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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a General Motors Corp., *et al.*	:	Case No. 09-50026 (REG)
Debtors.	:	(Jointly Administered)

MOTION OF THE TPC LENDERS FOR (I) A DETERMINATION THAT THE BANKRUPTCY COURT'S DECISION ON VALUATION METHODOLOGY IS A FINAL ORDER OR, IN THE ALTERNATIVE, (II) LEAVE TO APPEAL THE BANKRUPTCY COURT'S DECISION ON VALUATION METHODOLOGY

Wells Fargo Bank Northwest, N.A. ("Wells Fargo"), as Agent (the "Agent"), on behalf of Norddeutsche Landesbank Girozentrale (New York Branch), as Administrator (the "Administrator"), Hannover Funding Company ("Hannover" or the "CP Lender"), and Deutsche Bank, AG, New York Branch, HSBC Bank USA, National Association, ABN AMRO Bank N.V., Royal Bank of Canada, Bank of America, N.A., Citicorp USA, Inc., Merrill Lynch Bank

USA, and Morgan Stanley Bank, as purchasers, (collectively with the Administrator, the "TPC Lenders"), by and through its undersigned counsel, pursuant to 28 U.S.C. § 158(a) and Bankruptcy Rules 8001, 8002 and 8003, respectfully submits this motion (the "Motion") for (I) a determination that the Decision on Valuation Methodology for TPC Lenders' Collateral [Docket No. 12140], entered in these cases on October 16, 2012 by Judge Robert E. Gerber (the "Valuation Methodology Decision") (attached hereto as Exhibit A), is a final order appealable as of right or, in the alternative, (II) leave to appeal the Valuation Methodology Decision.

PRELIMINARY STATEMENT

This case arises out of General Motors' high-profile bankruptcy, in which the iconic automobile company has been restructured and continued for the benefit of the business's economic stakeholders as a whole. One of the keys to this successful transformation was the ability of the General Motors business, through a Section 363 sale (the "363 Sale") consummated in the early phases of the bankruptcy cases, to retain and continue to use a number of specifically selected assets and operations for its continued manufacture and sale of automobiles. As part of that sale, "New GM" acquired from "Old GM" (as each term is defined herein) two facilities that served as security for indisputably secured loans advanced by the TPC Lenders to Old GM (the "Facilities" or "TPC Property").

In July 2009, the Bankruptcy Court, based on agreement of the parties, and as part of the Sale Order (as defined below), ordered that the TPC Lenders would be entitled to an allowed secured claim, to be paid from certain funds placed in escrow by New GM, in an amount "equal to the fair market value of the TPC Property on the Commencement Date under section 506 of the Bankruptcy Code (the "TPC Value")." Sale Order ¶ 36. Section 506(a) of the Bankruptcy Code provides that the value of a secured creditor's claim "shall be determined in light of the

purpose of the valuation and the proposed disposition or use of such property." 11 U.S.C. § 506(a)(1). The issue that is the subject of this appeal is whether the proper methodology to calculate "the fair market value of the TPC Property" under section 506 of the Bankruptcy Code is a "fair value" or "use value" method – which depends on the determination of the "proposed disposition or use" of the Facilities on the Commencement Date.

Based on General Motors' representations in connection with seeking approval of the 363 Sale,[1] it is beyond dispute that on the Commencement Date, the Facilities were to be retained, operated, and to be used in an uninterrupted fashion for the benefit of General Motors' ongoing business, albeit under a new name. Therefore, valuation under Section 506 of the Bankruptcy Code should reflect such proposed use. This conclusion is reinforced by reality – the sale of the Facilities as part of the ongoing General Motors business that was proposed on the Commencement Date in fact occurred, and the Facilities have continually been used in the General Motors business as part of its revitalized operations, conferring substantial benefits upon that business and New GM.

However, even though it made numerous statements to the contrary, when it came time to value the Facilities, New GM suddenly claimed that the TPC Value should ignore the intent of Old GM and New GM on the Commencement Date and at all times thereafter to continue to use

[1] In seeking approval of the Sale Order, the Debtors repeatedly informed the Bankruptcy Court that allowing the sale would preserve and maximize the true value of the properties subject to the Sale Order, including the TPC Property, as going concerns. *See* Debtor's Memorandum of Law in Support of Debtors' Motion Pursuant to 11 U.S.C. §§ 105, 363(b), (f), (k), (m) and 365, and Fed. R. Bankr. P. 2002, 6004 and 6006, to (I) Approve (A) the Sale Pursuant to the Master Sale and Purchase Agreement with Vehicle Acquisition Holdings LLC, a U.S. Treasury-Sponsored Purchaser, Free and Clear of Liens, Claims, Encumbrances and Other Interests; (B) the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (C) Other Relief; and (II) Schedule Sale Approval Hearing dated November 14, 2005 at 3 [Docket No. 105] ("It is axiomatic that going concern value exceeds liquidation value. Thus, it is in the best interests of all stakeholders that, whenever possible, avoidance of liquidation and preservation of going concern value, and the preservation of a business, jobs and correlated interests, should be the objectives of any bankruptcy case."); *id*. at 4-5 ("Against this backdrop, the authority for the 363 Transaction, which enables the Company to sell its major assets as a going concern, rather than simply liquidating them, is clear in the Bankruptcy Code and under the cases.); *id*. at 11 ("The 363 Transaction … enabl[es] the business to be sold and continue operations without the current financial and operating distress and free of bankruptcy, as part of an immediately viable going concern.").

the Facilities. Instead, New GM argued that the TPC Value would be merely a purported "fair value" that might have been obtained if, instead of being sold as a part of a going concern for continued use in the General Motors business, the Facilities had been sold into the market to any party other than one engaged in the manufacture of automobiles.

The TPC Lenders disagreed with New GM's counter-factual methodology and the dispute was submitted to the Bankruptcy Court for a legal determination on the valuation methodology to be used in determining the TPC Value. Despite clear evidence to the contrary, the Bankruptcy Court endorsed New GM's position and held that the valuation methodology proposed by New GM is the proper method to determine the TPC Value, finding that under the sale transaction then proposed by Old GM, a sale to New GM was not the only permissible outcome. Therefore, the Bankruptcy Court reasoned that the proposed "disposition or use" was not the sale that was contemplated on the Commencement Date and that in fact occurred, but was instead a generic "sale" to a hypothetical third party. In its opinion, the Court did, however, acknowledge that a "value in use" methodology would be proper in a scenario "where the property has not been subject to a sale process (especially one subject to higher and better offers), and remains in the hands of its original owner or a successor by means other than a sale." Valuation Methodology Decision at 16. The TPC Lenders respectfully assert that under the law, and the Court's own caveat that "value in use" is appropriate when the property remains in the hands of the successor of a debtor, the Court erred in its classification of the transaction as a hypothetical generic "sale" rather than the one contemplated on the Commencement Date and that occurred in reality, and therefore, ordered that the wrong valuation methodology be used in determining the TPC Value.

The TPC Lenders submit that they are entitled to appeal as a matter of right under 28 U.S.C. § 158(a)(1), as the Valuation Methodology Decision effectively and finally decided the merits of a key issue; namely, the methodology for determining the dollar amount that the TPC Lenders will receive on account of their secured claim. By holding that the "fair market" valuation methodology advocated by New GM is appropriate, the Bankruptcy Court finally determined the rights of the TPC Lenders vis-à-vis New GM with respect to that issue. Accordingly, leave to appeal is not required, and this Court need go no further than that. The TPC Lenders nevertheless submit this Motion out of an abundance of caution in the event that the District Court determines that the Valuation Methodology Decision is interlocutory in nature, thereby requiring leave to appeal under 28 U.S.C. § 158(a)(3) and Bankruptcy Rule 8003(a).

Even if the Valuation Methodology Decision is not appealable as of right, the TPC Lenders should be granted leave to appeal because: (a) the Valuation Methodology Decision raises a controlling question of law; (b) there are substantial grounds for difference of opinion about that question of law; and (c) an immediate appeal would materially advance the litigation by resolving perhaps the single most substantial legal issue involving the TPC Lenders' secured claim.

STATEMENT OF RELEVANT FACTS

On June 1, 2009 (the "Commencement Date"), General Motors Corporation ("Old GM"), and its affiliated Debtors filed voluntary Petitions for chapter 11 protection under the Bankruptcy Code.

Also on the Commencement Date, General Motors filed a Motion Pursuant to 11 U.S.C. §§ 105, 363(b), (f), (k), and (m), and 365 and Fed. R. Bankr. P. 2002, 6004, and 6006, to (I) Approve (A) the Sale Pursuant to the Master Sale and Purchase Agreement With Vehicle

Acquisition Holdings LLC (the "Purchaser" or "New GM"),[2] a U.S. Treasury-Sponsored Purchaser, Free and Clear Of Liens, Claims, Encumbrances, and Other Interests; (B) the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (C) Other Relief; and (II) Schedule Sale Approval Hearing (the "363 Sale Motion") [Docket No. 92]. Among other things, the 363 Sale Motion requested that the Court approve the sale of the majority of General Motors' assets, free and clear of any liens, encumbrances and other interests, to New GM. Included among the assets to be sold were the Facilities – a transmission manufacturing plant in White Marsh, Maryland and a distribution center in Memphis, Tennessee – which served as security for certain secured loans provided by the TPC Lenders to General Motors.

In support of the 363 Sale Motion, Old GM informed the Court that the transaction was the only means available to prevent the General Motors business from being forced into liquidation and to enable it to emerge from bankruptcy and avoid a complete collapse. *See, e.g.*, 363 Sale Motion ¶ 33 ("The 363 Transaction is the only realistic alternative for the Company to avoid liquidation of its assets . . . ."). At the same time, both Old GM and New GM made clear that the sale of the assets from Old GM to New GM would result in a seamless continuation of the same business and same company. For instance, in the 363 Sale Motion, General Motors represented that "[t]he result of the sale will be the *continuation of the business* represented by the assets to be sold that will make the Purchaser (sometimes referred to as "New GM") a lynchpin of the domestic automotive industry so this nation once again can assume its place as

[2] At relevant points herein that go across the period in which the 363 Sale occurred, the Agent refers to "General Motors" herein for ease of reference.

the domicile of one of the leading automotive manufacturers in the world." *Id.* ¶ 2 (emphasis added).[3]

In seeking Court approval for the sale, Old GM repeatedly emphasized how the assets held substantially more value as a going concern rather than simply being sold piecemeal into the market. According to Old GM, the sale would allow New GM to "acquire the purchased assets, create a New GM, and operate New GM free from any entanglement with the bankruptcy cases, and thereby preserve the going concern value . . . ." Affidavit of Frederick A. Henderson Pursuant to Local Bankruptcy Rule 1007-2 ("Henderson Aff.") dated June 1, 2009 at ¶ 74 [Docket No. 21]. Among other things, in the 363 Sale Motion, Old GM stated that the "[p]roposed sale is the only viable alternative that will permit realization of the going concern value of the assets to be sold and effect the transformation of the Purchased Assets to be the foundation for an efficient, productive, and economically viable business that will be competitive." 363 Sale Motion ¶ 2; *see also id.* ¶ 62 ("The 363 Transaction is the best and only way for the Company's assets to retain going concern value"); Henderson Aff. ¶ 16 (stating that the sale was "the only, viable means to save and carry forward GM's business in a new enterprise ("New GM") that will maximize and realize the going concern value of the Company's assets").

In addition to emphasizing the going concern value of the assets, Old GM also repeatedly stated that the 363 Sale would result in greater recoveries for creditors than would have resulted from a sale to unknown parties on or around the Commencement Date. For example, in the 363

[3] After the entry of the Sale Order, General Motors made clear that its acquisition of the assets allowed it to continue in business as a reorganized entity, albeit one based upon the same assets and operations as before. For instance, in a Form 8-K, General Motors Company, the parent entity of General Motors LLC, stated that New GM was simply a reorganized form of Old GM, one that operated the same business and assets as before. *See* General Motors Company, Current Report (Form 8-K), at 1 (Aug. 7, 2009) ("Prior to July 10, 2009, the business of the Company was operated by [Old GM]").

Sale Motion, Old GM represented to the Court that the "[i]mplementation of the sale will best serve the interests of the Company's economic stakeholders, as the only other alternative [to the sale] will result in little or no recoveries from the Company's assets as well as severe economic consequences for the domestic automotive industry and the nation." 363 Sale Motion ¶ 6; *see also* Henderson Aff. ¶ 82 ("[a]ny delay will result in irretrievable revenue perishability and loss of market share to the detriment of all economic interests"); *id.* ¶ 98 ("The only alternative to the 363 Transaction is a liquidation of the Debtors' assets – a process that will severely reduce the value of the Company's assets to the prejudice of its employees and all economic stakeholders.").

Similarly, Old GM informed the Court that "[a]bsent approval of [the sale], the Company will be forced to liquidate, yielding only a fraction of the value that the assets subject to the sale would have as a going concern . . . [a] scenario [that would] . . . result in significantly lesser recoveries by the Company's creditors . . . ." Memorandum of Law in Support of Debtor's 363 Sale Motion at 2. Thus, according to Old GM, the 363 Sale would "maximize[] the value of the Company's business for the benefit of all of the Debtors' economic stakeholders." *Id.* at 12.

On June 19, 2009, the TPC Lenders filed a Limited Objection of White Marsh/Memphis Secured Lender Group to Debtors' Motion Pursuant to 11 U.S.C. §§ 105, 363(b), (f), (k), and (m) and 365 and Fed. R. Bankr. P. 2002, 6004, and 6006, (I) to Approve (A) the Sale Pursuant to the Master Sale and Purchase Agreement With Vehicle Acquisition Holdings LLC, a U.S. Treasury-Sponsored Purchaser, Free and Clear of Liens, Claims, Encumbrances and Other Interests; (B) the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (C) Other Relief, and (II) Scheduling Sale Approval Hearing and, in the Alternative, Request for Adequate Protection Pursuant to 11 U.S.C. § 363(e) (the "Limited Objection")

[Docket No. 2018], for the purpose of preserving the rights and interests of the TPC Lenders as holders of first-priority secured claims against the Facilities. While not objecting in principle to the 363 Sale, the TPC Lenders' Limited Objection sought that either their claims be satisfied in full, or alternatively, that the TPC Lenders' existing rights in the Facilities be unaffected by the sale and be provided adequate protection for the TPC Lenders' interests. Limited Objection ¶ 1.

Ultimately, the TPC Lenders agreed that the Debtors' interests in the Facilities would be transferred under Section 363(e) of the Bankruptcy Code to New GM free and clear of liens and other encumbrances. In exchange, the Sale Order provided, among other things, that the TPC Lenders' secured claims would be valued by agreement of the parties at a later date, or failing agreement, by the Bankruptcy Court. Sale Order ¶ 36. In addition, the Sale Order provided for the establishment of a cash escrow account in the amount of $90.7 million, the full amount of the TPC Lenders' secured claims. *Id.* ¶ 37. In the event the TPC Lenders' secured claims were valued at less than $90.7 million, the TPC Lenders would have an allowed general unsecured claim for the deficiency, up to the amount of $45 million. *Id.* ¶ 38.

On July 5, 2009, the Bankruptcy Court approved Old GM's request to sell certain specifically selected properties, including the Facilities, to New GM and to allow General Motors to continue to utilize and operate the facilities on a going forward basis. In approving the 363 Sale, the Court noted that Old GM contended that the sale was "appropriate and indeed essential" because "GM's business can be sold, and its value preserved, before the company dies." Findings at 2. As a result, the Court found that "nobody can seriously dispute, the only alternative to an immediate sale is liquidation – *a disastrous result for GM's creditors* . . . . In the event of a liquidation, creditors now trying to increase their incremental recoveries would get nothing." *Id.* at 3 (emphasis added). The Bankruptcy Court also noted that the 363 Sale would

allow New GM to continue to use the assets subject to the Sale Order, which would "bring[] in value. Creditors will thereafter share in that value pursuant to a chapter 11 plan subject to confirmation by the Court." *Id.* at 42-43.

In its Findings, the Bankruptcy Court expressly referenced the objection of the TPC Lenders, noting that the TPC Lenders had "a lien on property to be transferred," and were attempting to ensure "adequate protection as part of the sale," *id.* at 28 n.21, and further established that the TPC Lenders' secured claim was fixed at an amount "equal to the fair market value of the of the TPC Property on the Commencement Date under section 506 of the Bankruptcy Code (the "TPC Value"), as determined at a valuation [to be] hearing conducted by this Court or by mutual agreement of the Debtors, the Purchaser, and the TPC Lenders." *See id.* ¶ 36.

After entry of the Sale Order, the TPC Lenders filed a proof of claim. Thereafter, the TPC Lenders and New GM attempted to reach a consensual agreement with respect to the TPC Value in order to determine the dollar amount to be dispersed out of the Escrow Account in satisfaction of the TPC Lenders' secured claim. During negotiations between the TPC Lenders and New GM on the dollar amount of the TPC Value, a dispute arose regarding the proper valuation methodology to be used in setting the TPC Value – a "use value" (as advocated by the TPC Lenders) or a competing methodology advocated by New GM that assumed a sale without a specified purpose. In March 2011, at the direction of the Bankruptcy Court, the TPC Lenders and New GM submitted briefs in support of their conflicting valuation methodologies, with the TPC Lenders advocating for a "value in use" standard based on the stated intent of New GM to use the Facilities to continue the business of Old GM. In contrast, New GM proposed a methodology that would value the Facilities as if, instead of being sold as part of a going concern

for continued use in the General Motors business, the Facilities had been sold into the market in a hypothetical transaction to some party other than one engaged in the manufacture of automobiles. According the appraisals obtained by both parties, the sum in dispute on this one issue, based on the conflicting valuation methodologies is between approximately $22 million and $34 million. The Bankruptcy Court heard oral argument on the valuation methodology on March 14, 2011.

On October 16, 2012, the Bankruptcy Court issued its opinion that the valuation methodology proposed by New GM should be the valuation methodology for determining the TPC Value.[4] The TPC Lenders appeal from the Decision setting the valuation methodology for the TPC Value.

STATEMENT OF ISSUE ON APPEAL

Whether the Bankruptcy Court erred in determining that the "fair market" standard that does not take into account the 363 Sale proposed on the Commencement Date is the correct valuation methodology for determining the value of the TPC Lenders' collateral for purposes of section 506(a) of the Bankruptcy Code. The Agent seeks a reversal of the Valuation Methodology Decision with direction to the Bankruptcy Court to employ the TPC Lenders' "value in use" methodology for determining the value of the TPC Property.

ARGUMENT

I. The Bankruptcy Court Opinion Is Appealable as of Right

Pursuant to 28 U.S.C. § 158(a)(1), "[t]he district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees" of bankruptcy courts. 28

[4] The TPC Lenders also have liens against equipment and other personal property at the Facilities. The instant dispute does not involve the valuation of that collateral.

U.S.C. § 158(a)(1). Jurisdiction to hear the merits of an appeal under section 158(a)(1) rests on whether the Bankruptcy Court issued a final, appealable order.

Courts in the Second Circuit apply a broader concept of finality to bankruptcy court decisions than other types of decisions issued in civil litigation. *See, e.g., Dubin v. S.E.C. (In re Johns-Manville Corp.)*, 824 F.2d 176, 180 (2d Cir. 1987) (this greater flexibility is due to special attributes of bankruptcy). This pragmatic approach is appropriate because "'bankruptcy proceedings often continue for long periods of time, and discrete claims are often resolved at various times over the course of the proceedings.'" *Bank Brussels Lambert v. Coan (In re Arochem Corp.)*, 176 F.3d 610, 619 (2d Cir. 1999) (quoting *BancTexas Dallas, N.A. v. Chateaugay Corp. (In re Chateaugay Corp.)*, 880 F.2d 1509, 1511 (2d Cir. 1990)).

Under the more pragmatic bankruptcy understanding of finality, an order must "finally dispose of discrete disputes within the larger case." *Arochem*, 176 F.3d at 620 (quoting *In re Palm Coast, Matanza Shores Ltd. Partnership*, 101 F.3d 253, 256 (2d Cir. 1996)); *see also Chateaugay*, 880 F.2d at 1511 (same). Where a decision by the Bankruptcy Court "state[s] a legal conclusion about how the value of the security interest should be calculated," that decision is immediately appealable. *Chase Manhattan Mortgage Corp. v. Rodriguez (In re Rodriguez)*, 272 B.R. 54, 57 (D. Conn. 2002); *see also Comerica Bank v. Red Mtn. Mach. Co. (In re Red Mtn. Mach. Co.)*, 471 B.R. 242, 249 (D. Ariz. 2012) (analogizing to the analysis under section 506(a), an order determining the formula for the purposes of an election under section 1111(b) of the Bankruptcy Code is appealable as of right where it "seriously [a]ffected" appellant's substantive rights and "resolved how those rights would be allocated"). The finality of the legal conclusion is not altered by the possibility that the value is not itself determined with finality, because future determinations of value "would not affect the court's resolution of the legal

issue." *Rodriguez*, 272 B.R. at 57; *see also Red Mtn. Mach. Co.*, 471 B.R. at 249 (an order determining valuation formula is final where "[a]ll that remained was to factually determine the dollar value of the two classes of claims").

In issuing the Valuation Methodology Decision, the Bankruptcy Court determined the method by which the TPC Lenders' collateral will be valued: under that decision, the collateral must be valued at its "fair market" value without taking into account the disposition of that collateral proposed on the Commencement Date rather than its "value in use." The Valuation Methodology Decision substantially determined the parties' rights respecting the Facilities, and all that remains is for the actual dollar amount of the secured claim to be determined. This is a legal conclusion, which will be unaffected by the future determination of the value of the TPC Property, and is immediately appealable. *See Rodriguez*, 272 B.R. at 58 ("A 506(a) order deciding an issue of law is a final order, subject to appeal under 28 U.S.C. § 158(a)(1).").

II. If the Bankruptcy Court Opinion Is Not Appealable as of Right, this Court Should Grant the Agent Leave to Appeal.

Even if the Valuation Methodology Decision is not appealable as of right under 28 U.S.C. § 158(a)(1), the Agent submits that leave to appeal should be granted. An appeal from an interlocutory judgment, order, or decree of the bankruptcy court is commenced by filing a Notice of Appeal and a Motion for Leave to Appeal pursuant to Bankruptcy Rule 8001(b) and 28 U.S.C. § 158(a)(3). A Notice of Appeal is being filed concurrently herewith. It is within the discretion of the district court, rather than the bankruptcy court, to determine whether leave should be granted. *See, e.g.*, 28 U.S.C. § 158(a)(3); *Alexander v. Bank of Woodstock (In re Alexander)*, 248 B.R. 478, 482 (S.D.N.Y. 2000)).

Because the standards for granting leave to appeal from an interlocutory decision of the bankruptcy court are not laid out by statute or by rule, courts typically borrow the standards

provided in 28 U.S.C. § 1292(b), which governs interlocutory appeals from the district court to the court of appeals. *See, e.g., Mid-Hudson Realty Corp. v. Duke & Benedict, Inc. (In re Duke & Benedict, Inc.),* 278 B.R. 334, 343 (S.D.N.Y. 2002) ("Leave to appeal interlocutory bankruptcy orders is governed by the standards set forth in 28 U.S.C. § 1292(b) which dictates the circumstances under which courts of appeal may hear interlocutory orders of the district court." (citing *In re Johns-Manville Corp.*, 45 B.R. 833, 835 (S.D.N.Y. 1984))). That is, "an interlocutory appeal may be granted when (1) the order appealed from involves a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.* All three factors are satisfied here.

A. The Valuation Methodology Decision Involves a Controlling Question of Law

"A 'controlling question of law' is one where 'either (1) reversal of the bankruptcy court's order would terminate the action, or (2) determination of the issue on appeal would materially affect the outcome of the litigation.'" *Alfa, S.A.B. de C.V. v. Enron Creditors Recovery Corp. (In re Enron Corp.),* No. M-47 (CM), 2009 WL 3349471, at *5 (S.D.N.Y. Oct. 16, 2009) (quoting *In re Alexander*, 248 B.R. at 483).

Here, there is no question that determination of whether the Bankruptcy Court correctly determined the valuation methodology applicable to the TPC Property will materially affect the outcome of the litigation. If the Valuation Methodology Decision is affirmed, the value of collateral and thus the secured claim of the TPC Lenders will be determined by resort to the fair market value – which New GM has determined to be $30.575 million, and the TPC Lenders have determined to be $42 million (excluding the as yet undetermined value of equipment and other personal property at the Facilities). *See* Valuation Methodology Decision at 5. If the Valuation

Methodology Decision is reversed, the value of the TPC Property and the secured claim will be determined by resort to the value in use – which the TPC Lenders have determined to be $64.9 million.[5] *Id.* The value in use is thus more than double New GM's determination of "fair market value", a material difference. While either method is likely to require evidentiary proceedings to arrive at a final determination of the dollar amount of the TPC Lenders' secured claim, the resolution of this issue on appeal will settle the correct framework for determining the value of the TPC Property and will dramatically affect further proceedings in this matter. In contrast, leaving the appeal of this issue until other issues concerning the value of the TPC Lenders' collateral are determined would likely result in considerable wasted efforts on the part of the Bankruptcy Court and the parties, to no benefit. An immediate appeal should accordingly be granted.

B. There are Substantial Grounds for Difference of Opinion on the Relevant Legal Question

"'In order to demonstrate that there is substantial ground for a difference of opinion, [appellants] must show that the issue is difficult and of first impression and involves more than just a strong disagreement among the parties.'" *Duke & Benedict*, 278 B.R. at 343-44 (quoting *In re Ionosphere Clubs, Inc.*, No. 98-9112A, 1999 WL 717291, at *3 (S.D.N.Y. Sept. 15, 1999)). "When a controlling question of law presents an issue of first impression, permission to appeal is often granted." *Enron*, 2009 WL 3349471, at *6 (citing *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 25 (2d Cir. 1990) and *North Fork Bank v. Abelson*, 201 B.R. 382, 390 (E.D.N.Y. 1997)).

[5] New GM did not commission an appraisal according to the value in use standard. New GM informed the bankruptcy court that if it determined that the value in use methodology was correct that it would commission an appraisal to reach a value under that methodology. *See* Response by General Motors LLC to Motion of the TPC Lenders for an Entry of an Order (I) Initiating Valuation Proceedings in Accordance with the Sale Order, and (II) Establishing a Schedule with Respect to the Valuation Proceedings ¶ 8 [Docket No. 9080].

The Bankruptcy Court stated in its Valuation Methodology Decision that the most on-point case, *Associates Commercial Corporation v. Rash*, 520 U.S. 953 (1997), cited by both parties, is only on-point "to a limited degree," and "there is a dearth of more relevant authority." Valuation Methodology Decision at 11-12.[6] The Bankruptcy Court discounted the applicability of *Rash* "because its facts are so distinguishable from those here." *Id.* at 12. The Bankruptcy Court further left the door open for the use of the "value in use" mechanism in certain hypothetical circumstances. *See* Valuation Methodology Decision at 16 ("The Court can easily see uses for the 'value in use' mechanism under other scenarios – most obviously where the property has not been subjected to a sale process (especially one subject to higher and better offers) and remains in the hands of its original owner or a successor by means other than a sale.").

The Valuation Methodology Decision does not address the fact that Section 506(a) includes "use" alongside "disposition" as a consideration to be used in determining the value of the collateral. Moreover, there is no controlling case law addressing the question of whether a court must, in the context of a sale under section 363 of the Bankruptcy Code, take into account the clearly-intended "use" and "disposition" of a secured creditor's collateral in valuing that collateral, or whether the court may simply assume the value that would be generated by a sale other than the one intended. This is an issue that must be addressed with finality in order to determine the TPC Value. An immediate appeal to resolve that issue is appropriate.

C. An Immediate Appeal Will Materially Advance the Litigation

An immediate appeal will materially advance the litigation where such an appeal will preclude the need for proceedings based on the initial decision. *See, e.g.*, *Enron*, 2009 WL

[6] The Agent in no way concedes that *Rash* is not dispositive and reserves all arguments on the merits of the case. However, this is a case of first impression in that *Rash* did not involve a 363 sale in the chapter 11 context, and there is no other controlling decision by the Supreme Court or the Court of Appeals for the Second Circuit.

3349471, at *7 ("Before the parties are put to the expense of trials to resolve issues of fact that are germane only if the Bankruptcy Court correctly decided this underlying legal issue," it should be determined whether the Bankruptcy Court did correctly decide the underlying legal issue.). Furthermore, courts in this district have held that "applications for leave should be liberally granted where, as here, an appeal would facilitate the expeditious resolution of the case." *Id.* (citing *In re Manville Forest Prods. Corp.*, 31 B.R. 991, 995 n. 5 (S.D.N.Y. 1983)).

Resolving the parties' dispute as to the appropriate valuation methodology will materially advance, and facilitate the resolution of, this litigation. The question of the proper valuation methodology is a threshold consideration that affects the entire course of the valuation proceedings to follow, as the Bankruptcy Court recognized at the outset of the Valuation Methodology Decision. *See* Valuation Methodology Decision at 1 (noting that the parties agree that "a determination of the threshold issue of the appropriate [valuation] methodology will facilitate settlement, or at least advance the ultimate resolution of the controversy."). Indeed, the question of valuation methodology was put before the Bankruptcy Court as a threshold issue at the request of New GM for the very purpose of avoiding costly proceedings – in terms of time, legal costs, and judicial resources – while the valuation methodology issue remained unsettled.

The same logic that caused the Bankruptcy Court to hear the valuation methodology question first also compels the conclusion that its immediate appeal will materially advance the litigation over the value of the TPC Property. If the Bankruptcy Court's decision is not appealed now, the Bankruptcy Court and the parties will no doubt consume considerable judicial resources and costs in prosecuting the litigation, only to have such expenditures likely rendered moot if the Valuation Methodology Decision is later reversed. In contrast, if the Bankruptcy Court's decision is appealed now, a major – if not the major – issue in resolving their entire controversy

will be determined with finality, likely expediting a further resolution. Regardless of the outcome, an immediate appeal materially advances resolution of all of the parties' issues respecting this matter, and should be allowed.

CONCLUSION

WHEREFORE, the Agent, on behalf of the TPC Lenders, respectfully requests that this Court (A) (i) determine that the Valuation Methodology Decision is a "final" order appealable as of right or, in the alternative, (ii) grant leave to appeal from the Valuation Methodology Decision, and (B) grant other such other relief as is just and reasonable.

Dated: New York, New York
October 30, 2012

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EXHIBIT A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11 Case
MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a General Motors Corp., *et al.*	:	No. 09-50026 (REG)
Debtors.	:	(Jointly Administered)

DECISION ON VALUATION METHODOLOGY
FOR TPC LENDERS' COLLATERAL

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ROBERT E. GERBER
UNITED STATES BANKRUPTCY JUDGE:

This contested matter arises in the jointly administered chapter 11 cases of Motors Liquidation Company (formerly known as General Motors Corporation) ("**Old GM**") and its affiliates (collectively, the "**Debtors**"). But this dispute is between General Motors LLC ("**New GM**")—the purchaser of the majority of Old GM's assets in the July 2009 asset sale (the "**363 Sale**")—and certain secured creditors (the "**TPC Lenders**")[1] that held liens on two of Old GM's assets prior to the 363 Sale.

The TPC Lenders seek a valuation of their collateral in accordance with the July 2009 sale order (the "**Sale Order**"),[2] which will determine the extent to which they are entitled to payment in cash, in contrast to New GM securities. But New GM and the TPC Lenders cannot agree on which of two alternative valuation methodologies, discussed below, is the proper one. New GM contends that the "fair market" method should be utilized, while the TPC Lenders argue that the "value in use" method should be. They agree, however, that a determination of the threshold issue of the appropriate methodology will facilitate settlement, or at least advance the ultimate resolution of the controversy.

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1 As of the Petition Date, the TPC Lenders were comprised of, collectively, Wells Fargo Bank Northwest, N.A., as agent, on behalf of Norddeutsche Landesbank Girozentrale (New York Branch) as administrator, Hannover Funding Company, as CP Lender, and Deutsche Bank, AG, New York Branch, HSBC Bank USA, ABN AMRO Bank N.V., Royal Bank of Canada, Bank of America, N.A., Citicorp USA, Inc., Merrill Lynch Bank USA, and Morgan Stanley as purchasers.

2 The Sale Order had the lengthy formal name of Order (I) Authorizing Sale of Assets Pursuant to Amended and Restated Master Sale and Purchase Agreement with NGMCO, Inc., A US Treasury Sponsored Purchaser; (II) Authorizing Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with the Sale; and (III) Granting Related Relief (ECF # 2968).

For the reasons below, the Court determines that the "fair market" method is the proper one. The Court's Findings of Fact[3] and Conclusions of Law in connection with this determination follow.

Findings of Fact

1. Background

On June 1, 2009 (the "**Commencement Date**"), Old GM and a few other Old GM affiliates filed for relief under chapter 11 of the Bankruptcy Code. On the Commencement Date, Old GM filed a motion (the "**Sale Motion**"), pursuant to section 363 of the Bankruptcy Code, seeking to sell the bulk of its assets to an entity that later became New GM, free and clear of any liens and other interests.[4] Liens would then attach to the proceeds of the 363 Sale.

Under the Sale Motion, while the entity that later became New GM was the stalking horse bidder, the sale procedures proposed a sale open to higher or better offers by anyone else.[5] Under the sale transaction as then proposed, a sale to New GM was not the only permissible outcome.

2. The TPC Properties

Included as part of the property to be sold under the 363 Sale Motion was a transmission manufacturing plant in White Marsh, Maryland (the "**Maryland Facility**") and a service parts distribution center in Memphis, Tennessee (the "**Tennessee Facility**" and with the Maryland Facility, the "**TPC Properties**"). On the Commencement Date, the TPC Lenders held liens on

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[3] To avoid unnecessarily lengthening this decision, record citations are limited to the most important matters, and are omitted for undisputed facts, except where record matter is quoted.

[4] *See* Sale Motion (ECF #92).

[5] *See id.* at ¶¶ 15 ("Subject to [Court] approval and the submission of any higher or better offers, the Sellers have reached an agreement with the Purchaser (together with the Sellers, the "Parties") as embodied in the proposed MPA.") (footnote omitted); ¶ 49 ("The sale of the Purchased Assets pursuant to the MPA is subject to higher or better offers."). Detailed procedures for consideration of any higher or better offers were set forth in ¶ 49 of the motion.

the TPC Properties that aggregately secured $90.7 million in debt. The lien on the Maryland Facility secured $63.9 million, and the lien on the Tennessee Facility secured $26.8 million.

3. TPC Lenders' Limited Objection to the 363 Sale

Shortly before the hearing on the Sale Motion, the TPC Lenders filed a limited objection[6] to the Sale Motion. While not objecting in principle to the 363 Sale, the TPC Lenders sought either (1) that their claims be satisfied in full, or, alternatively, (2) that existing rights in the TPC Properties be unaffected by the 363 Sale, and that they receive adequate protection for their interests.

After a series of negotiations, the TPC Lenders and Old GM agreed to protective provisions under which the proposed sale could go through while protecting the TPC Lenders' lien rights, discussed below. No bids higher or better than that of the entity that became New GM were forthcoming, and a sale to the entity that became New GM was approved.

4. The Sale Order

The protective provisions that previously were negotiated thereafter were included in the Sale Order that the Court ultimately approved. Thus the Sale Order provided, in relevant part, that "the TPC Lenders shall have an allowed secured claim in a total amount equal to the fair market value of the TPC Propert[ies] on the Commencement Date under section 506 of the Bankruptcy Code (the "**TPC Value**") . . . ."[7] And as adequate protection for the TPC Lenders' secured claim, New GM agreed to place $90.7 million in cash into an interest-bearing escrow account (the "**Escrow Account**").

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[6] "Limited" objections are a common device used in the bankruptcy community when the objector does not seek outright denial of the motion, but instead seeks protective provisions, clarifications, reservations of rights or similar lesser relief incident to the granting of the underlying motion.

[7] Sale Order at ¶ 36.

The Sale Order also provided, in substance, that, promptly after the TPC Value was determined, the TPC Lenders would receive an amount of cash equal to their secured claim, including interest, from the Escrow Account.[8]

5. Entry of the Sale Order and Failed Negotiations Thereafter

On July 5, 2009, after approving the 363 Sale over others' objections, the Court entered the Sale Order. Under the Sale Order, the TPC Properties were transferred free and clear of liens from Old GM to the entity now known as New GM, and the $90.7 million was placed into the Escrow Account.[9]

After entry of the Sale Order, the TPC Lenders filed a proof of claim. Thereafter, New GM and the TPC Lenders attempted to reach a consensual agreement with respect to the TPC Value to determine the amount required to be disbursed out of the Escrow Account on account of the TPC Lenders' claim.

In connection with these negotiations, New GM and the TPC Lenders obtained their own appraisals for the TPC Properties. New GM obtained an appraisal that utilized the "fair market" standard. But the TPC Lenders obtained two appraisals—one that utilized the "fair market" standard and another that utilized the "value in use" standard. Using the "fair market" standard, New GM valued the TPC Properties at $30.575 million, and the TPC Lenders valued the TPC Properties at $42 million. But using the "value in use" standard, the TPC Lenders valued the TPC Properties at $64.9 million.

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[8] If the value of the TPC Lenders' secured claim turned out to be less than $90.7 million, the TPC Lenders could assert an allowed unsecured claim against Old GM's estate equal to the difference between $90.7 million and the value of the TPC Lenders' secured claim, though subject to a maximum of $45 million. If, however, the value of the TPC Lenders' secured claim were to exceed $90.7 million, the TPC Lenders could assert an additional secured claim against Old GM's estate equal to the Escrow Account's shortfall.

[9] Neither Old GM nor New GM made a statement as to what portion of the consideration paid as part of the 363 Sale was attributable to the TPC Properties.

Discussion

The issue is effectively one of contractual interpretation—of a provision that the parties agreed would go into the Sale Order. The controversy calls for interpretation of the clause "fair market value of the TPC Propert[ies] on the Commencement Date under section 506 of the Bankruptcy Code," as used in ¶ 36 of the Sale Order—and as that interpretation might be informed by section 506 of the Code or other statutory provisions, or by any relevant caselaw.[10]

A. Textual Analysis

As usual,[11] the Court starts with textual analysis. The language in question has three components: (1) "fair market value"; (2) "on the Commencement Date"; and (3) "under section 506 of the Bankruptcy Code." Each of these components at least initially must be considered in the Sale Order's interpretation.[12]

The first is "fair market value." New GM argues that the plain meaning of the Sale Order compels the utilization of the "fair market" standard because the Sale Order includes the exact phrase "fair market value."[13] That has surface appeal, but is overly simplistic; without more, the phrase "fair market value" is open to more than one interpretation. And as *Collier* observes, "the

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[10] In briefing, New GM contended that the TPC Lenders' decision to appraise the TPC Properties under both a "fair market value" standard and "value in use" standard suggested that the TPC Lenders did not truly believe that the "value in use" standard was appropriate. But at oral argument, both parties agreed to refrain from reliance upon parol evidence or extrinsic evidence. Hrg. Tr. (ECF # 10086) ("**Hrg. Tr.**") at 27 (TPC Lenders confirmed that they were not seeking to rely on parol evidence); *id*. at 34 (New GM confirmed that it was not seeking to rely on parol evidence).

But even if the TPC Lenders' decision to employ two appraisals were admitted as parol evidence, this fact would have little significance—because it is unclear whether the TPC Lenders used both standards because they did not truly believe that the "value in use" standard was correct, or were simply trying to be careful. For each of these reasons the TPC Lenders' decision to employ more than one type of appraisal does not affect this analysis.

[11] *See*, *e.g.*, *In re Motors Liquidation Co*., 462 B.R. 494, 500 & n.33 (Bankr. S.D.N.Y. 2012)

[12] *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)) ("It is 'a cardinal principal of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'").

[13] *See* New GM Opening Br. (ECF #9494) at ¶ 24 ("No other valuation standard is mentioned in the Sale Order.").

determination of fair market value will depend on the particular market and means selected to gauge the value of the item in question."[14] Thus, "fair market value" does not by itself determine the valuation methodology, because "fair market value" does not specify a market nor a means, and other metrics may be significant as well. At the least, to interpret "fair market value," the other components of the Sale Order, each of which may act as a clarifier, or a metric, must be considered as well.

The second component is "on the Commencement Date"—a time marker that informs both "fair market value" and "under section 506 of the Bankruptcy Code." Obviously, it dictates the date as to which the valuation should be considered.[15] It also provides the context in which the phrase "under section 506 of the Bankruptcy Code" should be considered, and has the potential for dictating more than these two things in instances where the potential use of the collateral changes over time.

The third and final component—"under section 506 of the Bankruptcy Code"—incorporates statutory language (and, as a practical matter, any relevant caselaw construing the statutory language), into the order's effectively contractual language—"fair market value"—upon which the parties agreed. The two phrases, as the TPC Lenders correctly argue,[16] must be "read together."

But beyond these things, textual analysis is unhelpful. And ultimately it is inconclusive. It fails to answer the underlying question.

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14 4 *Collier on Bankruptcy* ¶ 506.03[6] (16th ed. 2010).

15 Hrg. Tr. at 21 (both parties agree that the relevant date here is the Commencement Date: June 1, 2009).

16 TPC Lenders' Opening Br. (ECF # 9493) at ¶ 32.

B. Section 506 and Related Caselaw

As is apparent from the above, textual analysis of the order itself is insufficient to decide the controversy. The Court instead must look to the language of section 506 and any available mechanisms to apply it.

Section 506(a) governs the allowance of a secured claim. After providing, in relevant part, that an allowed claim of a creditor secured by a lien is a secured claim "to the extent of the value of such creditor's interest in the estate's interest in such property" (and is an unsecured claim to the extent that the value of such creditor's interest is less than the amount of such allowed claim), section 506(a) provides:

> Such value shall be *determined in light of the purpose of the valuation and of the proposed disposition or use of such property,* and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

Thus key considerations are (1) the purpose of the valuation and (2) the proposed disposition or use of the collateral.[17] The Court considers these in turn

1. "The Purpose of the Valuation"

With respect to the first of these considerations--the purpose of the valuation—the two sides effectively are in agreement. New GM contends that:

> The purpose of the valuation is to fix the TPC Lenders' secured claim in the context of a Section 363 sale of the TPC Propert[ies] or, more specifically, to fix the TPC Lenders' claim to escrow proceeds pursuant to the terms and procedures dictated by the Sale Order.[18]

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[17] *See, e.g., In re SW Boston Hotel Venture, L.L.C.,* --- B.R. ---, 2012 Bankr. LEXIS 4657, 2012 WL 4504251 (BAP 1st Cir. Oct. 1, 2012) ("***SW Boston Hotel Venture***")(quoting and then applying section 506(a) to determination of secured creditor's allowed claim after sale of part of its collateral during the course of a chapter 11 case).

[18] New GM Opening Br. at ¶ 33.

The TPC Lenders' understanding of the purpose does not differ materially. They argue that the purpose here is:

> the allowance of the TPC Lenders' secured claims and determination of the extent to which the TPC Lenders are entitled to recover from the escrow account established under the Sale Order cash in an amount equal to the value of the TPC Propert[ies].[19]

Thus, both parties agree that the purpose of the valuation is to determine the value of the TPC Properties so that an amount of cash equal to this value can be released from the Escrow Account and paid to the TPC Lenders on account of their claim.

But notwithstanding that agreement, the valuation methodology issue requires more in the way of analysis. That is so because the parties' common understanding as to the "purpose of the valuation" does not lead to a specific valuation methodology. In fact (and understandably), the two sides pay very little attention to section 506(a)'s reference to the "purpose of the valuation"; it brings little to the table. In most, if not all, analyses under section 506(a) of the Bankruptcy Code (and certainly here), the "purpose of the valuation" will be, at least in some form, to determine the amount in which a secured claim should be allowed. That is, after all, section 506(a)'s purpose. Ultimately, the "purpose" prong of section 506(a) does not resolve this dispute.

2. "Proposed Disposition or Use of Such Property"

The second factor to be considered, as noted above, is the "proposed disposition or use of such property"—*i.e.*, the collateral. As previously noted,[20] the relevant time for that determination is "on the Commencement Date."

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[19] TPC Lenders Opening Br. at ¶ 34 (arguing that this purpose is similar to the valuation purpose present in this Court's decision in *In re Urban Communicators PCS*, 379 B.R. 232, 241 (Bankr. S.D.N.Y. 2008)).

[20] *See* page 5, *supra*.

On the Commencement Date, as the TPC Lenders quite correctly note, Old GM was operating both the Maryland Facility and the Tennessee Facility as "integral parts of the General Motors business."[21] But section 506 does not refer to the "existing" use of the property to be valued. Rather, it refers to the "*proposed* disposition or use" of that property.[22] On the Commencement Date, Old GM *proposed a 363 Sale* when it filed the Sale Motion. In fact, the TPC Lenders acknowledge this fact. They observe in briefing that on the Commencement Date, Old GM "announced its intention to sell the two facilities to New GM, on an arm's length basis and for fair consideration, as part of a going-concern sale of the overwhelming majority of Old GM's business and assets."[23]

In that context, New GM argues that the 363 Sale was a "disposition"—because Old GM and New GM were (and still are) two distinct legal entities, and Old GM sold the TPC Properties to New GM.[24] But the TPC Lenders argue that New GM's appraisals are based on a "fiction that New GM did not retain and continue to operate the property, but instead abandoned the properties and attempted to sell empty properties to a third party."[25] Because of Old GM's relationship with New GM, the TPC Lenders argue that this Court should acknowledge the "continued use and operation [of the TPC Properties] as part of the General Motors business, first under Old GM and then under New GM."[26]

Contentions of that character are not unreasonable, but ultimately the Court cannot agree with them. While we now know, with the benefit of hindsight, that New GM was the winning

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21 TPC Lenders Opening Br. at ¶ 35.

22 *See* Bankruptcy Code section 506(a) (emphasis added).

23 TPC Lenders Opening Br. at ¶ 35.

24 New GM Opening Br. at ¶ 37.

25 TPC Lenders Reply Br. (ECF # 9116) at ¶ 6.

26 TPC Lenders Opening Br. at ¶ 42.

bidder, the sale procedures proposed "on the Commencement Date" proposed a *sale*, and, significantly, a sale open to higher and better offers by anyone else.[27] Under the sale transaction as proposed on the Commencement Date, a sale to New GM was not the only permissible outcome. The Court well knows, of course, based on evidence it heard at the sale hearing, that just as no private financing for keeping Old GM alive was available (making the U.S. and Canadian governments the only available lenders), no private buyers who'd be willing to pay more than the U.S. and Canadian Governments' credit bids turned up. But the proposed sale was structured as bankruptcy sales traditionally are, making the property available for whomever might make the highest and best offer. The Court's factual findings support the New GM view.

However, while the Court has found, as facts, that the situation was as just described and described in the preceding Findings of Fact on the Commencement Date, the Court believes that it should also examine any potentially relevant caselaw—along with the language of the Sale Order and section 506, and the facts as the Court has found them—to determine the extent to which caselaw might inform the Court's determination on these issues. The caselaw, to the extent it is on point (which is so only to a limited degree), supports, or at least does not contradict, New GM's view.

To provide assistance as to the meaning of "disposition or use," both sides address a decision by the U.S. Supreme Court in a chapter 13 case, *Associates Commercial Corporation v. Rash*.[28] In *Rash*, a chapter 13 debtor attempted to cram down a plan that allowed the debtor to retain his truck over the objections of a secured creditor that possessed a lien on it.[29] Of course, *Rash* involved a continuing use, and not a sale, but as the creditor's secured claim needed to be

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[27] *See* n.5, *supra*.

[28] 520 U.S. 953 (1997) .

[29] *See id.* at 957.

valued, and there is a dearth of more relevant authority, both sides understandably address it anyway.

Describing the debtor's "disposition or use" of the collateral—the truck—as being of "paramount importance," the *Rash* court considered the debtor's two possible choices under the Bankruptcy Code: to either (1) surrender the truck to the creditor or (2) retain the truck under the cram down option.[30] The *Rash* court then considered the respective consequences that these choices would have on the secured creditor.[31] If the debtor had chosen to surrender the truck, the secured creditor would have liquidated the truck and received the truck's liquidation value. But because the debtor instead chose to *use* the truck, and the debtor's continued use of the truck required the secured creditor to continue holding a lien, the Supreme Court held that the liquidation value of the truck should not be used, because the liquidation value "attribute[d] no significance to [these] different consequences."[32] Instead, the Supreme Court decided to utilize a "replacement value" standard, which the Court defined as "the price a willing buyer in the debtor's trade, business, or situation would pay a willing seller to obtain property of like age and condition."[33]

Post-*Rash* case law suggests that *Rash* can be applied to the provisions of all three reorganization chapters—11, 12, and 13—because these chapters all treat secured claims similarly.[34] But *Rash* has no material significance in this case, because its facts are so distinguishable from those here. The TPC Lenders, unlike the secured creditor in *Rash*, agreed

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30 *See id.* at 962.

31 *See id.* at 962-63 ("When a debtor surrenders the property, a creditor obtains it immediately, and is free to sell it and reinvest the proceeds. . . . If a debtor keeps the property and continues to use it, the creditor obtains at once neither the property nor its value and is exposed to double risks: The debtor may again default and the property may deteriorate from extended use.").

32 *Id.* at 962.

33 *Id.* at 959 n.2.

34 *See In re Bell*, 304 B.R. 878, 880 n.1 (Bankr. N.D. Ind. 2003).

to Old GM's "disposition or use of" the TPC Properties by not objecting to the sale itself,[35] and by then consenting to the Sale Order. Additionally, Old GM, unlike the debtor in *Rash*, did not retain the collateral, and the TPC Lenders, unlike the secured creditor in *Rash*, did not retain their liens on the TPC Properties.

Of course, this Court said *Rash* had "no material significance" to this case, rather than saying that *Rash* had no significance whatever. Even though *Rash* is so inapposite, its underlying thought process is still instructive—as it invites the Court to consider how the TPC Lenders would have been affected if Old GM, instead of participating in the 363 Sale, had chosen an alternative option. Ideally, any methodology analysis would be sufficiently principled to account for different scenarios, and provide for any varying consequences.

Here, considering the matter in *Rash* terms, there were three principal options. First, Old GM could have proposed on the Commencement Date that the TPC Properties be surrendered to the TPC Lenders. In this hypothetical situation, the TPC Lenders would have liquidated the TPC Properties and their secured claim would have been valued at the TPC Properties' liquidation value. But because the TPC Lenders did not receive control of the TPC Properties, each side, understandably, recognizes that the fair market value would not be the value on liquidation.[36]

The second option would have been for Old GM to retain the property, as it did with respect to a very limited subset of its property, principally property with environmental problems, or that otherwise was unwanted by New GM. This scenario would have provided the

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[35] This was hardly a tactical blunder on their part, however, and in any event would have made no difference. There were hundreds of other objections to the sale, which this Court ultimately overruled, in its lengthy opinion approving the sale. *See In re General Motors Corp.*, 407 B.R. 463 (Bankr. S.D.N.Y. 2009), *stay pending appeal denied*, 2009 WL 2033079 (S.D.N.Y. 2009) (Kaplan, J.), *appeal dismissed and aff'd*, 428 B.R. 43 (S.D.N.Y. 2010) (Buchwald, J.) and 430 B.R. 65 (S.D.N.Y. 2010) (Sweet, J.), *appeal dismissed*, No. 10–4882–bk (2d Cir. Jul. 28, 2011). And even if they had objected to the sale itself, the underlying character of the sale would of course have been the same.

[36] *See* New GM Reply Br. (ECF # 9797) at ¶ 10; TPC Lenders Opening Br. at ¶ 47.

strongest basis for an application of the TPC Lenders' contentions, as this would indeed involve a "use," as contrasted to a "disposition." But this too is an option that was not chosen.

The third option was a sale, and this of course is what happened. And after the sale, New GM turned out to be the winning bidder—though as the prospective sale was structured at the outset, that was not the only possible result.

Recognizing that, the TPC Lenders still disagree with New GM, arguing that the correct valuation methodology must regard the 363 Sale as it was proposed on the Commencement Date to have taken place between Old GM and New GM—New GM specifically—and not between Old GM and an unspecified purchaser. But the Court finds such a characterization to be unpersuasive. In fact, Old GM did not limit the 363 Sale to New GM. And if Old GM had instead sold the TPC Properties to another purchaser, the consequences from the perspective of the TPC Lenders would be exactly the same. In this alternative scenario, the TPC Lenders would have relinquished their liens on the TPC Properties, and would have received cash from the alternative purchaser. But they would have been affected the same way, and the transaction that generated the cash to pay them down would still have been a sale, as contrasted to a continuing use.[37]

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[37] Likewise, the Court has also considered the potential significance of the very recent 1st Circuit BAP decision in *SW Boston Hotel Venture*, *see* n.17, *supra*, decided after the briefing and argument on this controversy. That case, like this one, involved a 363 sale in the course of a chapter 11 case, and a need to determine the size of a lender's secured claim. But it is otherwise inapposite. *SW Hotel Venture* dealt with different issues—there, most significantly, *when* the lender should be deemed to be oversecured, in the context of a claim for postpetition interest, *see* 2012 Bankr. LEXIS 4657, at *21-34, 2012 WL 4504251, at *7-11, ultimately concluding that the lender was oversecured on the petition date, *see* 2012 Bankr. LEXIS 4657, at *34, 2012 WL 4504251, at*11, and not just on the later date on which the collateral was sold. It did not involve, much less address, a situation where the collateral to be valued was sold to a purchaser that might be argued to be a successor to the debtor, and hence involve a continuing "use," as contrasted to a "sale," of the collateral that had been sold.

3. The Resulting Standard: "Fair Market Value" or "Value in Use"?

In that context, New GM argues that the correct valuation methodology is "fair market value" as it is defined by *Black's Law Dictionary*: the "price that a seller is willing to accept and a buyer is willing to pay in the open market and in an arm's-length transaction."[38] That definition is consistent with the definition of "fair market value" as defined by *The Dictionary of Real Estate Appraisal*, and as set forth in the TPC Lenders' appraisal.[39]

Thus, the parties seem to agree on the definition of the "fair market value" standard. But the TPC Lenders argue that the correct valuation method should be the "value in use" (or "use value") standard as defined by *The Dictionary of Real Estate Appraisal*:

> The value a specific property has to a specific person or a specific firm as opposed to the value to persons or the market in general. Special purpose properties such as churches, schools and public buildings, which are seldom bought and sold in the open market, can be valued on the basis of value in use. The value to a specific person may include a sentimental value component. The value in use to a specific firm may be the value of a plant as a part of an integrated multiplant operation.[40]

The "value in use" standard differs from the "fair market value" standard in that the "value in use" standard refers to a "specific person or a specific firm."[41] More precisely, these

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38 New GM Reply Br. at ¶ 3 (citing *Black's Law Dictionary* 1587 (8th ed. 2004)).

39 *See* TPC Lenders Tennessee Appraisal at 2-3; *see also* TPC Lenders Maryland Appraisal at 3 (citing *The Dictionary of Real Estate Appraisal* (4th ed. 2002) ("The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby: buyer and seller are typically motivated; both parties are well informed or well advised, and acting in what they consider their best interests; a reasonable time is allowed for exposure in the open market; payment is made in terms of cash in United States dollars or in terms of financial arrangements comparable thereto; and the price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.")).

40 *See* TPC Lenders Tennessee Appraisal at 2 (citing *The Dictionary of Real Estate Appraisal* (4th ed. 2002)).

41 *Id.*

two standards differ in the respects that an appraisal made under the "fair market value" standard deducts for (1) functional obsolescence,[42] (2) external obsolescence,[43] and (3) tax advantages that would only be obtained by either the seller or the buyer—here Old GM or New GM.[44]

The Court can easily see uses for the "value in use" mechanism under other scenarios—most obviously where the property has not been subjected to a sale process (especially one subject to higher and better offers), and remains in the hands of its original owner or a successor by means other than a sale. But the Court does not see the "value in use" method as appropriate here,[45] where the TPC properties were the subject of a sale.[46]

Conclusion

For the foregoing reasons, the "fair market" standard is the correct valuation methodology.

Dated: New York, New York
October 16, 2012

s/Robert E. Gerber
United States Bankruptcy Judge

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42 Functional obsolescence deductions address improvements that a generalized buyer in the industry would not value. Hrg. Tr. at 11-12. One example of a functional obsolescence would be the value of an air-conditioning system that was built into the Tennessee Facility, because the appraiser determined that a generalized buyer would not place value on the system.

43 External obsolescence deductions originate from the economic conditions at the time of the valuation and, using the same example, might include the construction—and other costs—of replacing the air-conditioning system in the Tennessee Facility. *Id.*

44 An example of this would be a tax abatement offered to Old GM and New GM, but not a generalized buyer.

45 Reaching that conclusion would be easier if the TPC Properties had been sold separately, and not as part of the much larger sale here. But that difference is insufficient to cause the Court to reach a different conclusion; the TPC Properties were nevertheless conveyed as part of a sale. Similarly, while the Court is also mindful that the U.S. and Canadian Governments were able to credit bid for the assets that were purchased, and others would have had to outbid them with cash, the right to credit bid is a basic right of secured lenders, which can be denied only for cause. *See* Bankruptcy Code section 363(k); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2070 & n.2 (2012).

46 Likewise, the Court has considered, but ultimately rejected, the TPC Lenders' contention that a ruling against them would give New GM a windfall. The result here is simply what normal valuation analyses would yield. The parties presumably could have agreed that if New GM were the winning bidder, the TPC Properties would be valued using the "value in use" mechanism, but they did not do so.

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Hearing: TBD
Answer deadline: 4 p.m. November 13, 2012

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a General Motors Corp., *et al.*	:	Case No. 09-50026 (REG)
Debtors.	:	(Jointly Administered)

NOTICE OF MOTION OF THE TPC LENDERS FOR (I) A DETERMINATION THAT THE BANKRUPTCY COURT'S DECISION ON VALUATION METHODOLOGY IS A FINAL ORDER OR, IN THE ALTERNATIVE, (II) LEAVE TO APPEAL THE BANKRUPTCY COURT'S DECISION ON VALUATION METHODOLOGY

PLEASE TAKE NOTICE that Wells Fargo Bank Northwest, N.A. ("Wells Fargo"), as Agent (the "Agent"), on behalf of Norddeutsche Landesbank Girozentrale (New York Branch), as Administrator (the "Administrator"), Hannover Funding Company ("Hannover" or the "CP Lender"), and Deutsche Bank, AG, New York Branch, HSBC Bank USA, National Association, ABN AMRO Bank N.V., Royal Bank of Canada, Bank of America, N.A., Citicorp USA, Inc.,

and Merrill Lynch Bank USA, Morgan Stanley Bank, as purchasers, (collectively with the Administrator, the "TPC Lenders"), by and through its undersigned counsel respectfully submits the annexed Motion of the TPC Lenders for (I) a Determination that the Bankruptcy Court's Decision on Valuation Methodology is a Final Order or, in the Alternative, (II) Leave to Appeal the Bankruptcy Court's Decision on Valuation Methodology (the "Motion"), pursuant to 28 U.S.C. § 158(a) and Bankruptcy Rules 8001, 8002 and 8003.

PLEASE TAKE FURTHER NOTICE that a hearing, if any, on the Motion will be scheduled at a later date by the United States District Court for the Southern District of New York.

PLEASE TAKE FURTHER NOTICE that any answer in opposition to the Motion must (a) be made in writing; (b) conform to the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules for the Southern District of New York; (c) state with particularity the legal and factual basis for the objection; and (d) be filed with the Court no later than 4 p.m. on November 13, 2012 in accordance with General Order M-399 (which can be found at www.nysb.uscourts.gov) by registered users of the Bankruptcy Court's filing system and served in accordance with General Order M-399 on counsel for the Agent, Sidley Austin LLP, 787 Seventh Avenue, New York, NY 10019 (Attn: Steven M. Bierman, Esq., and Nicholas K. Lagemann, Esq.) and Sidley Austin LLP, One South Dearborn, Chicago, IL 60603 (Attn: Kenneth P. Kansa, Esq.) no later than 4 p.m. on November 13, 2012.

Dated: New York, New York
October 30, 2012

/s/ Steven M. Bierman
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