the industrial **battery** business. **Exide** made several unsuccessful prepetition overtures to **EnerSys** in attempts to regain the **Exide** mark. **Exide's** chapter 11 proceeding now provides it with the opportunity to regain the **Exide** mark by rejecting the Agreement. **EnerSys** has objected to the rejection.[FN5]

FN5. **EnerSys's** President and CEO, Mr. John Craig, described poignantly the tenor of this dispute when he testified that "**Exide** ... is trying to ... steal back the [**Exide**] trademark and I don't think that is fair." *See* 3/12/04 Tr. 176:1-4.

DISCUSSION

The Court is called upon to determine whether the Agreement is an executory contract and, if so, whether **Exide** exercised proper business judgment in rejecting the Agreement.

I. *Rejection of the Agreement.*

[1][2] An executory contract must be assumed or rejected *in toto*. *See* Sharon Steel Corp. v. National Fuel Gas Distribution Corp., 872 F.2d 36, 41 (3d Cir.1989); *In re Teligent, Inc.*, 268 B.R. 723, 728 (Bankr.S.D.N.Y.2001). A contract will not be bifurcated into parts that will be rejected and those that will not. *See* *In re Metro Transp. Co.*, 87 B.R. 338, 342 (Bankr.E.D.Pa.1988). Correspondingly, all of the contracts that comprise an integrated agreement must either be assumed or rejected, since they all make up one contract. *See* *Philip Servs. Corp. v. Luntz (In re Philip Servs., Inc.)*, 284 B.R. 541, 547-548 (Bankr.D.Del.2002), *aff'd* 303 B.R. 574 (D.Del.2003); *In re Karfakis*, 162 B.R. 719, 725 (Bankr.E.D.Pa.1993). **EnerSys** contends that rejection must be denied ***229** because **Exide** failed to **reject** all of the agreements executed between the parties (not just the agreements at the center of dispute in this case), but I have already determined that the Trademark License, the Asset Purchase Agreement, the Administrative Services Agreement, and the December 27, 1994, letter agreement all comprise one, integrated agreement.

II. *Is the Agreement Executory?*

[3] Section 365(a) of the Bankruptcy Code allows debtors in possession to **reject** an executory contract.[FN6] *See* 11 U.S.C. § 365(a). The party seeking to **reject** a contract bears the burden of demonstrating that it is executory. *See* *DSR, Inc. v. Manuel (In re Hamilton Roe Int'l, Inc.)*, 162 B.R. 590, 593 (Bankr.M.D.Fla.1993); *In re Rachels Industries, Inc.*, 109 B.R. 797, 802 (Bankr.W.D.Tenn.1990).

> FN6. 11 U.S.C. § 365(a) provides:
> [e]xcept as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or **reject** any executory contract or unexpired lease of the debtor.

[4] In determining whether a contract is executory and, hence, subject to rejection, courts in this Circuit utilize the Countryman standard, which provides that a contract is executory when "the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other." Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 Minn. L.Rev. 439, 460 (1973); *Sharon Steel*, 872 F.2d at 39; *In re Waste Systems Int'l, Inc.*, 280 B.R. 824, 826-827 (Bankr.D.Del.2002). "Thus, unless both parties have unperformed obligations that would constitute a material breach if not performed, the contract is not executory under § 365." *Enterprise Energy Corp. v. United States (In re Columbia Gas Sys., Inc.)*, 50 F.3d 233, 239 (3d Cir.1995). Consequently, I must determine whether both parties have unperformed material obligations under the Agreement. *See* *Columbia Gas*, 50 F.3d at 239; *Waste Systems Int'l*, 280 B.R. at 827; *In re Access Beyond Technologies, Inc.*, 237 B.R. 32, 43 (Bankr.D.Del.1999). In doing so, I look initially at the "four corners" of the Agreement. *See* *Shoppers World Community Ctr., L.P. v. Bradlees Stores, Inc. (In re Bradlees Stores, Inc.)*, 2001 WL 1112308, at *8, 2001 U.S. Dist. LEXIS 14755, at *27 (S.D.N.Y. September 20, 2001) ("the executoriness analysis examines an agreement on its face to determine whether there are material obligations that require substantial performance from the parties").

[5][6] "The time for testing whether there are material unperformed obligations on both sides is when the bankruptcy petition is filed." *Columbia Gas*, 50 F.3d at 240; *see* *Waste Systems Int'l*, 280 B.R. at 827; *In re HQ Global Holdings, Inc.*, 290 B.R. 507, 510 (Bankr.D.Del.2003). **Exide** sought chapter 11 relief on April 15, 2002. To determine whether the Agreement contained any material obligations as of April 15, 2002, I must "consider contract principles under relevant nonbankruptcy law." *Columbia Gas*, 50 F.3d at 240 n. 10. The parties designated New York as their choice of law governing the Agreement.

A. *Material Obligations*

[7][8][9] Under New York law, an obligation is material if a breach of the same "would justify the other party to suspend his own performance, or ... defeat the ***230** purpose of the entire transaction." *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 895 (2d Cir.1976); *accord* *Bradlees Stores*, 2001 WL 1112308, at *2001 U.S. Dist. LEXIS 14755, at *25. That is, an obligation is material if it relates to the root or essence of the contract. *See* *Medical Malpractice Ins. Ass'n v. Hirsch (In re Lavigne)*, 114 F.3d 379, 387 (2d Cir.1997); *see also* *Philip Services*, 284 B.R. at 547. An obligation must be material at the time the agreement is executed.

[10] **Exide** contends that the following are material obligations under the Agreement:

(1) **Exide** must refrain from suing **EnerSys** for trademark infringement for the use of the **Exide** mark (i.e., must permit **EnerSys** to use the **Exide** mark) ("the Use Grant");

(2) **EnerSys** must refrain from using the **Exide** mark outside of the industrial **battery** business ("**EnerSys's** Use Restriction");

(3) **Exide** must refrain from using the **Exide** mark within the industrial **battery** business ("**Exide's** Use Restriction");

(4) **EnerSys** must maintain a minimum level of quality for its products that contain the **Exide** mark ("the Quality Standards");

(5) **Exide** must make payments into a pension plan maintained for the benefit of its employees ("Pension Plan Obligation");

(6) **Exide** must maintain the registration of the **Exide** mark ("Registration Obligation");

(7) **Exide** and **EnerSys** must indemnify each other from and against certain costs, losses, liabilities, damages, lawsuits, claims, etc. ("Indemnification Obligations"); and

(8) **Exide** and **EnerSys** must cooperate with one another after the closing of the Agreement in order to effectuate certain provisions contained therein ("Further Assurances Obligations").

1. Paragraph 13.6 of the Asset Purchase Agreement.

[11] **EnerSys** claims that paragraph 13.6 of the Asset Purchase Agreement makes clear that none of the foregoing obligations are material, because **Exide's** remedies are limited to those remedies contained in paragraph 13.6 of the Asset Purchase Agreement, which provides:

Exclusive Remedies. The indemnification provided for in this Article XIII shall be the exclusive remedy available to any Indemnitee against any Indemnitor for any Damages hereunder to the exclusion of all other common law or statutory remedies, including without limitation the right to contribution under CERCLA or analogous state law; *provided,* however, that notwithstanding the foregoing, the parties hereby agree that failure of the parties to perform certain of their respective obligations under this Agreement or the Ancillary Agreements may result in consequences to the non-breaching party for which money damages may not be sufficient. In such case, the non-breaching party shall be entitled to seek specific performance and other equitable relief, which shall be cumulative and non-exclusive of any other remedy available to such non-breaching party pursuant to this Article XIII.

EnerSys contends that **Exide** does not have the right to terminate all future performance under the Agreement upon default because **Exide's** remedies are limited strictly to indemnification, or equitable relief, when monetary damages prove to be insufficient. If **Exide** cannot terminate its performance upon default, which element is necessary to satisfy the Countryman ***231** test, **EnerSys** argues that the Agreement cannot be executory.[FN7]

FN7. **Exide** argues that **EnerSys** is precluded from making this argument because **EnerSys** failed to identify it in response to **Exide's** contention interrogatories or at any time prior to its closing argument. Insofar as **EnerSys** failed to identify this argument until closing arguments, **EnerSys** waived its right to assert the same. *See, e.g., Thorn EMI N. America, Inc. v. Intel Corp.*, 936 F.Supp. 1186, 1191 (D.Del.1996), *aff'd*, 157 F.3d 887 (Fed.Cir.1998), *cert. denied* 526 U.S. 1112, 119 S.Ct. 1756, 143 L.Ed.2d 788 (1999) (holding that party is prevented from raising a claim or defense that was not adequately described in a response to a contention interrogatory or joint pre-trial order); *CPC Int'l, Inc. v. Archer Daniels Midland Co.*, 831 F.Supp. 1091, 1102-1103 (D.Del.1993), *aff'd* 31 F.3d 1176 (Fed.Cir.1994), *cert. denied* 513 U.S. 1184, 115 S.Ct. 1176, 130 L.Ed.2d 1129 (1995) (finding that ADM waived the right to assert certain matters as defenses to CPC's claims of infringement by failing to identify them in response to CPC's interrogatories and by failing to include them in the draft pretrial order). Even were I to consider **EnerSys's** argument, the argument fails.

Paragraph 13.6 of the Asset Purchase Agreement

does not preclude **Exide** from terminating performance under the Agreement. When viewing paragraph 13.6 in relation to the other provisions of the Asset Purchase Agreement, it is apparent that paragraph 13.6 relates solely to claims for indemnification. The Asset Purchase Agreement contains a separate article regarding termination. Furthermore, the language of paragraph 13.6 suggests that the non-breaching party is entitled to equitable relief in addition to monetary relief with respect to any claim for indemnification. It does not, as **EnerSys** argues, limit a non-breaching party's remedies under the Agreement solely to indemnification or equitable relief.

2. Paragraph 8 of the Trademark License.

Paragraph 8 of the Trademark License provides:
Termination. Licensor shall have the right to terminate this Trademark License if (a) products covered hereunder and sold by Licensee in connection with the Licensed Marks fail to meet the Qaulity Standards, or (b) Licensee uses, assigns or sublicenses its rights under the Licensed Trade Name or the Licensed Marks outside the scope of the Licensed Business [FN8] and, in either such case, reasonable measures are not initiated to cure such failure or improper use within ninety (90) days after written notice from Licensor. Upon termination of this Trademark License, Licensee and its sublicensees shall, within a reasonable period of time not to exceed two (2) years, discontinue all use of the Licensed Marks and Licensee shall discontinue all use of the Licensed Trade Name and shall cancel all filings or registrations made pursuant to Paragraph 10 hereof and change its corporate or trade name registrations, if any, to exclude the Licensed Trade Name; provided, however, that if any failure to meet Quality Standards or improper use of, or assignment or sublicense of rights under, the Licensed Trade Name or Licensed Marks occurs in any jurisdiction other than the United States and is not remedied as permitted hereunder, this Trademark License will terminate only with respect to the jurisdiction in which such failure or improper use occurred.

FN8. Licensed Business refers to the industrial **battery** business (*see* paragraphs 1[A] and [B] of the Trademark License).

EnerSys's Use Restriction and the Quality Standards are material, since both relate to the foundation of the Agreement.[FN9] ***232** These restrictions are necessary because they protect **Exide's**, as well as **EnerSys's**, interests in the **Exide** mark. A default of either would result in a material breach. Therefore, **EnerSys's** agreement to refrain from using the **Exide** mark outside of the industrial **battery** business, as well as to maintain quality standards set for the mark, are material components to which **EnerSys** remained subject as of the petition date.

FN9. *See* section II.A.3. of this Opinion, *infra.*

If **EnerSys** violates its Use Restriction or the Quality Standards, **Exide** may terminate the Trademark License. Contrary to **EnerSys's** contentions, a breach of its Use Restriction or the Quality Standards allows **Exide** to terminate the Agreement, not simply the Trademark License, because the Agreement is an integrated contract. Consequently, **Exide** may terminate the performance of any of its remaining obligations under the Agreement upon the breach of either obligation.

3. Conditions vs. Obligations

Alternatively, **EnerSys** contends that its Use Restriction and the Quality Standards are not obligations under the Agreement, but are conditions. Because the failure of a condition cannot result in a material breach, **EnerSys** argues that the Use Restriction and the Quality Standard cannot satisfy the Countryman test.

[12][13] There is a critical distinction in the law between the failure of a condition and a breach of a duty (i.e., a promise).[FN10] *See Columbia Gas*, 50 F.3d at 241. "While a contracting party's failure to fulfill a condition excuses performance by the other party whose performance is so conditioned, it is not, without an independent promise to perform the condition, a breach of contract subjecting the nonfulfilling party to liability for damages." *Merritt Hill Vineyards, Inc. v. Windy Heights Vineyard, Inc.*, 61 N.Y.2d 106, 113, 472 N.Y.S.2d 592, 460 N.E.2d 1077 (N.Y.1984) (citing Restatement (Second) of Contracts § 225). A party is not in breach of contract if a condition does not occur unless that party is under a duty to cause the occurrence of such condition. *See Columbia Gas*, 50 F.3d at 241. Whether a particular term of an agreement imposes a duty or is a condition is a matter of contract interpretation. *Id.*, at 241.

FN10. "A promise is 'a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.' " *Merritt Hill Vineyards, Inc. v. Windy Heights Vineyard, Inc.*, 61 N.Y.2d 106, 112, 472 N.Y.S.2d 592, 460 N.E.2d 1077 (1984) quoting Restatement (Second) of Contracts § 2(1)(1981). "A condition, by comparison, is 'an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.' " *Id.*, at 112, 472 N.Y.S.2d 592, 460 N.E.2d 1077 quoting Restatement (Second) of Contracts § 224 (1981).

a. *The Quality Standards.*

[14] Paragraph 5 of the Trademark License, which concerns the Quality Standards, provides, in relevant part, that:
[l]icensee shall maintain the standards of quality set by Licensor for the conduct of the Licensed Business under the Licensed Trade Name and the goods bearing the Licensed Marks which Licensor established prior to the execution of this Trademark License (the "Quality Standards").[FN11]

FN11. **Exide** had established quality standards prior to the execution of the Agreement. *See* 3/3/04 Tr. 69:20-71:18.

It is apparent that the parties intended the Quality Standards to be an affirmative undertaking rather than a condition. **EnerSys** agreed affirmatively to maintain the standards of quality for the mark set by ***233 Exide**. As such, the Quality Standards are an obligation. *See, e.g.*, *HQ Global Holdings*, 290 B.R. at 510 (noting that franchisees' duty to maintain quality standards under license was an obligation). **EnerSys** also argues that, even if the Quality Standards are material, **Exide** waived performance of **EnerSys's** duty to comply with the Quality Standards because **Exide** failed, *inter alia*, to enforce them. As a result, according to **EnerSys**, the Quality Standards cannot serve as a basis for executoriness to satisfy the Countryman test.

Paragraph 5 of the Trademark License also provides that:

[l]icensee agrees to furnish to Licensor, upon Licensor's request, representative samples of all labels, advertising materials and other associated materials used in the sale, offering for sale, or marketing of goods bearing the Licensed Trade Name or Licensed Marks to enable Licensor to confirm that the labeling and advertising meet the Quality Standards.

The evidence established that **Exide** did devote some effort at monitoring the quality of **EnerSys's batteries** bearing the **Exide** mark. **Exide** inspected **EnerSys's** plants and **batteries**, tested the **batteries** and received technical data about the **batteries** from **EnerSys**. *See* 3/3/04 Tr. 68:11-69:19. These efforts provided **Exide** with information about the quality of **EnerSys's batteries**. **Exide** was satisfied that **EnerSys** met the Quality Standards. Moreover, **Exide** was under no affirmative duty to track regularly and monitor the quality of **EnerSys's** products that contained the **Exide** mark to ensure that **EnerSys** was complying with the Quality Standards. Likewise, **EnerSys's** duty to comply with the Quality Standards was not made contingent upon **Exide's** efforts at monitoring **EnerSys's** products.

The circumstances here demonstrate that the quality control measures exercised by **Exide** were sufficient.[FN12] There was no evidence that **EnerSys** was not complying with the Quality Standards. The record reflects that **Exide** did not receive any reports from within the industrial **battery** industry regarding any significant problems with the quality of **EnerSys's batteries**. If anything, the evidence established that **EnerSys** was making high quality products. Indeed, **EnerSys** claims that it is the leading manufacturer of motive power **batteries** in the world.

FN12. The level of control required depends upon the particular circumstances of each case. *See United States Jaycees v. Philadelphia Jaycees*, 639 F.2d 134, 140 (3d Cir., 1981). *Cf. Creative Gifts, Inc. v. UFO*, 235 F.3d 540, 548 (10th Cir., 2000) (holding that a licensee is estopped from arguing that the licensor lost its rights in its mark because the licensor did not exercise adequate quality control over licensee's use of the mark).

b. ***EnerSys's** Use Restriction.*

Paragraph 2 of the Trademark License provides, in relevant part, that:

Licensor hereby grants to Licensee, and Licensee hereby accepts from Licensor, ... a perpetual, exclusive, world-wide, royalty-free license to use the Licensed Trade Name as a corporate name or trade name within the scope of the Licensed Business, and a non-exclusive, perpetual, world-wide, royalty-free license to use the Licensed Trade Name in connection with the motorcycle **battery** business, but only as part of the trade name or corporate name "Yuasa-**Exide**, Inc." While retaining the corporate name "Yuasa-**Exide**, Inc.", Licensee may sell products in businesses other than the Licensed Business and the motorcycle **battery** business but Licensee shall not sell such products under the Licensed Trade Name and shall sell such products under an assumed name, ***234** fictitious name or through some other mechanism whereby the Licensed Trade Name is not used before the public or trade in relation to such products.

Licensor hereby grants to Licensee, and Licensee hereby accepts from Licensor, ... a perpetual, exclusive, world-wide, royalty-free license to use the Licensed Marks within the scope of the Licensed Business on and in connection with the goods for which such Licensed Marks are registered or as otherwise permitted under applicable law within the scope of the Licensed Business ...

Furthermore, paragraph 8 of the Trademark License provides, in relevant part, that:Licensor shall have the right to terminate this Trademark License if ... Licensee uses, assigns or sublicenses it rights under the Licensed Trade Name or the Licensed Marks outside the scope of the Licensed Business ....

Under these two provisions, **EnerSys** is permitted to use the **Exide** mark within the industrial **battery** market. Although there is no affirmative undertaking by **EnerSys** actually to use the **Exide** mark, **EnerSys** is obliged to use the mark only in accordance with the terms of the Agreement. *See* *Novon Int'l, Inc. v. Novamont (In re Novon Int'l. Inc.)*, 2000 WL 432848, at *4, 2000 U.S. Dist. LEXIS 5169, at *12 (W.D.N.Y. March 31, 2000). **EnerSys** must observe the restrictions imposed by the grant of the license; the **EnerSys's** Use Restriction is an affirmative undertaking, or, obligation. *Id.*

4. Materiality of the Obligations

Lastly, **EnerSys** contends that notwithstanding the terms of paragraph 13.6 of the Asset Purchase Agreement and paragraph 8 of the Trademark License, none of the obligations identified by **Exide** are material.

a. *The Use Grant.*

Pursuant to the Use Grant, **Exide** is obligated to allow **EnerSys** to use the **Exide** mark subject to the terms of the Trademark License. In connection with the Use Grant, **Exide** also agreed to prosecute all substantial claims of infringement and oppose all attempted registrations of potentially confusing trademarks, trade names or service marks (paragraph 17 of the Trademark License). This is a material obligation. *See, e.g.,* *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers, Inc.)*, 756 F.2d 1043, 1046 (4th Cir.1985), *cert. denied* 475 U.S. 1057, 106 S.Ct. 1285, 89 L.Ed.2d 592 (1986) (holding that the licensor's contingent duty to defend infringement suits was a material obligation).[FN13]

FN13. **Exide** also has an ongoing duty to refrain from suing **EnerSys** for infringement of the mark. *See* *Everex Sys., Inc. v. Cadtrak Corp. (In re CFLC, Inc.)*, 89 F.3d 673, 677 (9th Cir.1996); *Novon Int'l*, 2000 WL 432848, at *4, 2000 U.S. Dist. LEXIS 5169, at *12; *Access Beyond Technologies*, 237 B.R. at 43. This is important since a "licensor's promise to refrain from suing the licensee for infringement is the raison d'etre for a [trademark] license." *Id.* A default by **Exide** in performing this duty would cause a material breach since **EnerSys** would no longer be getting the benefit of its bargain, i.e., the use of the mark. Thus, the Use Grant is a material obligation.

b. ***EnerSys's** Use Restriction and the Quality Standard.*

For the reasons previously set forth, **EnerSys's** Use Restriction and the Quality Standard are ongoing material obligations.[FN14]

FN14. **Exide** also argues that the extensive negotiations surrounding the terms of the Trademark License evidences the materiality of **EnerSys's** Use Restriction and the Quality Standard. In support of this

argument, **Exide** sought to introduce certain exhibits (**Exide** exhibits. 27, 28, 29, 30, 31 and 32) relating to the negotiations of the Agreement and prior drafts of the Agreement. **EnerSys** objected to the admission of **Exide** exhibits 27-32 on the grounds that such documents violated the parol evidence rule.

According to New York law, "where the parties have reduced their agreement to an integrated writing, the parol evidence rule operates to exclude evidence of all prior or contemporaneous negotiations between the parties offered to contradict or modify the terms of their writing." *Marine Midland Bank-Southern v. Thurlow*, 53 N.Y.2d 381, 387, 442 N.Y.S.2d 417, 425 N.E.2d 805 (1981); *see Holland v. Ryan*, 307 A.D.2d 723, 724[, 762 N.Y.S.2d 740] (N.Y.App.Div. 4th Dept.2003); *see also In re Worldcorp [WorldCorp], Inc.*, 252 B.R. 890, 895 (Bankr.D.Del.2000).

I have already concluded that the Agreement was a fully integrated, unambiguous document. Thus, the parol evidence rule is applicable. *See Marine Midland Bank[-Southern]*, 53 N.Y.2d at 387[, 442 N.Y.S.2d 417, 425 N.E.2d 805]; *see, e.g., Fr. Winkler KG v. Stoller*, 839 F.2d 1002, 1005 (3d Cir.1988) (noting that before the parol evidence rule can be applied, there must be a determination as to whether the parties have adopted a writing as the final and complete expression of their agreement).

However, **Exide** offers exhibits 27-32 only to demonstrate the materiality or importance of the provisions of the Trademark License. Such evidence is not barred by the parol evidence rule. *See, e.g., Chevron U.S.A. Inc. v. El-Khoury*, 285 F.3d 1159, 1165 (9th Cir.2002), *amended by, reh'g denied* No. 00-57126, 2002 U.S.App. LEXIS 9128 (9th Cir. May 14, 2002) (holding that the parol evidence rule does not bar the consideration of earlier draft agreements for purposes of demonstrating the parties' intent with respect to the importance of the terms in the agreement). **Exide** Exhibits 27-32 were not offered for the purpose of varying, contradicting or interpreting the terms of the Agreement.

235** c. ***Exide's *Use Restriction.*

The Use Grant gives **EnerSys** an exclusive license to use the **Exide** mark within the industrial **battery** business. It would be contrary to the terms of the Use Grant that **Exide** be permitted to use the **Exide** mark within the industrial **battery** business. Indeed, **Exide** agreed not to grant any licenses to third parties which would be inconsistent with **EnerSys's** use of the mark. This agreement, in and of itself, is a material obligation of **Exide**. *See, e.g., Otto Preminger Films, Ltd. v. Qintex Entertainment, Inc. (In re Qintex Entertainment, Inc.)*, 950 F.2d 1492, 1496 (9th Cir.1991) (holding that the licensor's duty to refrain from selling the rights to subdistribute movies to third parties was a significant obligation); *Fenix Cattle Co. v. Silver (In re The Select-A-Seat Corp.)*, 625 F.2d 290, 292 (9th Cir.1980) (holding that because of the exclusive nature of the license which the licensee received, the licensor was under a continuing obligation not to sell its software packages to third parties). Therefore, an agreement by **Exide** to forbear from using the **Exide** mark in the industrial **battery** business is a continuing, material obligation. *See, e.g., HQ Global Holdings*, 290 B.R. at 510 (holding that the franchisor's agreement to refrain from using the proprietary marks in the exclusive territories of the franchisees was an ongoing material obligation as of the petition date).

d. *Pension Plan Obligations.*

Under the Agreement, **Exide** was obligated to contribute to certain employee pension plans. Specifically, paragraph 7.2(b) of the Asset Purchase Agreement provides, in relevant part, that:

With respect to all defined benefit plans maintained by Seller as of the Closing Date ... Seller agrees that it shall be solely responsible to employees and former employees of the Division with respect to pension benefits accrued thereunder as of the Closing Date. Seller agrees to vest the Subject Employees ***236** immediately after such Closing Date in their accrued benefits, if any, under the **Exide** Hourly Employees' Pension Plan, the **Exide** Retirement Income Security Plan, and the **Exide** Corporate Pension Plan as of the Closing Date.

Furthermore, paragraph 7.3(a) of the Asset Purchase Agreement provides:With respect to the **Exide** Savings Plan (the "Savings Plan") and the **Exide** Salaried Retirement Plan (the "Retirement Plan"), except as otherwise provided, Seller agrees that it shall be solely responsible to Subject Employees with respect to benefits accrued thereunder as of the Closing Date. Seller further agrees to vest the Subject Employees immediately following such Closing Date

in their respective accounts, if any, under the Savings Plan and the Retirement Plan. Seller shall contribute to each said plan, in accordance with the terms of said plans, all amounts attributable to employees and former employees of the Division which are owed to or under the plans as of the end of the plan year last preceding the Closing Date.

Exide submitted sufficient evidence at hearing demonstrating that it has been paying and will continue to pay millions of dollars to the **Exide** Hourly Employees' Pension Plan until there are no more participants in the plan. [FN15] *See* 3/4/04 Tr. 107:13-109:14. Contributions to pension plans are considered ongoing, material obligations. *See, e.g.*, *In re The Bastian Co., Inc.*, 45 B.R. 717, 720-721 (Bankr.W.D.N.Y.1985) (finding that pension plan contributions were ongoing, material obligations). Failure by **Exide** to make contributions to the plans could subject **EnerSys** to claims by employees and **EnerSys**, in turn, could assert claims against **Exide**.[FN16] The Pension Plan Obligations are material, ongoing obligations under the Agreement.

FN15. **EnerSys** complains that **Exide** should be precluded from arguing that the Pension Plan Obligations demonstrate that the Agreement is executory because in its response to **EnerSys's** first set of interrogatories, **Exide** failed to identify pension plan contributions under paragraph 7.2 of the Asset Purchase Agreement (dealing with Defined *Benefit* Plans). In its response to **EnerSys's** interrogatories, **Exide** instead identified paragraph 7.3 of the Asset Purchase Agreement (dealing with Defined *Contribution* Plans) as a remaining material obligation under the Agreement. In addition, **EnerSys** claims that **Exide** did not present any evidence at trial concerning contributions made pursuant to paragraph 7.3 of the Asset Purchase Agreement.
Although **Exide** may have identified erroneously the applicable benefit plan in its interrogatory response, I will not preclude use of the correct benefit plan and **Exide's** obligations in connection therewith. **Exide** supported its claim concerning its pension plan obligations from evidence that was introduced at hearing. **EnerSys** had ample opportunity then to challenge such evidence.

FN16. **EnerSys** acknowledged this much in its post-trial submissions. *See also* footnote 17, *infra*.

e. *Registration Obligation.*

Exide contends that it is obligated to maintain registration of the **Exide** mark under the Agreement. Specifically, paragraph 12 of the Trademark License provides, in relevant part, that:
Licensor shall maintain Licensed Marks in accordance with Licensor's usual and customary business practices. In the event that Licensor intends in good faith to cease payment of maintenance fees for or otherwise allow to lapse any of the Licensed Marks in a particular country, Licensor will notify Licensee of its intention to take such action at least one hundred twenty (120) days in advance ... except in the case where Licensor intends to refile an application to register such Licensed Mark covering goods ***237** within the scope of the Licensed Business ....

EnerSys argues that the Registration Obligation is not really an obligation, since paragraph 12 also provides that if **Exide** intends to cease support of the Licensed Marks, all it need do is notify **EnerSys** in advance. Failure to maintain the marks or to give the appropriate notice could very well deprive **EnerSys** of the benefit of its bargain. I conclude that the affirmative duty to maintain the Licensed Marks and the added duty to give notice to **EnerSys** upon any expected lapse of the Licensed Marks, taken together, are material, ongoing obligations of **Exide**.

Moreover, under the Agreement, **EnerSys** must refrain from making an application for or otherwise attempting to register the **Exide** mark in the United States Patent and Trademark Office or other similar agency in any foreign country or state, except where required by law (*see* paragraph 10 of the Trademark License). **EnerSys** is also required to execute and obtain registered user agreements for countries which require registration of the use of a trademark under a license. These are an ongoing, material obligations of **EnerSys**.

f. *Indemnification Obligations.*

In the Agreement, the parties agree to indemnify each other against certain liabilities and cooperate in the defense of indemnified claims (*see* Article 13 of the Asset Purchase Agreement). In addition, **EnerSys** agrees to indemnify **Exide** against claims arising in

connection with **EnerSys's** use of the **Exide** mark. These obligations to indemnify in the Agreement "carry significant burdens and create considerable benefits." *See Philip Services*, 284 B.R. at 549. Insofar as claims for indemnification can still arise under the Agreement (and the parties recognize the possibility of such),[FN17] the obligation to indemnify is ongoing and material since unperformed obligations remain under the Agreement for both parties. *See, e.g.*, *Qintex Entertainment*, 950 F.2d at 1496 (holding that the licensor's duty to indemnify and defend the licensee was a significant obligation); *Richmond Metal Finishers*, 756 F.2d at 1046 (holding that the licensor's contingent duty of indemnifying the licensee was material); *Philip Services*, 284 B.R. at 549-550 (holding that indemnity provisions constituted ongoing, material obligations since neither party completed performance of the contract and obligations remained to be performed).

FN17. **EnerSys** acknowledged in its post-trial submissions that if **Exide** failed to honor its obligations to contribute to the pension plans, it could seek indemnification from **Exide** for claims made by employees.

g. *Further Assurances Obligations.*

Paragraph 9.9 of the Asset Purchase Agreement provides:

Seller hereby acknowledges that its assistance may be required from time to time to enable Purchaser to record or perfect title in, or otherwise to consummate more effectively, the transaction contemplated in this Article IX with respect to the Assigned Marks, the Assigned Letters Patent, the Proprietary Rights, and the Intellectual Property Rights, and Seller agrees that after the Closing and at the request of Purchaser or its designee, at the cost or expense of Purchaser (except in relation to United States patents, trademarks and applications therefor), Seller will (or will cause its Affiliates, as applicable, to) use all reasonable efforts to execute and deliver such other documents and take such other actions as may reasonably be requested by Purchaser or its designee to record the transfer to Purchaser or its ***238** designee of the rights assigned herein, or otherwise to consummate more effectively the transactions contemplated in this Article IX.[FN18]

FN18. Article IX of the Asset Purchase Agreement deals with intellectual property-related matters, including assignment and licensing.

This common type of provision requires the parties to execute certain documents or undertake other acts to effectuate the intellectual property transactions provided for in the Agreement. This duty is ongoing, and, without such assurances, the parties may not be able to effectuate or maintain their intellectual property-related rights as required in the Agreement. Thus, the Further Assurances Obligations, even if seldom invoked, are ongoing, material obligations.

B. *Performance of the Obligations*

EnerSys contends that no material obligations existed as of the petition date because both parties substantially performed the Agreement. I disagree. As discussed above, both parties had a number of material obligations under the Agreement to perform as of the petition date and, therefore, could not have rendered substantial performance. At a minimum, **EnerSys** remained obligated to use the **Exide** mark in accordance with the terms of the Agreement. *See Novon Int'l*, 2000 WL 432848, at *4, 2000 U.S. Dist. LEXIS 5169, at *12. The Agreement included a license and a license imposes a number of ongoing performance obligations on the part of the parties. *See In re Kmart Corp.*, 290 B.R. 614, 618 (Bankr.N.D.Ill.2003).

C. *Sale vs. License.*

[15] In a related argument, **EnerSys** claims that the Agreement evidences a "closed sale" transaction rather than a license and, therefore, cannot be executory. While there was a sale aspect to the Agreement, the **Exide** mark was not one of the assets that **EnerSys** purchased. Rather, the Agreement granted to **EnerSys** only a right to use the **Exide** mark. Title to the **Exide** mark remained with **Exide** despite the fact that **EnerSys** was granted a royalty-free, exclusive license.[FN19] **EnerSys** cannot transfer or sublicense it without **Exide's** consent.[FN20] **Exide** retained ownership and control over the use of the mark.

FN19. *See* section III.B.4.a of this Opinion, *infra.*

FN20. **EnerSys** must seek **Exide's** consent

> to transfer or sublicense the **Exide** mark. *See Kmart Corp.*, 290 B.R. at 618 (finding that the licensee's duty to seek consent of the licensor to transfer the licensed material is an ongoing requirement of the licensee under the license agreement).

The Agreement was the result of an arm's-length transaction between two well-represented, sophisticated businesses. **EnerSys** might have bargained for an assignment of the **Exide** mark, if available, rather than only a license for the right to use it.[FN21] Indeed, **EnerSys** obtained assignments of other marks. The Agreement makes clear which marks were assigned (*see* paragraph and schedule 9.1 of the Asset Purchase Agreement) and which marks were licensed, such as the **Exide** mark (*see* paragraphs 2.1[c] and 9.5 and schedule 9.5 of the Asset Purchase Agreement). Moreover, the Agreement reflects that **EnerSys** purchased only those marks and other intellectual property that were to be assigned (*see* paragraph 2.1[a][vi] of the Asset Purchase Agreement).

> FN21. **EnerSys** complains that the license could not be structured as a sale because **Exide** also continued use of the mark for itself. This required that the transaction be structured as a license, under the express terms of which the license to be was "perpetual." A non-debtor party's expectation that its transaction will not later be unwound in bankruptcy is common, but not dispositive under § 365.

***239** [16] I conclude that the Agreement is a license with respect to the **Exide** mark: "[g]enerally speaking, a license agreement is an executory contract as such is contemplated in the Bankruptcy Code." *Novon Int'l*, 2000 WL 432848, at *4, 2000 U.S. Dist. LEXIS 5169, at *12; *accord Kmart Corp.*, 290 B.R. at 618. *See also Matter of Superior Toy & Mfg. Co., Inc.*, 78 F.3d 1169, 1176 (7th Cir.1996) (trademark license was an executory contract); *HQ Global Holdings*, 290 B.R. at 511 (trademark license was an executory contract); *Blackstone Potato Chip Co., Inc. v. Mr. Popper, Inc. (In re Blackstone Potato Chip Co., Inc.)*, 109 B.R. 557, 560 (Bankr.D.R.I.1990) (trademark license was an executory contract); *In re Chipwich, Inc.*, 54 B.R. 427, 430 (Bankr.S.D.N.Y.1985) (trademark license was an executory contract).[FN22]

FN22. **EnerSys** attempts to distinguish those cases finding a trademark license to be an executory contract on the grounds that: (1) the licenses did not involve an integrated contract for the sale of a business, (2) the licenses involved continuing royalty obligations, or (3) there were cross-licenses. **EnerSys's** argument on all three grounds misses the point. First, that the Agreement is integrated is not dispositive. The issue of whether a number of agreements are integrated is separate from whether an integrated agreement is executory. *See Blackstone Potato Chip*, 109 B.R. at 560 (The court, considering a license agreement along with a number of side agreements, determined the integrated agreement was an executory contract). Second, that there may be no continuing royalty obligations or cross-licenses here is not dispositive, either. The relevant issue is whether any material obligations remain under the Agreement. So long as there are any material, ongoing obligations, a license may be an executory contract.

III. *Did Exide's Decision to **Reject** the Agreement Satisfy the Business Judgment Test?*

[17] The propriety of a decision to **reject** an executory contract is governed by the business judgment standard. *See Group of Institutional Investors v. Chicago, Milwaukee, St. Paul, and Pacific R. Co.*, 318 U.S. 523, 550, 63 S.Ct. 727, 87 L.Ed. 959 (1943); *HQ Global Holdings*, 290 B.R. at 511; *In re Trans World Airlines, Inc.*, 261 B.R. 103, 120-121 (Bankr.D.Del.2001); *Wheeling-Pittsburgh Steel Corp. v. West Penn Power Co. (In re Wheeling-Pittsburgh Steel Corp.)*, 72 B.R. 845, 845-846 (Bankr.W.D.Pa.1987).

[18] A court is required to examine whether a reasonable business person would make a similar decision under similar circumstances. *See In re Vencor, Inc.*, 2003 WL 21026737, at *3, 2003 Bankr.LEXIS 659, at *8 (Bankr.D.Del. April 30, 2003). This is not a difficult standard to satisfy and requires only a showing that rejection will benefit the estate. *See Sharon Steel*, 872 F.2d at 39-40; *HQ Global Holdings*, 290 B.R. at 511; *In re Patterson*, 119 B.R. 59, 60 (E.D.Pa.1990); *Wheeling-Pittsburgh*, 72 B.R. at 846.[FN23]

FN23. As a leading bankruptcy treatise

> explained:
> [i]n the nonbankruptcy corporate law context, the business judgment rule is typically invoked after-the fact, when an allegedly improvident management decision has already been made and put into effect. In those cases, the courts concern themselves with the process by which the decision was made, not the wisdom or consequences of a decision that in retrospect turned out to be wrong. In contrast, in chapter 11, the business judgment rule is often invoked before-the-fact, when a trustee or debtor in possession proposes to undertake a transaction that is, or alleged to be, outside the ordinary course of business, or one that by statute requires court authorization, such as the assumption or rejection of an executory contract. In these cases, the courts are, understandably, not only concerned with the process by which the decisions were made, but also with the effect the business decision will have on the estate and the chapter 11 process.
> 7 Lawrence P. King, Collier on Bankruptcy, ¶ 1108.07[2], at 1108-16 (15th ed. revised 2003).

A. *Exide's* Decision-Making Process.

[19] **Exide** claims that its decision to **reject** the Agreement was the result of a ***240** deliberative and thoughtful process. **EnerSys** contends, however, that **Exide's** decision-making was insufficient to satisfy the business judgment standard. The Court must not substitute its own judgment for that of **Exide's**. *See Vencor*, 2003 WL 21026737, at *3, 2003 Bankr.LEXIS 659, at *8.

[20] **Exide's** chairman and CEO, Craig Muhlhauser, testified that it was his decision, ultimately, to **reject** the Agreement and he did so based upon the advice of his management team and his own business judgment.[FN24] *See* 3/4/04 Tr. 22:14-19. Muhlhauser testified that having unrestricted use of the **Exide** mark was necessary to achieve the goal of unifying **Exide** and, therefore, he believed the Agreement should be rejected. *See* 3/4/04 Tr. 22:23-23:6. Muhlhauser and other **Exide** officials believed **Exide** needed to "unify" so that it could compete effectively in the marketplace. *See* 3/3/04 Tr. 78:15-84:3, 179:5-16; 3/4/04 Tr. 35:17-36:22, 161:15-162:6, 175:14-176:13.

FN24. Although the decision to **reject** was discussed with **Exide's** board, it does not appear that their express approval was sought. *See* 3/4/04 Tr. 29:23-25, 33:5-14.

Furthermore, there was considerable testimony from members of Muhlhauser's management team (upon whom Muhlhauser relied) concerning **Exide's** pre-bankruptcy efforts in attempting to develop a strong, unified corporate name, unify its products under a common brand, and decrease confusion in the marketplace. *See* 3/3/04 Tr. 85:4-110:22, 180:1-10. In **Exide's** view, critical to achieving these goals was getting the **Exide** mark back. *See* 3/3/04 Tr. 92:8-24, 98:23-102:7; 3/4/04 Tr. 23:1-6, 173:24-175:17. **Exide** officers approached **EnerSys** several times to discuss ways of returning the **Exide** mark to **Exide**. *See* 3/3/04 Tr. 98:23-99:11, 106:23-107:6; 3/12/04 Tr. 133:18-134:19. Based upon these longsought-after goals, **Exide** seeks to **reject** the Agreement. *See* 3/3/04 Tr. 116:14-18, 180:18-184:12.

The evidence reveals that **Exide** spent considerable time and effort in studying its business operations, customer relations, competitive positioning and its general needs in formulating its strategic goal. **Exide** undertook additional analyses concerning its decision to **reject**. These sales forecasts (contained in **Exide** exhibits 155, 156 and 157) (the "Forecasts") assessed the expected impact on **Exide's** business of this Court's decision to approve rejection. *See* 3/3/04 Tr. 110:23-111:4; 185:1-186:1. That these Forecasts were undertaken demonstrate **Exide's** efforts at reviewing its rejection decision.[FN25]

FN25. **EnerSys** claims that the Forecasts are inadmissible because they are irrelevant and are based on hearsay. This argument lacks merit. *See* section III.B.1 of this Opinion, *infra.*

Based upon the foregoing, I conclude that **Exide** undertook appropriate steps in reaching its decision to **reject** the Agreement.[FN26] **Exide's** decision took into account ***241** the potential benefits, as well as the harms, in rejecting the Agreement.

FN26. **EnerSys** offered exhibit 253, which was **Exide's** supplemental response to an interrogatory request, to demonstrate that **Exide** attempted belatedly to justify its decision to **reject** the Agreement. The exhibit concerned a meeting of **Exide**

personnel at which confidential information was discussed. **Exide** objected to the exhibit's admission on the grounds that: (1) **Exide** did not rely on the information contained in the exhibit at trial, and (2) the parties expressly agreed that the information contained in the exhibit would not be part of the trial record, irrespective of which exhibit contained that information. **Exide** further claims that this Court endorsed this agreement between the parties. The information in **EnerSys** exhibit 253 apparently contains confidential information that **Exide** does not want disseminated to the public or, more importantly, shared with **EnerSys**.

After reviewing the record, it does not appear that there was an agreement between the parties to exclude the information contained in **EnerSys** exhibit 253 from admission into evidence. If anything, the parties disagreed over the use and admissibility of the information contained therein. Indeed, **Exide's** counsel commented during trial that the parties were like "two ships passing in the night" with respect to the use of the information contained in **EnerSys** exhibit 253. *See* 3/3/04 Tr. 26:1. The agreement that **Exide** alludes to in its post-trial submissions appears to concern inadvertent disclosures of documents that the parties agreed not to use. *See* 3/3/04 Tr. 26:6-28:1.

The fact that **Exide** did not rely upon the information contained in the exhibit at trial is irrelevant. Under Fed.R.Civ.P. 33, answers to interrogatories are admissible in evidence to the extent permitted by the Federal Rules of Evidence. Fed.R.Civ.P. 33(c); *see, e.g.*, *Kelly v. Crown Equip. Corp.*, No. 91-1143, [1991 WL 208771, at *5,] 1991 U.S. Dist. LEXIS 14452, at *12 (E.D.Pa. October 4, 1991). A verified response to an interrogatory request, such as that contained in **EnerSys** exhibit 253, may be admissible as an admission by a party opponent under Fed.R.Evid. 801(d)(2). *See, e.g.*, *Tamez v. City of San Marcos*, 118 F.3d 1085, 1098 (5th Cir.1997), *cert. denied* 522 U.S. 1125, 118 S.Ct. 1073, 140 L.Ed.2d 132 (1998). Clearly, **EnerSys** exhibit 253 is admissible under Fed.R.Evid. 801(d)(2)(A), since it is being offered against **Exide** and is a statement made by **Exide** (in its representative capacity, of course). **EnerSys** exhibit 253 is admissible and **Exide's** objection is overruled.

However, I recognize that the information contained in **EnerSys** exhibit 253 is confidential and that disclosure of the same may be inimical to **Exide's** competitive interests. Under appropriate circumstances, material introduced at trial may be safeguarded against disclosure afterwards. *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 533 (1st Cir.1993). *See also, e.g.*, *Jochims v. Isuzu Motors, Ltd.*, 151 F.R.D. 338, 341-342 (S.D.Iowa 1993) (trial exhibits containing confidential technical and commercial information were to remain sealed from the public). At the request of the parties the entire record of this proceeding was ordered sealed. Certain witnesses, including some of the parties themselves, were excluded during certain testimony, resulting in various levels of confidentiality. It is appropriate to seal **EnerSys** exhibit 253 and any testimony relating thereto and make it available only to the Court and to counsel for the parties.

B. *Impact of Rejection on the Estate.*

1. Qualitative Benefits of Rejection

EnerSys contends that **Exide** failed to demonstrate that the estate will benefit from rejection. **Exide** responds that rejecting the Agreement will result in both qualitative and quantitative benefits to the estate. Under the circumstances present, I conclude that the qualitative benefits alone, namely, brand unification and elimination of confusion in the marketplace, are sufficient to support the Debtor's decision to **reject**.

The evidence submitted by **Exide** demonstrates that brand unification will likely make **Exide** more competitive. Neil Bright, President of the Industrial Energy Business Unit of **Exide**, testified that the lack of brand unification has hurt **Exide's** customer relations and made **Exide** less competitive because of the increased costs that **Exide's** customers incur as a result of dealing with different **battery** brands. *See* 3/3/04 Tr. 78:15-79:6, 100:21-101:8, 108:12-109:9. Reducing **Exide's** customers' costs would certainly improve its current customer relations and may even increase its customer base.

Furthermore, Bright indicated that **Exide** risks losing

market share because it is unable to "present a unified face [for all of its brands] in front of the customer." *See* 3/3/04 Tr. 79:1-6. In this sense, **Exide's *242** customers are having trouble making the connection that the different brands **Exide** is using are actually associated with **Exide**. *See* 3/3/04 Tr. 75:9-76:10; 3/4/04 Tr. 172:12-20. This problem is two-fold: (1) customers may not use products that they do not believe are associated with **Exide** and (2) customers do not believe that **Exide** has global capabilities (because **Exide** appears to be a fractured company) which, according to **Exide**, is what customers want. *See* 3/3/04 Tr. 96:14-97:3, 100:21-101:8, 177:5-8; 3/12/04 Tr. 90:4-9. Indeed, one of **EnerSys's** own witnesses testified that **EnerSys** had lost market share because of a lack of focus on a single brand. *See* 3/12/04 Tr. 89:8-22. By unifying the brand, **Exide** expects to diminish these problems and become more competitive. Thus, an increase in **Exide's** competitive advantage is a benefit to the estate.

Eliminating confusion in the marketplace with respect to the **Exide** mark will also benefit the estate.[FN27] Both Mitchell Bregman, the President of **Exide** Industrial Energy Americas Business, and Bruce Cole, the Vice President of Marketing for the Industrial Energy Business Unit, testified that **Exide** is continually having to explain to its customers that it does not produce industrial **batteries** that contain the **Exide** mark even though it is **Exide**. *See* 3/3/04 Tr. 181:17-182-16; 3/4/04 Tr. 170:5-24. **Exide's** customers do not understand why an industrial **battery** that contains the **Exide** mark is not manufactured by the company with the same name. *See* 3/3/04 Tr. 181:6-15. As a result of such confusion, **Exide** has devoted considerable efforts at trying to reduce the confusion and differentiate its products. *See* 3/3/04 Tr. 182:6-15; 3/4/04 Tr. 171:1-24. By eliminating the confusion over the **Exide** mark, **Exide** will no longer have to continue with its efforts to reduce confusion (and incur any of the costs associated therewith) and can freely exploit the **Exide** mark. Cole testified that confusion over the **Exide** mark frustrates customers. *See* 3/4/04 Tr. 172:23-173:12. Like brand unification, elimination of confusion will likely improve **Exide's** customer relations.[FN28]

FN27. The evidence establishes that there was confusion in the marketplace concerning the **Exide** mark.

FN28. While the evidence suggests that **Exide's** post-bankruptcy marketing efforts may have contributed somewhat to the confusion in the marketplace, the confusion existed before such marketing efforts.

2. Quantitative Benefits of Rejection

While the qualitative benefits alone justify rejection, the quantitative benefits of rejection further support **Exide's** decision to **reject** the Agreement.

Exide's evidence suggests that achieving brand unification will decrease some of **Exide's** operating costs. Bright testified that **Exide** currently uses a large number of brands on its industrial **batteries** and that maintaining all of these brands is expensive. *See* 3/3/04 Tr. 101:9-15. Having only one corporate brand to maintain would likely decrease **Exide's** expenses and any reduction in expenses is a benefit to the estate. *See, e.g.*, *HQ Global Holdings*, 290 B.R. at 512 (holding that reduction in the debtor's advertising costs was a benefit to the estate). Likewise, **Exide's** expert witness, Scott Phillips, testified that brand unification would increase **Exide's** effectiveness and efficiency in its marketing efforts, which could also reduce **Exide's** costs. *See* 3/4/04 Tr. 134:14-135:8; 141:7-142:19.[FN29]

FN29. Phillips also testified that brand unification would permit **Exide** to pursue a variety of umbrella branding strategies. *See* 3/4/04 Tr. 134:14-135:8. Umbrella branding involves the use of a core brand in combination with other brand names or businesses. *See* 3/4/04 Tr. 135:14-136:1. According to Phillips, umbrella branding brings "greater focus and identity to the branding strategy of a company" and helps "create greater brand awareness, particularly in ... a global economy and where companies are increasingly dependent upon global customers." *See* 3/4/04 Tr. 136:2-9. However, Phillips conceded that umbrella strategies are not always appropriate, especially where there is a heightened need for local appeal. *See* 3/4/04 Tr. 152:16-152:13. While it is not entirely clear whether a global or regional branding strategy is better suited for the industrial **battery** industry, or the commercial power **battery** market in general, at least **Exide** will have the opportunity to exploit a global a strategy if it believes it is appropriate to do so. Having this option is a benefit to **Exide**.

***243** The sales analyses conducted by **Exide** demonstrate that rejection will likely benefit the estate; **Exide** will realize an increase in sales revenue from rejection. **Exide** believes that the information contained in the Forecasts demonstrates that rejection would result in an increase in its sales revenue. While the exact amount of any increase in revenue may be undetermined-whatever the amount-the estate will benefit. **Exide** will be allowed to use the mark in a business in which it was previously prohibited from so doing, and, in combination with its own name. Bregman testified that **Exide** believes its sales will increase by combining the **Exide** mark with its corporate name. *See* 3/3/04 Tr. 183:7-12.

[21][22] **EnerSys** argues that the Forecasts are inadmissible because much of the information contained therein (confidential material) has been redacted, thereby rendering such exhibits so unreliable as to be irrelevant. While significant portions of the analysis were redacted, perhaps diminishing the usefulness of the remaining information, the Forecasts still provide some useful information concerning the quantitative benefit of **Exide's** decision to **reject** the Agreement.[FN30] Questions concerning the reliability, accuracy or completeness of a document go to the weight of the evidence, not its admissibility. *See Greener v. The Cadle Co.*, 298 B.R. 82, 92 (N.D.Tex.2003). Based upon the foregoing, **Exide** Exhibits 155-157 are relevant.

FN30. Given that the parties are each other's main competitor and the information in the exhibits were confidential, it was necessary that **Exide** exhibits 155-157 contained redactions.

[23][24] **EnerSys** claims that the Forecasts, even if relevant, are inadmissible because they do not meet the requirements of the business records exception to the hearsay rule.[FN31] Here, the testimonies of Bright and Cole establish that **Exide** employees prepared the Forecasts contained in exhibits 155-157 based upon **Exide's** own internal data. *See* 3/3/04 Tr. 111:19-112:8; 3/4/04 Tr. 184:25-201:1. Second, it appears that the information contained in the Forecasts was recorded at or near a time it was obtained. Third, both Bright and Cole testified that it was a routine practice for **Exide** to conduct such type of analyses. *See* 3/3/04 Tr. 112:17-112:21; 3/4/04 Tr. 186:8-186:17. Finally, Bright testified credibly that the information obtained from conducting analyses, ***244** such as the ones contained in the Forecasts, to be reliable. *See* 3/3/04 Tr. 112:22-115:8. **EnerSys** argues that the Forecasts were neither the product of a regularly conducted business activity nor regularly kept in the ordinary course of business; the Forecasts were created solely for the purposes of the present litigation. Documents created expressly for the purpose of litigation do not fall within the business records exception because they lack the requisite indicia of reliability and trustworthiness that are necessary for the business records exception to apply. *See Palmer v. Hoffman*, 318 U.S. 109, 114, 63 S.Ct. 477, 87 L.Ed. 645 (1943), *reh'g denied* 318 U.S. 800, 63 S.Ct. 757, 87 L.Ed. 1163 (1943); *United States v. Casoni*, 950 F.2d 893, 910-911 (3d Cir.1991); *Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200, 205 (4th Cir.2000).

FN31. **Exide** seeks to admit exhibits 155-157 under the business record exception. Consequently, it does not appear that the parties dispute that **Exide** exhibits 155-157 are hearsay. **EnerSys** argues that the exhibits contain double hearsay in that **Exide** must not only establish that the exhibits themselves fall within the business records exception, but that the information from which the exhibits were created must also fall within one of the exceptions to the hearsay rule. The information contained in the exhibits was provided by **Exide** personnel (under a direction and duty to do so), rather than from any outside source, and was derived from **Exide's** own business data.

The Forecasts are a part of **Exide's** continual decision-making efforts concerning the proposed rejection. Obviously, it was important for **Exide** to conduct the analyses to quantify, as best it could, the effect of its decision to **reject** the Agreement and determine whether its decision to **reject** was appropriate.

EnerSys also contends that the testimonies of Bright and Cole concerning these exhibits and the analyses contained therein should be stricken from the record because they lack foundation. **EnerSys** argues that Bright and Cole did not perform any of the calculations or Forecasts contained in the exhibits and otherwise have no firsthand knowledge about them.

[25][26] Rule 803(6) of the Federal Rules of

Evidence does not require that foundation evidence for the admission of business records be provided by the actual custodian of the records. *See United States v. Console*, 13 F.3d 641, 656-657 (3d Cir.1993); *United States v. Pelullo*, 964 F.2d 193, 201 (3d Cir.1992). Rather, "other qualified witnesses" are permitted to lay a foundation and those whom may fall within this rubric is broad. *See Console*, 13 F.3d at 657; *Pelullo*, 964 F.2d at 201. Indeed, a qualified witness need only have a familiarity with a business' record-keeping practices and be able to attest that:
(1) the declarant in the records had personal knowledge to make accurate statements; (2) the declarant recorded the statements contemporaneously with the actions that were the subject of the reports; (3) the declarant made the record in the regular course of the business activity; and (4) such records were regularly kept by the business.

See Console, 13 F.3d at 657; *Pelullo*, 964 F.2d at 201.

Based upon the record, Bright and Cole are both "other qualified witnesses" who are permitted to lay a foundation for the admission of **Exide** exhibits 155-157 as business records. Bright testified generally about the electronic data warehouse system ("the System") **Exide** used in gathering the information for the analyses contained in the exhibits, the purpose of System, how **Exide** uses the System, and the System's usefulness in his decision-making process. *See* 3/3/04 110:23-115:8. Cole further expounded upon the use and purpose the System, the origin of the data in the exhibits, the rationale of the analyses performed, and who prepared the analyses set forth in the exhibits. *See* 3/4/04 Tr. 184:25-201:1, 241:10-241:15. It is apparent from the record that Bright and Cole have sufficient personal knowledge of the System used to prepare the analyses contained in **Exide** exhibits 155-157, as well as the persons who prepared them; consequently, Bright and Cole may provide by their testimony the foundational requirements for the admission of business records.***245** [FN32] *See, e.g.*, *United States v. Console*, 13 F.3d at 657 (the witnesses familiarity with the office record-keeping system enabled her to attest to each of the foundation requirements for the admission of an Accident Book as a business record). **Exide** exhibits 155-157 are relevant and admissible under the business records exception. Accordingly, **EnerSys's** objection is overruled and such exhibits will be considered by the Court.

FN32. I concluded already that **Exide** exhibits 155-157 qualify as business records.

In sum, the evidence demonstrates that there will be both qualitative and quantitative benefits to the estate from the rejection of the Agreement. I now consider whether **EnerSys's** potential rejection damage claim outweighs these benefits.

3. Rejection Damages

EnerSys argues that rejection of the Agreement will result in such a large rejection damage claim that it will outweigh any of the potential benefits identified by **Exide**. **Exide** contends that **EnerSys** has exaggerated its potential rejection damage claim because, *inter alia*, **EnerSys** did not take into account any mitigation of damages in calculating its rejection damages. Both parties relied upon expert testimony concerning the potential impact of rejection on **EnerSys** and both seek to discredit the testimony of each other's experts.

[27][28][29] The impact of **EnerSys's** potential rejection damage claim on the estate is relevant in determining the appropriateness of **Exide's** decision to **reject**.[FN33] *See, e.g.*, *Vencor*, 2003 WL 21026737, at *3, 2003 Bankr.LEXIS 659, at *8-9 (holding that it was appropriate to consider the avoidance of a large rejection damage claim); *In re Sun City Invs., Inc.*, 89 B.R. 245, 249 (Bankr.M.D.Fla.1988) (denying the debtor's motion to **reject** a contract because rejection would create a large claim against the estate, which would not be in the estate's best interest). In reviewing the impact of a rejection damage claim, I not need determine the exact amount of **EnerSys's** rejection damage claim.[FN34] Rather, I need only determine if the rejection claim would be so large as to make **Exide's** decision to **reject** the Agreement unreasonable.

FN33. In determining the benefit to the estate, the burden or impact that rejection will have on a nondebtor party is not a factor to be considered in determining the propriety of a decision to **reject**. *See Trans World Airlines*, 261 B.R. at 123; *Patterson*, 119 B.R. at 61; *Wheeling-Pittsburgh Steel*, 72 B.R. at 847. In other words, there is no balancing of the interests of the estate against the interests of other parties to the contract being rejected. *See Trans World Airlines*, 261 B.R. at 123; *Wheeling-*

Pittsburgh Steel, 72 B.R. at 848; *see also*, *Patterson*, 119 B.R. at 61; *see also* *Robertson v. Pierce (In re Chi-Feng Huang)*, 23 B.R. 798, 801-802 (9th Cir. BAP 1982). Thus, any negative impact of rejection on **EnerSys** itself is irrelevant in determining the propriety of **Exide's** decision to **reject** the Agreement.

FN34. The determination of the amount of **EnerSys's** rejection damage claim is not now before this Court.

EnerSys claims that it will suffer more than $67 million in damages as a result of rejection.[FN35] In support of such claim, **EnerSys*246** presented two expert witnesses, Dr. Warren Keegan (marketing and branding expert) and Brian Blonder (valuation expert). Keegan's opinion pertained to his survey of the motive power **battery** industry, which survey measured the impact of rejection on the **Exide** brand and on **Exide's** marketing communications. Blonder's opinion concerned the effect of rejection, primarily focusing on the amount of damages **EnerSys** would incur as a result.

FN35. **EnerSys's** rejection damage claim breaks down as follows:

*Harm to **EnerSys** if Rejection Summary*

Damage Element	*$ (In Millions)*
Lost Price Premium (Price Erosion)	$37
Incremental Cost-Switching to New Brand	$11
Lost Investment	$11
Lost Profit on Lost Sales	$12
Total Damages	$71
Present Value of Total Damages (as of 4/01/04)	$67

Exide contends that the testimony of Keegan and Blonder should be disregarded because they are wholly unreliable and incredible; however, **Exide's** objections go to the weight to be accorded such testimony, not its admissibility. [FN36] In considering the appropriate weight to accord each witness, a court may accept all of a witness' testimony, **reject** all of it, or accept some and **reject** other parts depending upon the credibility of the witness. *See* *Bennun v. Rutgers State Univ.*, 941 F.2d 154, 179 (3d Cir.1991), *reh'g denied* 941 F.2d 154 (3d

Cir.1991), *cert. denied* 502 U.S. 1066, 112 S.Ct. 956, 117 L.Ed.2d 124 (1992).

> FN36. *See Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 809 (3d Cir.1997).

Keegan concluded that rejection will harm **EnerSys** because of marketplace confusion (*see* 3/12/04 Tr. 248:5-253:9); however, the imposition of a transition period will likely reduce, if not eliminate, such confusion. As such, Keegan's survey evidence does little to convince me that **EnerSys** will likely suffer the magnitude of damages asserted as a result of rejection, especially if measures are put into place that will mitigate marketplace confusion.

Blonder testified that his $67 million damage assessment would remain essentially unaffected by any change in the assumptions or conditions he relied upon in formulating his opinion. *See* 3/26/04 Tr. 87:13-90:2, 109:19-114:19. This position simply undermines Blonder's credibility, particularly when he opines that the damage claim would be unaffected by a transition period. If mitigation efforts, over time, are taken into account, **EnerSys's** rejection damage claim will likely be far less than $67 million.[FN37]

> FN37. Phillips' offered rebuttal testimony concerning the duration of harm in the lost advertising category of damages, set forth in Section VII of Blonder's expert report (entitled "Loss of Return on Historical Investment Brand"). **EnerSys** objected to this testimony on the ground that such testimony was precluded by a prior order of this Court. Specifically, this Court ordered Phillips to produce a certain advertising study upon which he was basing a portion of his opinion and, unless Phillips produced this study, **Exide** would be precluded from offering rebuttal testimony from Phillips relating to the duration of harm in Section VII of Blonder's expert report.
> It is undisputed that Phillips never produced the advertising study. Further, **Exide** does not contest that Phillips is precluded from offering rebuttal testimony regarding the duration of harm in Section VII of Blonder's expert report because of Phillip's failure to produce the study. Thus, to the extent that Phillips rebuttal testimony relates to the duration of harm depicted in Section VII of Blonder's expert report, it is stricken from the record and will not be considered.
> With regard to the remainder of Phillips' rebuttal testimony, **EnerSys** argues that it is flawed and without a credible basis. Phillips offered an analysis which calculated the fair value of the **Exide** mark to **EnerSys**. Phillips calculated the amount of this value to be $8.4 million. *See* 3/26/04 Tr. 172:5-173:4. Phillips testified that the damage **EnerSys** would suffer as a result of rejection would bear some relationship to this value. *See* 3/26/04 Tr. 174:19-175:10. While this "fair market" analysis may provide some perspective concerning the amount of **EnerSys's** true rejection damages, it is not necessarily a complete measure of damages in this instance. This "fair market" approach fails to capture all of the damages that a licensee may incur as a result of losing a trademark, such as the costs of creating and establishing a new mark.

While the magnitude of possible damage to **EnerSys** as a result of rejection remains ***247** undetermined, it is evident that **EnerSys** will not incur the magnitude of damages it claims or an amount even close to that figure. **EnerSys's** claim for damages is speculative at best. I conclude, based upon this record, and for purposes of the proposed rejection, that **EnerSys's** eventual unsecured damage claim will be substantially less than $67 million.

Even if **EnerSys's** $67 million claim were to be allowed, it will not have as large an impact on the estate as **EnerSys** suggests. That dollar amount, although large in absolute terms, must be compared to the approximately $900 million of unsecured claims filed in this case. *See* 3/31/04 Tr. 28:1-2. When viewed in a proper perspective, an additional $67 million will not diminish the dividend to unsecured creditors sufficiently to render **Exide's** decision to **reject** unreasonable.[FN38]

> FN38. The Debtor argues that, under **Exide's** plan, unsecured creditors will receive approximately 20 to 22 cents on the dollar. *See* 3/31/04 Tr. 28:10-11.

The most dramatic indication that rejection is in the best interests of creditors comes from the position taken by the unsecured creditors themselves. After close of the evidence, the Official Committee of Unsecured Creditors (the "Committee") filed a post-hearing statement (Docket No. 4202) fully supporting **Exide's** Motion to **reject** the Agreements.

In its Statement, the Committee says, *inter alia:*
....
...general unsecured creditors would bear 100% of the rejection damages claims, but would own only 10% of the common stock of the reorganized Debtors plus warrants.

Therefore, the burden and benefit of rejecting the Trademark License would have a disproportionate impact on general unsecured creditors. Each of the existing general unsecured creditors would be impacted by double dilution: (a) a diluted benefit because of the minority position in the reorganized Debtors' equity and (b) a diluted share of that minority position as a result of an increase in the aggregate amount of general unsecured claims once **EnerSys's** rejection damages are included. As such, the Debtors' decision to **reject** the Trademark License should be judged based on its impact upon general unsecured creditors because they are most directly and adversely affected. *See, e.g., In re Klein Sleep Products, Inc.*, 78 F.3d 18, 25 (2d Cir.1996) (judging rejection of executory contract using best interests of unsecured creditors); *In re Kong*, 162 B.R. 86, 96 (Bankr.E.D.N.Y.1993) ("Central to this showing 'is the extent to which a rejection will benefit the general unsecured creditors of the estate.' ").
4. The Committee is persuaded that rejecting the Trademark License provides a net benefit to general unsecured creditors even after accounting for the double dilution effects described above. This conclusion is based on **EnerSys's** failure to demonstrate that rejection of Executory License would result in the $65 million rejection damages claimed by **EnerSys**. **EnerSys** bears the burden of proof with respect to the size of its damages, but the Committee is not persuaded by **EnerSys's** supporting evidence. **EnerSys's** estimates of its damages are excessive, are unrealistic, and, most significantly, exclude **EnerSys's** legal obligation to mitigate its damages. Such mitigation is straightforward since **Exide** is offering **EnerSys** a transition plan whereby **EnerSys** can reduce its potential damages significantly. Therefore, the Committee is convinced that ***248 EnerSys's** allowable claim against the Debtors' estates would be very small, especially since, among other things, the Debtors would be willing to accept a transition plan that is intentionally designed to minimize the loss of **EnerSys's** sales.
...Therefore, by authorizing and approving a transition plan as part of its ruling on the rejection of the Trademark License, the Bankruptcy Court would fulfill Congress' desire that bankruptcy courts use their equitable powers to provide appropriate remedies when trademark licenses are rejected by debtors.

Statement, ¶ ¶ 3-5.

[30] It is particularly appropriate here to give substantial weight to the views of the general unsecured creditors, the *only* constituents (besides **EnerSys**) in this chapter 11 proceeding who would suffer any ill effects of rejection.[FN39] This support is a significant factor weighing in favor of permitting rejection. *See Wheeling-Pittsburgh Steel*, 72 B.R. at 850 (in upholding the debtor's decision to **reject**, the court noted that "quite significantly, the official committee of unsecured creditors, which has been very active in this case, supports the debtor's decision to **reject** the Contract. It cannot be supposed that the committee of unsecured creditors, which is duty bound to act in the best interests of unsecured creditors, would support a decision which is inimical to the best interests of the debtor's estate and unsecured creditors").

FN39. The Committee and the Debtor were at bitter odds throughout nearly all of the pre-confirmation phase of this chapter 11. *See In re **Exide** Technologies*, 303 B.R. 48 (Bankr.D.Del., 2003). Although the plan ultimately confirmed was largely a consensual plan, I easily conclude that this is no committee which would willingly (or quietly) suffer any unnecessary harm at the hands of the Debtor.

The impact of **EnerSys's** rejection damage claim against the estate will not be so large that it would cause a reasonable business person not to **reject** the Agreement.

4. Reversion of the Exide Mark

EnerSys contends that the rejection of the Agreement will not result in a benefit to the estate because, upon rejection, **Exide** will not have the exclusive right to use the **Exide** trademark. **EnerSys's** argument is two-fold. First, **EnerSys** claims that title to the **Exide** mark (for use on industrial **batteries**) already passed to **EnerSys** in June 1991, when the parties entered into the Agreement. As such, rejection has no effect on **EnerSys's** right to use the mark. Second, **EnerSys** claims that rejection of the Agreement does not result in its termination and, therefore, **EnerSys** retains its right to use the **Exide** mark. Both arguments lack merit.

a. *Title to the **Exide** Mark.*

EnerSys's argument concerning the transfer of title to the **Exide** mark is an offshoot of its argument that the Agreement was a "closed sale" transaction. However, for the reasons already discussed herein, with respect to the **Exide** Mark, the Agreement is not a sale, but a license.

As previously noted, the Agreement identifies which marks were assigned to **EnerSys** (*see* paragraph and schedule 9.1 of the Asset Purchase Agreement) and which marks were licensed to **EnerSys** (*see* paragraph and

schedule 9.5 of the Asset Purchase Agreement). The **Exide** mark is listed in the category of those marks that were licensed to **EnerSys**. And with respect to those marks that were licensed to **EnerSys**, including the **Exide** mark, paragraph***249** 9 of the Trademark License provides, in relevant part, that:
[l]icensee shall acquire no right, title or interest with respect to the Licensed Marks or the Licensed Trade Name as a result of Licensee's use thereof in commerce or otherwise and Licensee acknowledges and agrees that all rights in and to the Licensed Marks and the Licensed Trade Name and the good will pertaining thereto belong exclusively to, and shall inure to the benefit of, Licensor.

Thus, there was never a transfer of ownership in the **Exide** mark. Rather, title to the **Exide** mark remained with **Exide**.

b. *Termination Upon Rejection.*

[31] **EnerSys** has pointed to authority for the proposition that rejection does not terminate an executory contract (*see* *Lavigne*, 114 F.3d at 387; *Columbia Gas*, 50 F.3d at 239 n. 8); however, none of the authority cited in support of such proposition involved trademark licenses. Rather, there is authority directly contradicting this proposition in the context of the rejection of trademark licenses. *See, e.g.*, *HQ Global Holdings*, 290 B.R. at 513 (holding that rejection terminates a trademark license); *Raima UK Ltd. v. Centura Software Corp. (In re Centura Software Corp.)*, 281 B.R. 660, 673-674 (Bankr.N.D.Cal.2002) (holding that rejection terminates a trademark license). In its trial brief, **EnerSys** argues that the decisions in *HQ Global Holdings* and *Centura Software* are flawed because their holdings are not reconciled with cases that hold that rejection does not equate to a termination of an executory contract. The unique nature of intellectual property licenses requires different treatment than non-intellectual property-related contracts upon rejection.

Moreover, Bankruptcy Code § 365(n) does not provide **EnerSys** with any protection from the consequences of rejection. Section 365(n)(1) provides that, upon rejection of an executory contract in which the debtor is a licensor of intellectual property, a licensee may elect either:
(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or
(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced ...

11 U.S.C. § 365(n).

The term "intellectual property", as used in § 365(n), is defined as a:
(A) trade secret; (B) invention, process, design, or plant protected under title 35; (D) plant variety; (E) work of authorship protected under title 17; or (F) mask work protected under chapter 9 of title 17; to the extent protected by applicable nonbankruptcy law.

11 U.S.C. § 101(35A). It is clear from the plain language of this definition that trademarks are excluded. *See* *HQ Global Holdings*, 290 B.R. at 513 (finding that trade names, trademarks and other proprietary marks are not included within the definition of intellectual property). *See also* *Centura Software*, 281 B.R. at 669-670 ***250** (noting that "Congress has ... expressly withheld § 365[n] protection from rejected executory trademark licenses"). Thus, trademark licensees, such as **EnerSys**, cannot use § 365(n) to elect to retain their rights to use a mark after rejection.[FN40]

FN40. **EnerSys** concedes that § 365(n) does not apply to trademark licenses, but argues that a negative inference should not be drawn from the fact that Congress granted protection to certain licensees in § 365(n) but not trademark licensees. I disagree.
Congress enacted § 365(n) in response to the Fourth Circuit's decision in *Richmond Metal Finishers*. *See* *HQ Global Holdings.*, 290 B.R. at 513 n. 5; *Centura Software*, 281 B.R. at 668. In *Richmond Metal Finishers*, the Fourth Circuit held that the licensee only had a claim for monetary damages under § 365(g) upon the debtor's rejection of a technology license. *Richmond Metal Finishers*, 756 F.2d at 1048. Rejection of the technology license agreement resulted in its termination and the licensee no longer had the right to use the technology. *Id.*
In enacting § 365(n), Congress sought to protect intellectual property licensees from such a result. Congress certainly could have included trademarks within the scope of § 365(n) but saw fit not to protect them. Therefore, the holding in *Richmond Metal Finishers*, as well as the holdings in the other pre and post § 365(n)

> trademark rejection cases cited herein, still retain vitality insofar as they relate to trademark licenses. As a result, a trademark license is terminated upon rejection and the licensee is left only with a claim for damages. *See HQ Global Holdings*, 290 B.R. at 513; *Centura Software*, 281 B.R. at 673.

Various decisions support the view that **Exide** is excused from its contractual obligations under the Agreement, including its obligation to allow **EnerSys** to use the **Exide** mark. *See Lavigne*, 114 F.3d at 387 (noting that rejection frees the estate from its obligation to perform); *HQ Global Holdings*, 290 B.R. at 513 ("[t]he result of the [d]ebtors' rejection of the [a]greements is that they are relieved from the obligation to allow the [f]ranchisees to use their proprietary marks"). Rejection of the Agreement leaves **EnerSys** without the right to use the **Exide** mark. *Id.*; *Centura Software*, 281 B.R. at 674-675 (holding that licensee is not entitled to retain any rights in the trademarks as a result of the rejection of the trademark agreement); *Blackstone Potato Chip*, 109 B.R. at 562 (approving the debtor's motion to **reject** a license agreement and ordering the return of trademarks and trade names to the debtor); *see also Chipwich*, 54 B.R. at 431 (holding that upon rejection of the trademark licenses, the licensee only has a claim for damages).

The primary benefit to rejecting a trademark license is reacquiring the right to use the mark in whatever capacity or market in which use by the licensor was previously excluded and extinguishing the licensee's right to use it. Taken to its logical end, **EnerSys**' argument that a licensee's right to use a trademark does not revert back to the licensor upon rejection means that a rejection of a trademark license would never offer meaningful relief to the debtor. This would be an absurd result. Under these circumstances, **Exide's** obligation to allow **EnerSys** to use the **Exide** mark is extinguished upon rejection.

IV. *Transition Period*

Since the exclusive use of the **Exide** mark in connection with industrial **battery** market will revert back to **Exide**, it is appropriate to fashion a transition period to mitigate any potential damage and business disruption that **EnerSys** may suffer as a result of losing the **Exide** mark. Other courts have utilized transition periods in connection with the rejection of an executory contract or unexpired lease. *See, e.g., HQ Global Holdings*, 290 B.R. at 514 (allowing for a 30-day transition period to phase out the franchisees' use of a proprietary mark); ***251***In re Texas Health Enters., Inc.*, 255 B.R. 185, 189 (Bankr.E.D.Tex.2000) (approving a transition plan for the turnover of a nursing home after the rejection of the lease for the same).[FN41]

> FN41. The Court requested input in post-hearing submissions from both parties concerning the imposition of a transition period if rejection was approved. Section 105(a) of the Bankruptcy Code allows this Court to "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of the [Bankruptcy Code]." 11 U.S.C. § 105(a). This provision essentially codifies "the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships." *United States v. Energy Res. Co., Inc.*, 495 U.S. 545, 549, 110 S.Ct. 2139, 109 L.Ed.2d 580 (1990).

Exide proposes a two-year transition period based on the termination provision in the Trademark License that calls for a "reasonable period not to exceed two (2) years" for discontinuing **EnerSys's** use of the mark.[FN42] **EnerSys** suggests a five-year transition period. Given that the parties have already agreed upon a maximum two-year time frame, I conclude that two years from the date of this decision is an appropriate transition period and I will so order. [FN43]

> FN42. Paragraph 8 of the Trademark License provides, in relevant part, that:
> [u]pon termination of this Trademark License, Licensee and its sublicensees shall, within a reasonable period of time not to exceed two (2) years, discontinue all use of the Licensed Marks and Licensee shall discontinue all use of the Licensed Trade Name ....

> FN43. Relying upon the terms of Trademark License to establish the two-year transition period is reasonable given the fact that both parties, who are highly sophisticated businesses, agreed upon such time-frame after much negotiation and, presumably, careful consideration in the course of their arm's-length transaction. Further, **EnerSys** does not provide any reason for following its suggested 5-year period or any other time period for that matter. Indeed, a transition period as long as the one suggested by **EnerSys** could actually be more harmful. The longer **EnerSys** continues to use the **Exide** mark, the more it would be doing so for **Exide's** benefit, since the mark ultimately reverts back to **Exide**. **EnerSys's** own expert

> witness testified as much. *See* 3/25/04 Tr. 57:6-12.
>
> However, establishing only a time-frame for the transition may not be sufficient. For the transition to be as smooth as possible, a plan should be created that sets forth how the transition will be carried out. However, before deciding whether the parties should be left to their own devices or whether the Court should impose such a plan and, if so, the terms of such a plan, I will schedule a hearing to solicit the parties' views about how best to proceed.

An appropriate Order follows.

ORDER

AND NOW, this 3rd day of April, 2006, upon consideration of the **Exide's** Motion to **Reject** (Docket Nos. 1614, 1615, 1617 and 1618), the opposition of **EnerSys**, Inc. thereto after hearing thereon and for the reasons set forth in the accompanying Opinion, it is hereby **ORDERED AND DECREED** that:

1. The Motion to **Reject** is GRANTED;

2. **EnerSys** shall have two years from the date hereof to discontinue any use of the **Exide** mark (as described in the accompanying Memorandum);

3. **EnerSys**, Inc. Shall have thirty days from the date of this Order to file its rejection damage claim;

4. A hearing will be held on **April 27, 2006 at 10:00 A.M.** in Bankruptcy Courtroom No. 5, 824 Market Street, Fifth Floor, Wilmington, Delaware to consider whether the Court should impose a transition plan, and if so, what the terms of such a plan should be; and

5. The parties shall have until **April 24, 2006** to file and serve position papers with ***252** respect to any further relief to be ordered by the Court.

Bkrtcy.D.Del.,2006.
In re Exide Technologies
340 B.R. 222, 46 Bankr.Ct.Dec. 95

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