No. 10-422

IN THE
Supreme Court of the United States

IN RE: EXIDE TECHNOLOGIES,

Debtor.

EXIDE TECHNOLOGIES,

Petitioner,

v.

ENERSYS DELAWARE INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions presented are:

1. Should the Petition be denied because the Petitioner waived any argument that the United States Court of Appeals for the Third Circuit erred in applying the "Countryman Test" (defined below) to determine whether the Agreements (defined below) were "executory," when the Petitioner failed to assert any objection to the use of the Countryman Test or propose the use of any other test of executoriness in proceedings before the Court of Appeals (or either of the lower courts that addressed this matter prior to the Court of Appeals), and, in fact, affirmatively argued to all three courts below that the Countryman Test applied and was satisfied, and raised the issue of the use of the Countryman Test for the first time in its Petition for a Writ of *Certiorari*?

2. Should the Petition be denied because there is no real, intolerable or genuine conflict among the federal courts of appeals regarding the test for determining whether a contract is executory?

3. Should the Petition be denied because, to the extent that there is a conflict among the federal courts of appeals regarding the test for determining whether a contract is executory, it is not sufficiently developed?

4. Should the Petition be denied because, to the extent that there is a conflict among the federal courts of appeals regarding the test for determining whether a contract is executory, it is based on outdated authority?

5. Should the Petition be denied because, to the extent that there is a conflict among the federal courts of appeals regarding the test for determining whether a contract is executory, it relates to an issue which is not sufficiently important?

6. Should the Petition be denied because, to the extent that there is a conflict among the federal courts of appeals regarding the test for determining whether a contract is executory, this is not an appropriate case for resolution of such conflict?

LIST OF PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

The names of all parties in the United States Court of Appeals for the Third Circuit are: Exide Technologies (Petitioner) and EnerSys Delaware Inc. (Respondent).

EnerSys Delaware Inc. is a wholly-owned subsidiary of EnerSys, a publicly traded company.

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INTRODUCTION

Respondent EnerSys Delaware Inc. ("**EnerSys**") respectfully requests that this Court deny the petition for a writ of *certiorari* seeking review of the Judgment and Opinion of the United States Court of Appeals for the Third Circuit ("**Court of Appeals**"), entered on June 1, 2010.

STATEMENT OF THE CASE

On June 10, 1991, Yuasa Battery Co. Ltd., a predecessor-in-interest to EnerSys,[1] and Exide Corporation, now known as Exide Technologies, Inc. ("**Exide**"), entered into an Asset Purchase Agreement ("**APA**"). Petition ("**Petition**" or "**Pet.**") at 5-6; Pet App. 28a. At closing (also on June 10, 1991), EnerSys paid Exide in excess of $135 million, representing all of the consideration due to Exide under the APA, and Exide transferred to EnerSys all of the assets of Exide's industrial battery business, including plants, inventory, contracts, trademarks, tradenames, patented technology and related goodwill. Pet. App. 29a. In addition, at closing on the APA (and also in consideration of the fully paid $135 million purchase price), Exide granted EnerSys a ***perpetual***, ***exclusive***, ***worldwide***, ***royalty-free*** license to use certain trademarks, including "Exide" (collectively, the "**Marks**"), on products sold in the industrial battery business pursuant to a Trademark Agreement which was incorporated into the APA and attached as an exhibit ("**Trademark Agreement**"). Pet.

1. For ease of reference, Yuasa Battery Co. Ltd. shall be referred to as "EnerSys."

at 6; Pet. App. 29a-30a. Obtaining the perpetual, exclusive, worldwide, royalty-free right to use the Marks on industrial batteries was critical to the decision of EnerSys to enter into the APA. Transcript of March 5, 2004 Hearing at 126, 128, 130, *In re Exide Technologies, et al.*, No. 02-11125 (Bankr. D.Del.).

On April 15, 2002, Exide and its debtor affiliates filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the "**Bankruptcy Code**") in the United States Bankruptcy Court for the District of Delaware (the "**Bankruptcy Court**"). *In re Exide Technologies, et al.*, No. 02-11125, D.I. 1 (Bankr. D.Del.).

On March 14, 2003, almost ***12 years*** after the closing of the APA, Exide filed four Notices of Rejection seeking to reject the APA, the Trademark Agreement, and two other related agreements (collectively, the "**Agreements**"). Pet. at 8; Pet. App. 29a & n.3; *In re Exide Technologies, et al.*, No. 02-11125, D.I. 1613, 1614, 1615 & 1617 (Bankr. D.Del.). The four Notices of Rejection described above are collectively referred to as the "**Notices to Reject**." Exide's primary objective in filing the Notices to Reject was to recapture the exclusive right to use the Marks (including "Exide") on industrial batteries, Pet. App. 30a, notwithstanding that it had transferred that right to EnerSys in perpetuity in 1991 and had long since been fully paid for that transfer. Pet. App. 29a-30a.

On April 14, 2003, EnerSys timely filed its objection to the Notices to Reject. *In re Exide Technologies, et al.*, No. 02-11125, D.I. 1726 (Bankr. D.Del.).

On April 3, 2006, the Bankruptcy Court entered an order and issued a supporting opinion granting Exide's request that it be permitted to reject the Agreements ("the **Rejection Order**" and the "**Bankruptcy Court Opinion**," respectively). Pet App. 27a-83a; Pet. at 8-9. On February 27, 2008, the United States District Court for the District of Delaware (the "**District Court**") affirmed the Rejection Order in a Memorandum Order (the "**District Court Order**"). Pet. App. 22a-26a.

On June 1, 2010, the Court of Appeals issued an opinion (the "**Court of Appeals Opinion**"), determining that the Agreements are not executory and cannot be rejected, and a judgment (the "**Court of Appeals Judgment**") vacating the District Court Order and remanding for further proceedings consistent with the Court of Appeals Opinion. Pet. App. 1a-13a; Opp. App. 78a-79a. On June 15, 2010, Exide petitioned the Court of Appeals for rehearing *en banc*. Opp. App. 56a-77a. On June 29, 2010, the Court of Appeals denied Exide's petition for rehearing *en banc*. Pet. App. 84a-85a.

Exide did not seek a stay of the mandate of the Court of Appeals and, on July 7, 2010, the Court of Appeals issued its mandate. *In re Exide Technologies, et al.*, No. 08-1872 (3d Cir. July 7, 2010). On July 14, 2010, the District Court vacated the District Court Order and remanded the case to the Bankruptcy Court for further proceedings. *In re Exide Technologies, et al.*, No. 06-00302, D.I. 31 (D.Del. July 17, 2010).

On August 27, 2010, the Bankruptcy Court entered an order that, among other things, vacated the Rejection Order and denied the Notices to Reject. *In re Exide Technologies, et al.*, No. 02-11125, D.I. 6400 (Bankr. D.Del.).

On September 27, 2010, Exide filed its Petition in this Court.

On October 12, 2010, the Bankruptcy Court entered an order that amended its August 27, 2010 Order in respects that are not relevant to this Petition. *In re Exide Technologies, et al.*, No. 02-11125, D.I. 6422 (Bankr. D.Del.).

REASONS FOR DENYING THE PETITION

I. EXIDE HAS WAIVED ANY ARGUMENT THAT THE COURT OF APPEALS APPLIED THE INCORRECT TEST TO DETERMINE WHETHER THE AGREEMENTS WERE EXECUTORY.

The Court should deny Exide's Petition on the basis of waiver.

Exide argues in its Petition that the Court of Appeals erred in applying the "Countryman Test" (the "**Countryman Test**") to determine whether the Agreements are executory and further argues that a "well-entrenched conflict" exists among the federal courts of appeals regarding the test to be used to determine what constitutes an "executory contract" under Section 365(a) of the Bankruptcy Code.[2] Pet. at

2. The Countryman Test defines an executory contract as "a contract under which the obligation of both the bankrupt and the other party to the contract are so far underperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." *Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 39 (3d Cir. 1989); *see also In re Columbia Gas Sys. Inc.*, 50 F.3d 233, 239 (3d Cir. 1995).

13-19. According to Exide, the conflict is between seven circuits, including the Third Circuit, which have adopted the Countryman Test, and two circuits which Exide asserts have adopted the "Functional Test." Pet. at 13-19.

For the reasons discussed below, there is no such conflict. Further, to the extent any such conflict exists, it is not well developed, is based on very old circuit court decisions purporting to adopt the Functional Test, and does not relate to an issue that is important enough to warrant granting the Petition. And, in any event, this case is a particularly poor vehicle to resolve any such conflict. It is not necessary, however, for this Court to address or resolve any of those issues because Exide, as a threshold matter, has waived any argument that the Court of Appeals erred in applying the Countryman Test in this case.

At no time prior to filing its Petition did Exide ever question or oppose the use of the Countryman Test to determine whether the Agreements were executory or propose that the Bankruptcy Court, the District Court, or the Court of Appeals consider or apply the Functional Test, or any other test, to make such a determination. To the contrary, as set forth below, Exide affirmatively argued to all three courts that the Countryman Test applied and had been satisfied.

A. The Proceedings Before the Bankruptcy Court

On January 14, 2004, prior to the hearing of this matter in the Bankruptcy Court, Exide filed a Pre-Rejection Hearing Brief. Exide wrote:

> Although the Bankruptcy Code does not specify what constitutes an "executory contract," courts generally follow the "Countryman Definition," which defines an agreement as executory if 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." *Sharon Steel Corp. v. National Fuel Gas Distrib. Corp.*, 872 F.2d 36, 39 (3d Cir. 1989) (quoting Countryman, *Executory Contracts in Bankruptcy, Part I*, 57 MINN.L.REV. 439, 460 (1973)).

Debtors' Pre-Rejection Hearing Brief at 7, *In re Exide Technologies, et al.*, No. 02-11125, D.I. 3461 (Bankr. D.Del. Jan. 14, 2004).[3]

At the hearing of this matter in March 2004, Exide asserted no objection to the use of the Countryman Test and proposed no other test for executoriness. Indeed,

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3. Exide filed its Pre-Rejection Hearing Brief in the Bankruptcy Court under seal but has agreed not to object to EnerSys' citation to, and quotation from, the pages of that document referenced herein.

to the contrary, in its closing argument, Exide affirmatively argued that the Countryman Test applied and had been satisfied. Transcript of March 31, 2004 Hearing, at 37, 67, *In re Exide Technologies, et al.*, No. 02-11125 (Bankr. D.Del.).

Following the hearing, in its Post-Trial Brief submitted to the Bankruptcy Court, Exide again affirmatively argued that the Countryman Test applied and had been satisfied. Debtors' Post-Trial Brief at 3, *In re Exide Technologies, et al.*, No. 02-11125, D.I. 4221 (Bankr. D.Del. April 13, 2004).[4] Exide wrote:

> As this Court has ruled …, the pertinent question is whether "the failure of either to complete performance would constitute a material breach excusing performance of the other." *See Sharon Steel Corp. v. Nat'l Fuel Gas Distr. Corp.*, 872 F.2d 36, 39 (3d Cir. 1989).

Id. Again, Exide asserted no objection to the Countryman Test and proposed no other test for executoriness. *See generally* Debtors' Post-Trial Brief, *In re Exide Technologies, et al.*, No. 02-11125 (Bankr. D.Del. April 13, 2004).

In the Bankruptcy Court Opinion issued in April 2006, the Bankruptcy Court applied the Countryman Test, *see* Pet. App. 32a-33a, found that the contract at

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4. Exide filed its Post-Trial Brief in the Bankruptcy Court under seal but has agreed not to object to EnerSys' citation to, and quotation from, the pages of that document referenced herein.

issue was executory, and granted Exide's motion to reject. *See generally* Pet. App. 27a-83a. Exide did not request reconsideration of any issue or appeal any aspect of either the Rejection Order or the Bankruptcy Court Opinion, including the application by the Bankruptcy Court of the Countryman Test.

B. The Proceedings Before the District Court

EnerSys appealed the Rejection Order to the District Court. In its Brief of Appellee filed in the District Court, Exide again asserted no objection to the Countryman Test and proposed no other test for executoriness. *See generally* Appellee's Opposition Brief on Appeal from Bankruptcy Court, *In re Exide Technologies, et al.*, No. 06-00302, D.I. 20 (D.Del. Oct. 5, 2006).

Instead, Exide argued that the Bankruptcy Court had correctly found that the Countryman Test applied and had been satisfied. Appellee's Opposition Brief on Appeal from Bankruptcy Court at 19-23, *In re Exide Technologies, et al.*, No. 06-00302 (D.Del. Oct. 5, 2006). Exide never argued or implied that it was an incorrect or inappropriate test or was inapplicable in any way. *Id.* Exide even claimed that courts generally follow this test, "further refining" the "characterization" that performance is due to some extent, on both sides. *Id.* at 20. Lest there be any confusion regarding Exide's position on the appropriate test for executoriness, Exide wrote: "The plain language of the Integrated Agreement unequivocally imposes on both Exide and EnerSys mutual ongoing material obligations, which render the contract executory ***under the relevant standard***." *Id.* at 19 (emphasis added).

In the District Court Order, the District Court affirmed the Bankruptcy Court's ruling, implicitly affirming its selection of the proper test for executoriness and applying the Countryman Test (without expressly citing Professor Countryman's article). Pet. App. 25a (finding the "Integrated Agreement imposed ongoing obligations on the part of both parties and the failure to perform these obligations would constitute a material breach excusing performance of the other party."); *see generally* Pet. App. 22a-26a. Again, Exide did not request reconsideration of any issue or appeal any aspect of the District Court Order, including application by the District Court of the Countryman Test.

C. The Proceedings Before the Court of Appeals

EnerSys then appealed the District Court Order. In its Brief of Appellee filed in the Court of Appeals, Exide again asserted no objection to the Countryman Test and proposed no other test for executoriness. *See generally* Opp. App. 1a-55a.[5] Moreover, Exide did not argue that either the Bankruptcy Court or the District Court had applied the incorrect test for executoriness. Instead, Exide argued that the Bankruptcy Court had correctly found – and the District Court had correctly affirmed – that the Countryman Test applied and had been satisfied. Opp. App. 32a-42a. Exide ***again*** asserted that courts generally follow this test, "further refining" the "characterization" that performance is due to some

5. Exide filed its Brief of Appellee in the Court of Appeals under seal, Opp. App. 1a, but has agreed not to oppose EnerSys' inclusion of that document in the Opposition Appendix filed on the public record.

extent, on both sides. *Id.* The Court of Appeals, applying the Countryman Test, reversed the District Court's finding of executoriness and remanded the case to the District Court for remand to the Bankruptcy Court. Pet. App. 1a-21a.

Exide then sought rehearing *en banc*, not on the basis that the Countryman Test was incorrect, inappropriate or inapplicable, but to the contrary, on the ground that the Countryman Test controlled but the panel's ruling had incorrectly applied it and, as a result, was contrary to *Sharon Steel* and *Columbia Gas*, among other authorities. *See generally* Opp. App. 56a-77a. Once again, Exide proposed no other test for executoriness but instead argued again that the Agreements were executory under the Countryman Test. *Id.* As noted above, the Court of Appeals denied Exide's Petition for Rehearing *en banc*. Pet. App. 84a-85a.

D. Exide's Waiver

On September 27, 2010, Exide filed its Petition, arguing for the first time that: (1) the Countryman Test is inconsistent with congressional intent and injects arbitrary state law analysis into an area of federal law that demands uniformity; and (2) the correct test to determine whether a contract is executory is the "Functional Test." Pet. at 13-25.

Exide waived these arguments by not presenting them to the Court of Appeals, the District Court, or the Bankruptcy Court. It is well settled that this Court ordinarily does not decide questions that were not raised

or resolved in the lower courts, absent a showing of unusual or exceptional circumstances. *Granite Rock Co. v. International Broth. of Teamsters*, 130 S. Ct. 2847, 2861 & n.14 (2010); *Astrue v. Ratliff*, 130 S. Ct. 2521, 2525 n.2 (2010); *Glover v. United States*, 531 U.S. 198, 205 (2001); *United States. v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992); *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977); *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *Neely v. Martin K. Eby Construction Co., Inc.*, 386 U.S. 317, 330 (1967); *Duigan v. United States*, 274 U.S. 195, 200 (1927).

In this case, there are no unusual or exceptional circumstances that warrant deviation from these well-established principles. In its Petition, Exide failed to inform this Court that it had not raised to any of the three courts below the argument that the Functional Test or, indeed, any test other than the Countryman Test, should have been applied to determine whether the Agreements are executory, and likewise failed to identify any unusual or exceptional circumstances that would justify excusing Exide's patent failure to raise this argument below. Accordingly, this Court should hold that Exide's newly minted argument regarding the proper test to determine the executoriness of a contract was waived and should deny Exide's Petition on that basis alone.[6]

6. Any argument that Exide did not waive its right to argue to this Court that the Functional Test should have been applied to determine executoriness of the Agreements because the Third Circuit had adopted the Countryman Test in *Sharon Steel,* 872 F.2d at 39, and *Columbia Gas*, 50 F.3d at 239, is unavailing. EnerSys has found no case excusing waiver simply because the

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II. THERE IS NO CONFLICT AMONG THE FEDERAL COURTS OF APPEALS REGARDING THE TEST FOR DETERMINING WHETHER A CONTRACT IS EXECUTORY.

This Court should deny Exide's Petition because there is no conflict among the federal courts of appeals regarding the test for determining whether a contract is executory that would warrant granting a writ of *certiorari*.

As noted by a leading treatise on Supreme Court practice, in granting writs of *certiorari* based on conflicts between courts of appeals, "there must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." Stern, Gressman, Shapiro and Geller, *Supreme Court Practice* § 4.3 (7th Ed. 1993). Further, "[a] genuine conflict, as opposed to a mere conflict in principle, arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts." *Id.* According to Exide, just such a conflict exists between two circuits, the Sixth and Eleventh, which Exide asserts have

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argument in question would have been contrary to controlling circuit law. Moreover, Exide failed to propose the use of the Functional Test even when these proceedings reached the Court of Appeals. Opp. App. 1a-55a. Nor did Exide argue for application of the Functional Test when it sought rehearing *en banc* before the Court of Appeals but, rather, argued that the panel had failed to properly apply the Countryman Test. Opp. App. 65a-77a.

adopted the "Functional Test" for determining whether a contract is executory, and seven other circuits, including the Third Circuit, which have adopted the Countryman Test for making such determination. Exide is mistaken.

Preliminarily, it should be noted that, throughout much of its Petition, Exide refers to the "Functional Test" as if it were a single, consistent standard. However, a review of Exide's own description of the holdings in the decisions which allegedly adopt the Functional Test in the Sixth Circuit and Eleventh Circuit reveals that not even Exide believes that any such single Functional Test exists. Rather, the version of the Functional Test that Exide asserts has been adopted in the Sixth Circuit treats a contract as executory as long as it imposes obligations which continue into the future and, if the debtor is seeking to reject, an obligation for the debtor to do something in the future. Pet. at 15. On the other hand, the version of the Functional Test Exide asserts has been adopted in the Eleventh Circuit treats a contract as executory as long as doing so would produce a benefit for the debtor. Pet. at 16-17. Plainly, to the extent a "Functional Test" exists, there is no single definition.

In addition, a review of the Eleventh Circuit case upon which Exide bases its argument reveals an apparent misstatement by Exide of its holding. To the extent the Eleventh Circuit has adopted a Functional Test, in the context of rejection, it appears to require that treating the contract as executory (and, so, allowing rejection) be ***critical*** to the debtor's reorganization. *In re General Dev. Corp.*, 84 F.3d 1364, 1374 (11th Cir. 1996)

("In the instant case, GDC's ability to reject homesite purchase agreements which obligated it to improve and deed developed homesite lots to tens of thousands of lot purchasers, when it was simply financially unable to fill such contractual obligations ***was critical*** to GDC's reorganization.") (emphasis supplied). Exide, however, appears to interpret *General Development* as setting a much lower bar, allowing for treatment of a contract as executory if rejection would relieve the debtor of any onerous, burdensome or disadvantageous obligation. [7]

A. There Is No Conflict Between the Sixth Circuit and the Circuits That Have Adopted the Countryman Test Regarding the Test for Determining Whether a Contract Is Executory.

Exide's argument that the Sixth Circuit has rejected the Countryman Test and adopted the Functional Test is based on *In re Jolly*, 574 F.2d 349 (6th Cir. 1978), *cert. denied,* 439 U.S. 929 (1978), as allegedly affirmed in *In re Becknell & Crace Coal Co.*, 761 F.2d 319 (6th Cir. 1985) and *In re Magness*, 972 F.2d 689 (6th Cir. 1992). For

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7. Exide does not make any attempt to define "burdensome," "disadvantageous" or "onerous" obligations or distinguish them from any other kind of obligations. Presumably, given Exide's argument that the materiality standard is inappropriate, Pet. at 20-25, Exide believes onerous, burdensome and disadvantageous obligations do not have to be material. And, in any event, Exide does not interpret *General Development* to require that relief from remaining debtor obligations be "critical" to the debtor's reorganization in order for the underlying contract to satisfy the Functional Test in the context of rejection.

reasons which will be discussed within, none of *Jolly*, *Becknell* or *Magness* creates a real, intolerable or genuine conflict with the decisions of the courts of appeals that have formally adopted the Countryman Test. However, even if such were not the case, no such conflict can possibly exist, because (a) a decision of the Sixth Circuit that post-dated *Jolly* and *Becknell* affirmatively adopted the Countryman Test more than twenty years ago, *see In re Terrell*, 892 F.2d 469 (6th Cir. 1989)[8], and (b) as discussed below, the discussion in *Magness* of the Functional Test was *dicta*.

In *Terrell*, the Sixth Circuit noted that the term "executory contract" is not defined in the Bankruptcy Code and then stated: "Congress apparently had in mind the definition of executory contracts set forth in Countryman, *Executory Contracts in Bankruptcy: Part 1*...." The *Terrell* Court then re-stated, verbatim, the Countryman Test, *id.* at 471 n.2, applied the Countryman Test to the facts and concluded, "[c]learly, there are material obligations left to be performed by both parties to the contract." *Id.* at 472. Based on that finding, the Court held that the contract in question was executory. *Id.* at 473.

Conspicuously absent from the *Terrell* opinion is any mention of the Functional Test. Further, since the decision in *Terrell* was issued, it has been cited by lower

8. Exide failed even to cite the *Terrell* decision in its Petition, let alone attempt to distinguish it or explain why it does not preclude any finding of a conflict between the approach in the Sixth Circuit to determining whether a contract is executory and the approach in the seven circuits that have adopted the Countryman Test.

courts in the Sixth Circuit as standing for the proposition that, in the Sixth Circuit, the Countryman Test applies. *See In re Ravenswood Apartments, Ltd.*, 338 B.R. 307, 311 (6th Cir. BAP 2006) ("After citing the definition set forth in the legislative history, the *Terrell* court adopted the so-called Countryman definition of an executory contract."); *In re Nat'l Fin. Realty Trust*, 226 B.R. 586, 589 (Bankr. W.D. Ky. 1998) (citing *Terrell* and stating: "The prevailing definition throughout the United States is generally referred to as the 'Countryman' definition. The Sixth Circuit has adopted that definition….").

Terrell, on its own, defeats Exide's claim of a conflict between the Sixth Circuit and those circuits that have adopted the Countryman Test. But even if the Sixth Circuit had not issued its *Terrell* decision, no real, intolerable or genuine conflict would exist between the law in the Sixth Circuit and the law in the circuits which have adopted the Countryman Test regarding the definition of an executory contract.

In *Jolly*, prior to the filing of the debtor's bankruptcy petition, the debtor entered into a contract to purchase burial plots, with the purchase price for the lots to be paid over time. When the debtor later defaulted on his payment obligations under that contract, the cemetery owner cancelled the contract and, prior to the debtor's bankruptcy filing, obtained a default judgment for the balance due. *In re Jolly*, 574 F.2d at 349-50. After the debtor filed his bankruptcy petition, the trustee sought to reject the burial plot contract. *Id.* at 350. In determining that the burial plot contract was not executory, the Jolly Court quoted the

Countryman Test and then noted, "[s]uch definitions are helpful, but do not seem to resolve this problem." *Id.* at 351.

This language falls far short of raising a real or intolerable conflict with the Countryman Test of the kind normally required by this Court to warrant granting a writ of *certiorari*. In fact, some lower courts within the Sixth Circuit do not even recognize *Jolly* as departing from the Countryman Test. *See, e.g. In re KMMCO, Inc.*, 40 B.R. 976, 978 (Bankr. E.D. Mich. 1984) (noting that the Countryman Test has been adopted by most courts and stating: "[t]his Court does not read the decision in *In re Jolly* to depart from this [the Countryman] well settled definition.").

Further, *Jolly* does not create a "genuine" conflict (*i.e.*, a conflict that would lead to different results on very similar facts) with the holdings of the courts of appeals that have formally adopted the Countryman Test. The *Jolly* Court held that the contract in question was not executory because the debtor had no remaining obligations. *In re Jolly*, 574 F.2d at 351. Had the *Jolly* Court applied the Countryman Test, it would have reached the same conclusion since the debtor did not have any remaining material obligations. *See In re Columbia Gas*, 50 F.3d at 240; *Sharon Steel,* 872 F.2d at 39.

Nor does the Sixth Circuit's decision in *Becknell* support Exide's argument that there is a real, intolerable or genuine conflict between the law in the Sixth Circuit regarding the definition of an executory contract and the law of circuits that have adopted the Countryman Test. *Becknell* does not mention the

Countryman Test or any case which applied the Countryman Test, let alone reject the Countryman Test. Rather, the Court in *Becknell* simply quoted from *Jolly* and then, without any independent reasoning, found the lease purchase agreement in that case to be executory because all of the parties to the contract "had obligations to perform in the future." *In re Becknell*, 761 F.2d at 322. And, there is no indication in the *Becknell* opinion that the remaining obligations of the parties were not material. As a result, it cannot be said with any confidence that the result in *Becknell* would have been any different under the Countryman Test. *See* Stern, Gressman, Shapiro and Geller, *Supreme Court Practice* § 4.3 (7th Ed. 1993).

Finally, the decision of the Sixth Circuit in *Magness* lends no support to Exide's claim of a conflict because *Magness* was not a case in which executoriness was even at issue. Rather, in *Magness*, the Court was required to determine whether a contract could be assumed and assigned notwithstanding the provisions of 11 U.S.C. § 365(c), which preclude assignment of certain types of contracts. *In re Magness*, 972 F.2d at 689. While the *Magness* Court did cite both the Countryman Test and *Jolly*, it specifically noted that "[i]n the instant case, because the trustee does not propose to reject the contract but wishes to assign it, ***it is not necessary to further explore the executory contract problem***." *Id.* at 694 (emphasis supplied). The discussion in *Magness* of the Countryman Test and *Jolly* was mere *dicta* and, so, does not provide any basis to find that a real, intolerable or genuine conflict exists between the test employed by the Sixth Circuit to determine whether a contract is executory and the test employed by the seven

circuits that have adopted the Countryman Test. *See Randall v. Scott*, 610 F.3d 701, 708 (11th Cir. 2010) ("*Dicta* is neither the law of the case nor binding precedent."); *Arcam Pharmaceutical Corp. v. Faria*, 513 F.3d 1, 3 (1st Cir. 2001) ("*Dictum* constitutes neither the law of the case nor the stuff of binding precedent.").

The conclusion is inescapable that no real, intolerable or genuine conflict exists between the Sixth Circuit's approach to determining whether a contract is executory and the approach of the seven circuits that have adopted the Countryman Test.

B. There Is No Conflict Between the Eleventh Circuit and the Circuits That Have Adopted the Countryman Test Regarding the Test for Determining Whether a Contract Is Executory.

Exide's argument that a conflict warranting the grant of its Petition exists between the Eleventh Circuit and the seven circuits that have adopted the Countryman Test is based on a single case, *In re General Dev. Corp.*, 84 F.3d 1364 (11th Cir. 1996). Pet. at 16-17. Exide's reliance on *General Development* is misplaced.

General Development is a *per curiam* decision in which the Eleventh Circuit did not author an opinion but, rather, simply affirmed based on the opinion of the district court. *Id.* at 1365. As noted by this Court in *Illinois State Bd. of Elec. v. Socialist Workers*, 440 U.S. 173, 182 (1979), "[a]s we stated in *Mandel* v. *Bradley* [internal citation omitted], the precedential effect of a

summary affirmance can extend no farther than 'the precise issues presented and necessarily decided by those actions.' " Additionally, in *Edwards v. Carpenter*, 529 U.S. 446, 452 n.3 (2000), this Court stated: "In any event, *per curiam* opinions decided without the benefit of full briefing or oral argument are of little precedential value."[9]

Even if the lack of precedential value of the *General Development* decision were to be ignored, it does not create a real, intolerable or genuine conflict with the law of the seven circuits that have adopted the Countryman Test. In *General Development*, the ***district court*** – not the Eleventh Circuit – stated: "While it does not appear that the Eleventh Circuit has adopted the 'functional approach' over the 'Countryman approach', the Eleventh Circuit in *In re Martin Brothers Toolmakers, Inc.* [internal citations omitted] appears more inclined to embrace the 'functional approach.' " *In re General Dev. Corp.*, 177 B.R. 1000, 1013 (S.D. Fla. 1995). In other words, while the district court opinion in *General Development*, affirmed without opinion by the Eleventh Circuit, ***predicts*** that the Eleventh Circuit would embrace the Functional Test, it also acknowledges that the Eleventh Circuit ***has not ruled*** on whether the Countryman Test or some version of the Functional Test should be applied in determining whether contracts are executory. *Id.* And that is exactly how lower courts in the Eleventh Circuit have interpreted *General*

9. The Eleventh Circuit's *per curiam* decision in *General Development* was rendered without oral argument, as evidenced by the notation in the caption that it was listed on the Non-Argument Calendar. *In re General Dev. Corp.*, 84 F.3d at 1364.

Development. *See, e.g., In re W.B. Care Center, LLC* 419 B.R. 62, 70 (Bankr. S.D. Fla. 2009) (citing *General Development* and stating, "[e]ven though this Circuit is 'amenable' to the functional test, it has not outright adopted the functional test over the Countryman test").

While the Eleventh Circuit may have expressed that it is "amenable" to the Functional Test, that expression of amenability falls far short of creating a real, intolerable or genuine conflict between the Eleventh Circuit and the seven circuits that have affirmatively and unambiguously adopted the Countryman Test. And since, for reasons discussed above, no such conflict exists between the Sixth Circuit and the seven circuits which have adopted the Countryman Test, there is no conflict among the federal courts of appeals that would justify granting Exide's Petition.

III. TO THE EXTENT THERE IS A CONFLICT AMONG THE FEDERAL COURTS OF APPEALS REGARDING THE DEFINITION OF EXECUTORY CONTRACT, IT IS UNDEVELOPED AND DOES NOT WARRANT THE GRANT OF EXIDE'S PETITION.

To the extent this Court concludes that there is a conflict regarding the approach to determining whether a contract is executory employed in the seven circuits which have adopted the Countryman Test, on the one hand, and either the Sixth Circuit or the Eleventh Circuit, on the other hand, the conflict is undeveloped and does not warrant granting Exide's Petition.

First, with regard to the Sixth Circuit, any conflict between its approach to defining executory contracts and the approach of the seven circuits that have adopted the Countryman Test would be based on the holding of a Sixth Circuit panel in *Jolly* and, possibly, the holding of a Sixth Circuit panel in *Becknell*.[10] *In re Jolly*, 574 F.2d at 351; *In re Becknell*, 761 F.2d at 322. However, eleven years after *Jolly* was issued and four years after *Becknell* was decided, a different Sixth Circuit panel issued its decision in *Terrell*, adopting the Countryman Test. *In re Terrell*, 892 F.2d at 471-73 & n.2. As a result, to the extent *Jolly* and *Becknell* adopted a version of the Functional Test, an internal conflict exists in the Sixth Circuit. Before this Court commits its very limited resources to resolving any perceived conflict between the Sixth Circuit and the seven circuits that have adopted the Countryman Test, the Sixth Circuit should resolve its own internal conflict.

Second, with regard to the Eleventh Circuit, any conflict between the approach of the Eleventh Circuit to defining executory contracts and the approach of the seven circuits that have adopted the Countryman Test would be based on an opinion of a district court, affirmed *per curiam* by the Eleventh Circuit. *In re General Dev. Corp.*, 84 F.3d 1364. Before this Court commits its very limited resources to resolving any perceived conflict between the law of the Eleventh Circuit defining

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10. For reasons stated *supra*, to the extent the Sixth Circuit discussed tests for determining the executoriness of contracts in *Magness*, 972 F.2d at 689, such discussion was *dicta* and cannot form the basis of a conflict with the seven circuits which have adopted the Countryman Test.

executory contracts and the law of the seven circuits that have adopted the Countryman Test, this Court should await a reasoned opinion from the Eleventh Circuit itself unambiguously adopting the Functional Approach.

IV. TO THE EXTENT THERE IS A CONFLICT AMONG THE FEDERAL COURTS OF APPEALS REGARDING THE DEFINITION OF EXECUTORY CONTRACT, IT IS BASED ON OUTDATED AUTHORITY AND DOES NOT WARRANT THE GRANT OF EXIDE'S PETITION.

To the extent there is any conflict between the law of the Sixth Circuit or the Eleventh Circuit defining executory contracts and the law of the seven circuits which have adopted the Countryman Test, such conflict would be based on Sixth Circuit and Eleventh Circuit authority which is thirty-two years old in the case of *Jolly*, twenty-one years old in the case of *Becknell*, and fifteen years old in the case of *General Development.* In addition, both of the Sixth Circuit cases Exide asserts have adopted the Functional Test, *Jolly* and *Becknell*, were decided under the Bankruptcy Act of 1898, 11 U.S.C. §§ 1 *et seq.* (1976) (repealed 1979), which was replaced with the Bankruptcy Code. Significantly, all seven decisions adopting the Countryman Test and cited by Exide in its Petition were rendered **after** *General Development*, the most recent of the cases that Exide asserts adopted the Functional Test. Pet. at 17; *see, e.g., In re Gen. DataComm Indus., Inc.*, 407 F.3d 616, 623 (3d Cir. 2005), *cert. denied sub nom. Gen. Datacomm Indus., Inc. v. Arcara*, 546 U.S. 1031 (2005); *In re*

Sunterra Corp., 361 F.3d 257, 264 (4th Cir. 2004); *In re Liljeberg Enters., Inc.*, 304 F.3d 410, 436 (5th Cir. 2002); *Dick ex rel. Amended Hilbert Residence Maint. Trust v. Conseco, Inc.*, 458 F.3d 573, 577 (7th Cir. 2006); *In re Craig*, 144 F.3d 593, 596 (8th Cir. 1998); *In re Int'l Fibercom, Inc.*, 503 F.3d 933, 941 (9th Cir. 2007); *In re Baird*, 567 F.3d 1207, 1211 (10th Cir. 2009). In fact, most of the appellate court decisions cited by Exide as adopting the Countryman Test were rendered within the last six years, and all were decided under the Bankruptcy Code, not the repealed Bankruptcy Act. Pet. at 17.

Given the age of *Jolly*, *Becknell* and *General Development* and the unanimous adoption of the Countryman Test by all seven circuits that have considered the issue over the last fifteen years, this Court should not devote its limited resources to addressing the definition of executory contract.

V. TO THE EXTENT THERE IS A CONFLICT AMONG THE FEDERAL COURTS OF APPEALS REGARDING THE TEST TO DETERMINE WHETHER A CONTRACT IS EXECUTORY, THE ISSUE RAISED IS NOT IMPORTANT ENOUGH TO WARRANT GRANTING EXIDE'S PETITION.

Even if this Court were to conclude that there is a conflict among the federal courts of appeals regarding the proper test to determine whether a contract is executory, the issue raised is not important enough to warrant granting Exide's Petition because the result in most, if not all, cases will be exactly the same, regardless

of whether the Countryman Test or either version of the Functional Test which Exide asserts has been adopted in the Sixth or Eleventh Circuits is applied.

Initially, it should be noted that there is no shortage of decisions in which Bankruptcy Courts in circuits which have not yet adopted the Countryman Test have applied both the Countryman Test and some version of the Functional Test and affirmatively stated that the result was the same under both. *See, e.g., In re Appleridge Retirement Community, Inc.*, 422 B.R. 383, 398 (Bankr. W.D.N.Y. 2010); *In re Peralta Food Corp.*, No. 07-16508, 2008 WL 190503, at *5-6; *In re Driscoll*, 401 B.R. 512, 518 (Bankr. S.D. Fla. 2009); *In re Collins & Aikman Corp.*, 384 B.R. 751, 761-62 (Bankr. E.D. Mich. 2008).

That the Functional Test and the Countryman Test have produced the same results is not surprising, given the similarities in the tests, *see Huntington National Bank Co. v. Alix (In re Cardinal Industries)*, 146 B.R 720, 728-29 n.7 (Bankr. S.D. Ohio 1992) (noting that "the functional approach of defining executory contracts is not entirely separate and distinct from the Countryman definition"), and the circumstances in which requests to assume or reject contracts arise and are likely to be contested.

To the extent the Functional Test has been adopted in the Eleventh Circuit, the test requires that assumption or rejection be ***critical*** to the ability of the debtor to reorganize, s*ee In re General Dev. Corp.*, 84 F.3d at 1374. Very few contracts which do not satisfy the Countryman Test will meet that exacting requirement.

To the extent both parties to the contract have remaining material obligations, the contract will satisfy both the Countryman Test ***and*** the version of the Functional Test Exide asserts has been adopted by the Sixth Circuit (*i.e.*, some remaining obligations and an obligation of the debtor if rejection is sought).

To the extent both parties to the contract have remaining material obligations, the contract will satisfy both the Countryman Test ***and*** the version of the Functional Test Exide asserts has been adopted by the Eleventh Circuit (*i.e.*, the debtor benefit test ***but*** no requirement that, to the extent rejection is sought, it be critical to the debtor's reorganization) since, in order to obtain approval of assumption or rejection under the Countryman Test, the debtor must demonstrate that assumption or rejection satisfies the business judgment rule which, in turn, requires that assumption or rejection must benefit the debtor. *See Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U.S. 523, 550 (1943); *Sharon Steel,* 872 F.2d at 39-40.

To the extent the debtor has fully performed, or never had, any performance obligations (such as in connection with an option held by the debtor), the contract would be non-executory under: (a) the version of the Functional Test Exide asserts has been adopted by the Sixth Circuit (because the debtor has no remaining obligations), (b) the version of the Functional Test Exide asserts has been adopted by the Eleventh Circuit, if the debtor is seeking rejection (because rejection would not benefit the debtor), and (c) the Countryman Test (because the debtor would have no remaining material obligations.)

To the extent the debtor has materially performed but the non-debtor has not materially performed or not performed at all:

- It is unlikely the debtor would ever seek to reject the contract since rejection could result in forfeiture of the remaining performance due from the non-debtor, *In re Alongi*, 272 B.R. 148, 153 (Bankr. D.Md. 2001); and

- If the debtor wanted to retain the benefits under the contract, the fact that such contract could not be assumed because it was not executory under the Countryman Test would not necessarily prevent the debtor from realizing such benefits since the debtor could simply allow the contract to "ride through" the bankruptcy, rendering any contest regarding executoriness unnecessary. *Phoenix Mutual Life Ins. Co. v. Greystone (In re Greystone III Joint Venture)*, 995 F.2d 1274, 1281 (5th Cir. 1991) ("If a debtor neither assumes nor rejects an executory contract, the contract continues in effect."); *Hall v. Perry (In re Cochise College Park, Inc.)*, 703 F.2d 1339, 1352 (9th Cir. 1983) ("Until rejection, . . . the executory contract continues in effect . . . ."); *see also N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 545 n.12, (1984) (Brennan, J., concurring and dissenting) ("In the unlikely event that the contract is neither accepted nor rejected, it will 'ride through' the bankruptcy proceeding and be binding on the debtor even after a discharge is granted.").

The only circumstance in which application of the Countryman Test or a version of the Functional Test could lead to a different outcome in a case which has any real chance of arising is where the non-debtor has fully or materially performed (or never had any performance obligations), the debtor has not fully performed, and the debtor wants to reject the contract. However, even within this narrow category, the distinction between the Functional Test and the Countryman Test will have no significance in most cases for the reasons stated below.

Such a contract would be non-executory under the Countryman Test, since the non-debtor has materially performed. And if rejection is not "critical" to the debtor's reorganization, the contract would also likely be non-executory under the version of the Functional Test Exide asserts has been adopted in the Eleventh Circuit, since very few individual contracts are ***critical*** to a debtor's ability to reorganize. *See In re General Dev. Corp.*, 84 F.3d at 1374.

Moreover, if the debtor's remaining obligations under a contract which has been materially performed by the non-debtor do not constitute "claims," as that term is defined in the Bankruptcy Code, 11 U.S.C. § 101(5), it will not matter whether a version of the Functional Test or the Countryman Test is applied because rejection does not relieve debtors of obligations under contracts that are not "claims." *In re The Ground Round,* 482 F.3d 15, 18-19 (1st Cir. 2007)*; In re Lavigne*, 114 F.3d 379, 386-87 (2d Cir. 1997); *In re Austin Dev. Co.*, 19 F.3d 1077, 1083 (5th Cir. 1994), *cert. denied*, 513 U.S. 874 (1994). Such is the case because rejection

is not the equivalent of rescission but, rather, simply constitutes a breach of contract immediately before the bankruptcy petition date which, in turn, relegates any damages meeting the definition of "claim" in 11 U.S.C. § 101(5) to prepetition unsecured status. 11 U.S.C. § 365(g). *See* Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection,"* 59 U. COLO. L. REV. 845 (1988) [Andrew I]; Michael T. Andrew, *Executory Contracts Revisited: A Reply to Professor Westbrook*, 62 U. COLO. L. REV. 1 (1991) [Andrew II]; Jay Lawrence Westbrook, *A Functional Analysis of Executory Contracts*, 74 MINN. L. REV. 227 (1989); *see also In re The Ground Round,* 482 F.3d at 18-19; *In re Lavigne,* 114 F.3d at 386-87; *In re Austin Dev. Co.,* 19 F.3d at 1083.

In fact, as argued by EnerSys below and as accepted by Circuit Judge Thomas L. Ambro in his concurring opinion in the Court of Appeals in this case, rejection would not have divested EnerSys of its rights under the Trademark Agreement. Pet. App. 14a-21a. As a result, at least from the perspective of Judge Ambro, selection of the Countryman Test or the Functional Test would not have made any difference in this case. [11]

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11. The Court of Appeals Opinion, Pet. App. 1a-13a, is silent on the issue of impact of rejection addressed by Judge Ambro in the concurring opinion. Pet. App. 14a-21a. In the event this case were remanded to the Court of Appeals for application of a different executory contract test, and if it were determined that the Agreements are executory and can be rejected, the Court of Appeals would have to address the issue of impact of rejection.

VI. TO THE EXTENT THERE IS A CONFLICT AMONG THE FEDERAL COURTS OF APPEALS REGARDING THE DEFINITION OF EXECUTORY CONTRACT AND IT IS DETERMINED THAT THE ISSUE RAISED IS IMPORTANT ENOUGH TO WARRANT RESOLUTION BY THIS COURT, THIS CASE IS A POOR VEHICLE TO EFFECT SUCH RESOLUTION.

To the extent it is determined that there is a conflict among the federal courts of appeals regarding the proper definition of executory contract and that the issue is important enough to warrant resolution by this Court, this case is a very poor vehicle to effect such resolution.

First, even if Exide is not absolutely precluded from arguing for application of the Functional Test given its failure to make that argument to the Bankruptcy Court, the District Court, or the Court of Appeals, that failure alone makes this case a poor vehicle to resolve any issues relating to the definition of executory contract since this Court would be addressing those issues without the benefit of any analysis from the Bankruptcy Court, the District Court, or the Court of Appeals.

Second, as noted by Exide in its Petition, subsequent to the issuance by the Court of Appeals of its order denying Exide's petition for rehearing *en banc*, Exide filed a complaint (the "**Exide Declaratory Judgment Complaint**") in the Bankruptcy Court seeking a declaration of its rights under its confirmed plan of reorganization (the "**Exide Plan**"). Pet. at 12

n.2; Opp. App. 80a-97a. In the Exide Declaratory Judgment Complaint, Exide asserts, among other things, that based on the discharge and revesting provisions of the Bankruptcy Code and notwithstanding that the Court of Appeals has determined that the Agreements are not executory and cannot be rejected, "EnerSys does not have an enforceable right post-confirmation to use the EXIDE mark under the [Trademark] Agreement", and "Reorganized Exide is not encumbered by any use restriction provided in the [Trademark] Agreement," and prays for an order declaring those assertions to be correct. Opp. App. 95a-96a. In other words, according to Exide, even if its Petition were denied, it would still get all the relief it sought in connection with rejection of the Agreements, *i.e.*, exclusive use of the Exide trademark and tradename, even though it would be unable to reject the Agreements. While EnerSys strongly disagrees with the claims asserted in the Exide Declaratory Judgment Complaint, the fact that these claims are being asserted by Exide and, if accepted, would render moot the issue which Exide asks this Court to review (*i.e.*, whether the Agreements are executory and can be rejected), makes this case an extremely poor vehicle to resolve issues relating to the definition of executory contract.

Third, if the Petition is granted and this Court were to decide that the version of the Functional Test Exide asserts has been adopted by the Eleventh Circuit should have been applied, the Agreements would still be found to be non-executory because rejection of the Agreements was clearly not "critical" (as required by *In re General Dev. Corp.*, 84 F.3d at 1374) to the reorganization of Exide. This is evidenced by the fact

that Exide confirmed its plan of reorganization in April of 2004 without the ruling of the Bankruptcy Court granting its request to reject the Agreements, which did not come until April of 2006, two years after the plan had been confirmed. *See In re Exide Technologies, et al.*, No. 02-11125, D.I. 4341 dated April 21, 2004 & D.I. 5378 dated April 3, 2006 (Bankr. D.Del.); Pet. App. 27a-83a.

Fourth, if the Petition is granted, for reasons stated by Judge Ambro in his concurring opinion, even if the Agreements were found to be executory and Exide were permitted to reject, EnerSys would not be deprived of its rights under the Trademark Agreement. Pet. App. 14a-21a.

THE COUNTRYMAN TEST IS THE CORRECT AND APPROPRIATE TEST FOR DETERMINING WHETHER A CONTRACT IS EXECUTORY.

For the reasons stated by Professor Countryman in his article, *see* Countryman, *Executory Contracts in Bankruptcy, Part I*, 57 MINN.L.REV. 439, 460 (1973), and for the reasons stated in the multitude of decisions, including the seven court of appeals decisions cited by Exide, Pet. at 17, which have adopted the Countryman Test, the Countryman Test is the correct and appropriate test for determining whether a contract is executory. In the event the Petition is granted, EnerSys will address in detail why the Countryman Test is correct. However, for the limited purposes of this Brief in Opposition, EnerSys respectfully notes the following.

First, Section 365 of the Bankruptcy Code permits assumption or rejection of ***executory*** contracts. 11 U.S.C. § 365. It does not permit assumption or rejection of ***all*** contracts. Since a basic tenet of statutory construction is that a statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant unless the provision is the result of obvious mistake or error, *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 31 (3d Cir. 1995); *Com. of Pa. Dept. of Public Welfare v. U.S. Dept. of Health and Human Services*, 928 F.2d 1378, 1385 (3d Cir. 1991), the term "executory" must define a subset of all debtor contracts.

The legislative history of Section 365 provides some help in creating that subset by stating that, generally, executory contracts are contracts in "which performance remains due ***to some extent on both sides***," S.R. No. 989, 95th Cong., 2d Sess. 58, *reprinted in* U.S. Code Cong. & Ad.News 5787, 5844; H.R.Rep. No. 595, 95th Cong., 2d Sess. 347, *reprinted in* 1978 U.S.Code Cong. & Ad.News 5787, 5963 & 6303 (emphasis supplied).

The Countryman Test lends meaning to the term "executory" within the constraints imposed by Congress: *i.e.*, by limiting executory contracts to contracts with performance due on both sides and distinguishing within that universe between executory and non-executory contracts by reference to the quantum of performance remaining on both sides. And the meaning ascribed by the Countryman Test to the term executory is supported by common sense. By limiting the universe of executory contracts to those with

material obligations remaining on both sides, the Countryman Test ensures that only contracts with some threshold level of importance will be subject to the special powers of assumption and rejection.

Second, the Countryman Test introduces a level of objectivity and consistency to distinguishing between executory contracts and non-executory contracts by reference to a well established body of federal bankruptcy law that has developed since the Countryman Test was first announced in 1973, including law in the seven circuits that have formally adopted the Countryman Test, and state contract law.[12]

12. Exide attacks the Countryman Test on the basis that it could produce results that vary based on the law of the applicable state. Pet. at 22. However, Exide cites no examples of actual cases applying the Countryman Test and the materiality law of one state, in which the result would have been different had the law of a different state been applied. In fact, the laws of the states are very consistent in defining material versus non-material contractual obligations, as evidenced by the fact that at least forty-three states have either adopted or cited with approval the five-factor test stated in Section 241 of the Restatement (Second) of Contracts or its predecessor, Section 275. Carl N. Pickerill, *Executory Contracts Re-Revisited*, 83 AM. BANKR. L.J. 63, 84 n.128 (2009) (collecting cases). Further, Exide is incorrect in stating that the Court of Appeals Opinion is the first time the concept of substantial performance has been introduced into the materiality analysis. Pet. at 10, 11, 14, 19. In fact, numerous courts have considered substantial performance in their materiality analysis in applying the Countryman Test. *See, e.g.*, *Vermont Plastics v. Brine, Inc.*, 79 F.3d 272, 279 (2d Cir. 1996); *In re Munple, Ltd.*, 868 F.2d 1129, 1130 (9th Cir. 1989); *Royal Bank of Canada v. Beneficial Financial Leasing Corp.*, No. 87 Civ. 1056, 1992 U.S. Dist. LEXIS 9496, *24-25 (S.D.N.Y. June 29, 1992); *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 891 (N.Y. 1921), *reh'g denied*, 130 N.E. 933 (N.Y. 1921); *see also Plante v. Jacobs*, 103 N.W. 2d 296, 298 (Wis. 1960).

It should also be noted that Exide's professed concern that the Countryman Test has worked mischief in this case by saddling Exide with "onerous and burdensome" obligations extending into the future, Pet. at 26, is belied by the facts. Exide has no affirmative obligations that extend into the future. Rather, it is required only to refrain from interfering with the exclusive, worldwide, perpetual, royalty-free license that it provided to EnerSys in 1991 and for which it was fully paid twenty years ago. Pet. App. 29a. That is not an "onerous" burden under anyone's definition. In fact, in this case, the Countryman Test has not worked any mischief but, rather, has prevented an abuse by Exide of the Bankruptcy Code rejection powers.

The Countryman Test has served the bankruptcy process in the United States well over the last thirty-eight years, as evidenced by its formal adoption in seven circuits and the fact that it has not been directly rejected by any federal court of appeals. In the event the Petition is granted, EnerSys will address the merits of the Countryman Test in greater detail.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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