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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: MOTORS LIQUIDATION COMPANY, *et al.*, Debtors.	:	Chapter 11 Case Case No. 09-50026 (MG) (Jointly Administered)
MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST, by and through the Wilmington Trust Company, solely in its capacity as Trust Administrator and Trustee, Plaintiff, vs. JPMORGAN CHASE BANK, N.A., individually and as Administrative Agent for Various Lenders Party to the Term Loan Agreement described herein, *et al.*, Defendants.	:	Adversary Proceeding Case No. 09-00504 (MG)

DEFENDANTS' AMENDED PRE-TRIAL BRIEF

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PRELIMINARY STATEMENT

General Motors manufactures automobiles in massive plants that were constructed to accommodate sophisticated machinery and equipment engineered and installed to work together in concert. The forty fixed assets at issue in this trial were used by General Motors to do just that. Thirty-eight of the forty were in operation the day before Old GM filed for bankruptcy and were in operation the day New GM was born. Just two were left behind to be liquidated by the company now known as Motors Liquidation.

Over $1 billion is at stake in this trial for the parties and others. But in light of these few, undisputed facts, the central issues in the upcoming trial are readily resolved in the Term Lenders' favor:

The evidence at trial will show that the Representative Assets are fixtures. Under Michigan law: "Property is a fixture if (1) it is annexed to the realty, whether the annexation is actual or constructive; (2) its adaptation or application to the realty being used is appropriate; and (3) there is an intention to make the property a permanent accession to the realty." *Wayne Cty.* v. *Britton Trust*, 563 N.W.2d 674, 676 (Mich. 1997). And under Michigan law, there is "a presumption" that assets that are "attach[ed] by the owner" of the land are intended "to be permanent." *In re Mahon Indus. Corp.*, 20 B.R. 836, 839 (E.D. Mich. 1982). Ohio law does not yield any different conclusions. Each of the Representative Assets (described in detail in the accompanying handbook) meets the fixture test. *See* Points I-II, below.

The evidence at trial will show that all of the Representative Assets save two should be valued on a going-concern basis. Under 11 U.S.C. § 506(a)(1), the Term Lenders' collateral has to be valued in light of "the proposed disposition or use of such property." As of the agreed-upon valuation date (June 30, 2009), the "proposed disposition or use" of 38 of the 40 Representative Assets was a sale to New GM for continued use in manufacturing automobiles. Thus, by statute, the assets must be valued on a going-concern basis, not liquidation. The evidence to be presented at trial will show that the going-concern value of the 38 Representative Assets acquired by New GM is over $135 million. *See* Points III-IV, below.

The other issues at trial, likewise, should be resolved in the Term Lenders' favor:

The Term Lenders had a perfected security interest in the fixtures at GM Lansing Delta Township, an integrated assembly and stamping plant. The time for the Avoidance Action Trust to challenge the perfection of that lien passed a long time ago. But assuming that the issue is a live one, the evidence will show that the Term Lenders' lien on the fixtures in that plant was perfected by a recorded fixture filing. That filing named the facility in bold-faced text and put a prospective purchaser of or lender against the plant on actual, constructive and inquiry notice. *See* Point V, below.

The Term Lenders held a perfected security interest in fixtures at GM Powertrain Engineering Pontiac. Under the Collateral Agreement, Old GM granted the Term Lenders a security interest in all machinery and equipment located on land or in facilities that were "related or appurtenant" to facilities set forth on Schedule 1 to the Term Loan Collateral Agreement. The evidence will show that Powertrain Engineering Pontiac, and the land on which it sits, is "related or appurtenant" to the GM Metal Fabricating Division Pontiac plant, a facility expressly named in the Collateral Agreement. *See* Point VI, below.

BACKGROUND

A. The term loan and its security interest

General Motors Corporation ("Old GM") was the borrower under a $1.5 billion secured loan (the "Term Loan") governed by a Term Loan Agreement among Old GM, Saturn Corporation ("Saturn"), JPMorgan Chase Bank, N.A. ("JPMorgan") as administrative agent, and a syndicate of lenders (with JPMorgan, collectively, the "Term Lenders"). The Term Loan was secured by, among other things, Old GM's and Saturn's equipment, fixtures and general intangibles at plants designated in Schedule 1 to a Collateral Agreement, as well as any "related or appurtenant" facilities. The Term Lenders' security interests were perfected by (a) an umbrella UCC-1 financing statement filed in Delaware covering equipment, fixtures, and related intangibles at 42 scheduled GM plants and facilities that were on "related" land or that themselves were "related" to the 42; (b) an additional Delaware UCC-1 filing covering Saturn assets; and (c) 26 fixture filings filed in county real estate records that covered the fixtures at 26 plants plus the fixtures located at facilities that were on "related" land or that themselves were "related" to the 26.

In October 2008, in connection with the payout and termination of a separate synthetic lease transaction, Old GM's counsel, Mayer Brown, provided JPMorgan's counsel in the synthetic lease transaction, Simpson Thacher, with a draft UCC-3 termination statement that erroneously terminated that umbrella filing for the Term Loan. Simpson Thacher failed to detect the error, and Mayer Brown proceeded to file the erroneous document. The erroneous UCC-3 statement did not affect any of the 26 state fixture filings. In the months that followed, Old GM repeatedly provided JPMorgan with Officers Certificates representing that all of the liens securing the collateral for the Term Loan remained in full force and effect. As is well known to the Court, after Old GM filed for bankruptcy, the error was disclosed. The Second Circuit ultimately determined that, as to JPMorgan, the erroneous filing was effective to terminate the umbrella filing.

B. The pre-bankruptcy efforts to preserve the going-concern value of Old GM

Old GM and its affiliated Debtors filed bankruptcy cases on June 1, 2009. The filing was the culmination of lengthy involvement by the U.S. and Canadian Governments to ensure the company's long-term viability. The involvement began in late 2008, when Old GM — loath to file for bankruptcy — turned to the U.S. Government for financial assistance. Initial assistance was provided from the Troubled Asset Relief Program ("TARP") in the form of a 3-year, $13.4 billion bridge. In April 2009, after the change of Presidential administrations, Old GM received a second TARP loan of $2 billion. On May 20, 2009, Old GM received a third TARP loan of $4 billion.

The evidence will show that the purpose of these loans was to keep Old GM operating as a going concern and assure its ultimate survival as a successful, reorganized company. To that end, as a condition to the TARP loans, Old GM was required to submit viability plans. The plans were closely scrutinized, including by the Obama Administration's Auto Task Force. President Obama previewed that Old GM might need to use the "bankruptcy code as a mechanism to help them restructure quickly and emerge stronger," by using the "existing legal structure as a tool that, with the backing of the U.S. government, can make it easier for General Motors . . . to quickly clear away old debts that are weighing them down so that they can get back on their feet and onto a path to success."[1]

After months of negotiations between and among Old GM, the U.S. and Canadian Governments, Old GM's unions and others, the company produced a viable restructuring plan. That Viability Plan specifically contemplated a bankruptcy filing by Old GM. The "President deemed GM's plan viable and on June 1, 2009 committed approximately $30.1 billion of additional federal assistance . . . to support the company's restructuring."[2]

The Viability Plan and filing were intended to ensure that the company's manufacturing business would reemerge quickly as a viable competitive force in the auto industry. The evidence will show that at the heart of the Viability Plan was a program that enabled the company to make the changes it needed to thrive as a going concern. It allowed the company to shed excessive legacy health care costs and jettison low volume and stale brands like Pontiac and Saab. It allowed the company to streamline its oversized dealer network, enabling it more effectively to promote the GM brands that would continue post-bankruptcy. It allowed the company to eliminate excess capacity and dramatically reform its labor agreements.

Many of these changes were already underway before Old GM filed for bankruptcy. But what the section 363 sale did was enable the company to make all these necessary changes quickly and effectively, for the benefit of itself, its constituents, and ultimately the U.S. economy as a whole. The result was that New GM emerged as a focused, cost-competitive auto manufacturer.

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[1] "Remarks by the President on the American Automotive Industry," Office of the Press Secretary, March 30, 2009, available at https://obamawhitehouse.archives.gov/the-press-office/remarks-president-american-automotive-industry-33009.

[2] Ron Bloom, Senior Advisor at the U.S. Treasury Department, Statement before the Congressional Oversight Panel Regarding Treasury's Automotive Industry Financing Program (AIFP), U.S. Department of the Treasury, July 27, 2009, available at www.treasury.gov/press-center/press-releases/Pages/tg236.aspx.

C. The going-concern sale to New GM

To these ends, on June 1, 2009, the day of its filing, Old GM filed a motion (the "DIP Motion") seeking authority to obtain post-petition financing from the U.S. Treasury and Export Development Canada. Docket No. 64. The DIP Motion stated that the post-petition financing would allow the Debtors to continue operating pending the proposed sale to New GM and was "necessary to preserve going concern value." *Id.* ¶¶ 2, 63. The DIP Motion sought approval of immediate, interim loans of up to $15 billion and final loans of up to $33.3 billion. *Id.* ¶¶ 2, 60.

That same day, Old GM also filed a motion (the "Sale Motion") under section 363 of the Bankruptcy Code seeking to sell the vast majority of its assets to the entity that would become General Motors Company ("New GM"). Docket No. 92. The purpose of the sale to New GM was to ensure that Old GM's operating business would continue as a going concern: "The result of the sale will be the continuation of the business represented by the assets to be sold," so that New GM — like its predecessor — would be "one of the leading automotive manufacturers in the world." *Id.* ¶ 2.

The Sale Motion contemplated that the purchase price payable to Old GM would include, among other things, a credit bid in an amount equal to: (a) all of Old GM's pre-petition TARP loans; and (b) the vast majority of the Debtor-in-Possession financing being provided by the U.S. Treasury and Export Development Canada.[3] According to Evercore, Old GM's financial advisor, the total purchase price, including assumed liabilities, was between $91.2 and $93.6 billion. As explained in Point IV, the purchase price implies that New GM's common equity had a value of approximately $65 billion. Under the purchase agreement, the buyer, New GM, agreed to provide 10% of the post-closing common shares of New GM, plus New GM warrants, to Old GM for the benefit of its unsecured creditors.[4]

In seeking approval for the sale, Old GM emphasized that the assets being sold to New GM had substantially more value as a going concern than they would in liquidation. Fritz Henderson, Old GM's CEO, submitted an affidavit to this Court making the point that the sale would

[3] Disclosure Statement at 15; General Motors Company, SEC Form 8-K dated July 10, 2009.

[4] Sale Motion ¶ 18; Disclosure Statement at 17-18.

allow the purchaser 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*."[5]

The Official Committee of Unsecured Creditors of Old GM supported the going-concern asset sale. In a submission to this Court, the Creditors' Committee — the original plaintiff in this action to which the Avoidance Action Trust ("Avoidance Trust") is the successor — agreed with the Debtors that the sale transaction would "preserve the going-concern value of the Debtors' businesses." Docket No. 2362 at ¶ 3. Indeed, the Creditors' Committee also recognized that its constituents — Old GM's unsecured creditors — had bargained to receive 10% of New GM's equity and thus had staked their recovery on the continuation of GM's business as a going concern. *Id.* ¶¶ 20, 25.

On June 2, 2009, the day after the petition date, the Bankruptcy Court approved the bidding procedures proposed by the Debtors, imposing a deadline of June 22 for any competing bids. Docket No. 274. On the same day, the Bankruptcy Court entered an order approving the DIP Motion on an interim basis, permitting the U.S. Treasury to fund up to $15 billion of the DIP loan. Docket No. 292.

The Court granted the Debtors' motion to approve the DIP financing from the U.S. Government on June 25. The final order authorized Old GM to draw the balance of the DIP facility and required Old GM to apply part of the amounts borrowed under the facility to repay all amounts outstanding under the Term Loan. Docket No. 2529 (the "DIP Order"). This would enable New GM to acquire the purchased assets free of the Term Lenders' lien. Consistent with the DIP Order, on Tuesday, June 30, Old GM wired approximately $1.5 billion to JPMorgan in satisfaction of the Term Loan, which was distributed to the Term Lenders. Accordingly, for purposes of this proceeding, the parties have agreed that they will use June 30, 2009 as the valuation date for the collateral. Docket No. 637.

[5] Docket No. 21 (Affidavit of Frederick A. Henderson Pursuant to Local Bankruptcy Rule 1007-2 ("Henderson Aff.") ¶ 74 (emphasis added). *See also* Sale Motion ¶ 62 ("The 363 Transaction is the best and only way for the Company's assets to retain going concern value").

Two business days later, on Sunday, July 5, the Court entered its findings of fact and conclusions of law approving the Sale Motion (the "Sale Decision"). Docket No. 2967. *In re General Motors Corp.*, 407 B.R. 463 (Bankr. S.D.N.Y. 2009). The Sale Decision expressly recognized that the assets of Old GM were being sold as a going concern and, as a result, the sale would preserve "going concern value." *Id*. at 480, 493. The Court observed that Evercore had found that the purchase price was fair to Old GM, and that no contrary evidence had been submitted. *Id.* at 481. The Court also found that "the 363 Transaction was the product of intense arms'-length negotiations." *Id*. at 494.

POINT I

THE LEGAL STANDARDS THAT DETERMINE WHETHER AN ASSET IS A FIXTURE

Section 7.10 of the Term Loan Collateral Agreement provides that all "rights and obligations of the parties" are governed by New York law. Under New York law, the determination of whether an asset is a fixture is governed by the law of the state where the asset is located.[6] Thus, it is undisputed that Michigan law (discussed in Point I.A) governs the lion's share (83%) of the 40 Representative Assets. Docket No. 631 at 12-13 (Avoidance Trust's Preliminary Brief). As discussed below in Point I.B, Ohio law (which governs the rest of the Representative Assets) leads to the same conclusions.

A. The applicable legal standard under Michigan law

The Michigan Supreme Court has held: "Property is a fixture if (1) it is annexed to the realty, whether the annexation is actual or constructive; (2) its adaptation or application to the realty being used is appropriate; and (3) there is an intention to make the property a permanent accession to the realty." *Wayne Cty.* v. *Britton Trust*, 563 N.W.2d 674, 676 (Mich. 1997). Furthermore, "installation" of an asset "by the owner of the land raises a presumption

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[6] *See, e.g., In re Del Drago's Estate*, 38 N.E.2d 131, 137 (N.Y. 1941); *In re Haldeman*, 208 Misc. 419, 422 (N.Y. Sur. 1955); Restatement (First) of Conflict of Laws § 208 (2016) ("Whether an interest in a tangible thing is classified as real or personal property is determined by the law of the state where the thing is.").

under Michigan law that the accession was intended to be permanent." *In re Johns-Manville*, 88 F.2d 520, 521 (6th Cir. 1937); *In re Cliff's Ridge Skiing Corp.*, 123 B.R. 753, 759 (Bankr. W.D. Mich. 1991); *Mahon*, 20 B.R. at 839.

Michigan cases provide ample guidance on how to establish each of the criteria of this three-part test:

1. Annexation

An asset is "annexed to the realty" if it is "attached or affixed" to real property in *any* manner — "actual or constructive." *Wayne Cty.* v. *Britton Trust*, 563 N.W.2d at 679. Even "slight" physical attachment can suffice. *E.g.*, *id.* at 678-79; *see also, e.g.*, *In re Joseph*, 450 B.R. 679, 692 (Bankr. E.D. Mich. 2011) (mailbox hanging on two screws was attached to house).

"Actual" annexation occurs when an item is affixed to real property physically. *See, e.g.*, *Cincinnati Ins. Co.* v. *Federal Ins. Co.*, 166 F. Supp. 2d 1172, 1180 (E.D. Mich. 2001) (milling machine was "anchored and bolted"); *Tuinier* v. *Charter Twp. of Bedford*, 599 N.W.2d 116, 120 (Mich. Ct. App. 1999) (greenhouses were "annexed" to the real estate "by both bolts and gravity").

While physical attachment is sufficient, it is not required. Rather, "it is without dispute that Michigan, like other jurisdictions, recognizes the law of *constructive* annexation." *Wayne Cty.* v. *Britton Trust*, 563 N.W.2d at 680 (emphasis added). Assets that are not physically attached to real property may be constructively annexed in many different ways.

For example, the Michigan Supreme Court has held that assets may be "constructively attached by [their] weight" alone. *Velmer* v. *Baraga Area Sch.*, 424 N.W.2d 770, 775 (Mich. 1988). In *Velmer*, the court considered whether a 1,000-pound milling machine used in a shop classroom was "part of the [school] building." *Id.* at 771. The lower court had held that it was not, because the milling machine was "not bolted or permanently affixed to the floor." *Id.* at 772. The Michigan Supreme Court reversed, rejecting the distinction between assets that were "actually" or "constructively" annexed. *Id.* at 775. *Accord Dehring* v. *Beck*, 110 N.W. 56, 56, 57 (Mich. 1906) (50-barrel tanks of beer annexed to brewery only "by their own great weight" were "part of the mortgaged premises").

Constructive annexation also occurs when "articles which are not themselves actually or directly annexed to the realty" become "part of, or accessory to, articles which are so annexed." *Wayne Cty.* v. *Britton Trust*, 563 N.W.2d at 680 (citation omitted). Put another way, assets are deemed "constructively annexed" if "their removal from the realty would impair both their value and the value of the realty." *Id.* at 679 (citing *Colton* v. *Mich. Lafayette Bldg. Co.*, 255 N.W. 433 (Mich. 1934)). This is because "where the principal part of the machinery is [a] fixture due to actual annexation to the realty, the parts of it, although not actually annexed to the freehold, are fixture[s] where they would, if removed, leave the principal part unfit for use, and where of themselves they are not capable of general use elsewhere." *Id.* at 680 (citation omitted).

Applying this principle, the court in *In re Mahon Industrial* held that 23 overhead bridge cranes — essentially identical to the Charger Crane here — were fixtures constructively annexed to an industrial building, even though they were "not actually attached to the real estate but instead r[ode] upon or [were] attached to rails." 20 B.R. at 839. In so holding, the court pointed to the fact that the "value of the rails [would be] considerably lessened without the cranes." *Id.*

Similarly, in *Sondreal* v. *Bishop Int'l Airport Auth.*, the court held that an airport concourse jetway and its service stairs were fixtures. 2005 WL 599752, at *3 (Mich. Ct. App. Mar. 15, 2005). The jetway was "bolted to the terminal building," but the service stairs were merely "bolted to the jetway." *Id.* Nonetheless, "[w]ithout the service stairs, there [would be] no ready access to the tarmac in the event of a jetway malfunction, and no direct access to the jetway by ground crew employees." *Id.* The stairs were therefore "part of or accessory to machines or equipment that [were] attached to the realty[,] such that one [could not] readily be used without the other," and, accordingly, were fixtures "constructively attached to the realty." *Id.*[7]

[7] It should be noted that unpublished opinions are not considered "precedentially binding" in Michigan. Mich. Ct. App. Rule 7.215(c)(1) (2016). Nevertheless, as the Avoidance Trust stated in its preliminary June 15, 2016 brief, "it is useful to consider unpublished opinions." Docket No. 631 at p. 8 n.2.

Likewise, in *Colton*, the Michigan Supreme Court addressed whether assets that were not affixed to the real estate at all — including elevator rugs, entrance mats, window shades, mirrors, and clocks — were constructively annexed to an office building. 255 N.W. at 434; *see Wayne Cty.* v. *Britton Trust*, 563 N.W.2d at 679 (noting *Colton*'s "focus" was whether assets "were constructively annexed"). The *Colton* court emphasized that the office building had been "erected for the purpose of renting stores and offices to the public, and, in order to be rentable, must have various articles or accessories such as those listed above." 255 N.W. at 434. Because these assets could not be "removed from the building or transported from place to place without impairing their value as well as the value of the building," the articles were constructively annexed and deemed fixtures. *Id.*

2. Adaptation

The second element of the fixture test, adaptation, involves "the relationship between the chattel and the *use* which is made of the realty to which the chattel is annexed." *Wayne Cty.* v. *Britton Trust*, 563 N.W.2d at 680 (emphasis added). The adaptation element is met where an asset is "a necessary or at least a useful adjunct to the realty, considering the purposes to which the latter is devoted." *Id*. (quoting 35 Am. Jur. 2d Fixtures § 12). The Michigan Supreme Court in *Britton Trust* looked to a Wisconsin Supreme Court decision as "a useful guide" in this area of the law (*id*.); there, coolers that stored perishables in a supermarket were held to be fixtures, because "[t]he test here is not the adaptability to the *building*, but the adaptability to the *use* to which the building is put." *Premonstratensian Fathers* v. *Badger Mut. Ins. Co.*, 175 N.W.2d 237, 241 (Wis. 1970) (emphases added). *See also Pal-O-Mar Bar, IV, Inc.* v. *Badger Mut. Ins. Co.*, 2013 WL 6182640, at *2 (Mich. Ct. App. Nov. 26, 2013) (adaptation present where asset is "a necessary or useful supplement to the realty in light of the realty's purpose").

So here, adaptation is met so long as an asset is necessary or useful to the *use* to which Old GM's facilities were put: auto manufacturing. The case law confirms this conclusion.

For example, in *Cincinnati Insurance*, the Eastern District of Michigan held that the adaptation test was met for a large, computer controlled milling machine — an asset similar in function to, though somewhat larger than, the three Warren Transmission milling machines included among the Representative Assets — because it was used by a manufacturer of automobile and aerospace parts "in the regular course of its business." 166 F. Supp. 2d at 1180.

Similarly, in *Smith* v. *Blake*, the Michigan Supreme Court held that a metal lathe and a "cupola furnace" used in a foundry and manufacturing business — again, assets similar to several of the Representative Assets — were "adapted" to the realty because the building at issue had been "erected many years [before] for a foundry and machine shop," and the assets were "adapted to the business for which the building was erected." 55 N.W. 978, 979 (Mich. 1893).

And in *Cliff's Ridge*, the court held that a ski chairlift met the adaptation element because it "was adapted to the ski hill real property for its use and purposes." 123 B.R. at 759. *See also, e.g.*, *Colton*, 255 N.W. at 434 ("This building was erected for the purpose of renting stores and offices to the public and, in order to be rentable, must have various articles and accessories such as" "elevator rugs," "entrance mats," "window shades," "mirror[s]" and "clock[s]"); *Peninsular Stove Co.* v. *Young*, 226 N.W. 225, 226 (Mich. 1929) (gas ranges in building "erected for use as an apartment house" were fixtures adapted to the "use" to which the realty "was to be put when completed," because "desirable tenants likely could not be secured without them"); *Ottaco, Inc.* v. *Gauze*, 574 N.W.2d 393, 396 (Mich. Ct. App. 1997) (mobile home was "adapted to the use" of land that "was zoned for single-family residential use").

3. Intent

The final element of the three-part fixture test is "intention to make the property a permanent accession to the realty." *Wayne Cty.* v. *Britton Trust*, 563 N.W.2d at 676. Intent is determined by "objective visible facts" from the "surrounding circumstances," not any "secret subjective intent" of the annexor. *Id.* at 680. This objective "[i]ntent may be inferred from the nature of the article affixed, the purpose for which it was affixed, and the manner of annexation." *Id.*

Indeed, as noted, "installation" of an asset "by the owner of the land raises a presumption under Michigan law that the accession was intended to be permanent." *Johns-Manville*, 88 F.2d at 521; *see, e.g.*, *Cliff's Ridge*, 123 B.R. at 759 (ski-chairlifts installed by landowner were "presumed to be permanent"); *Mahon*, 20 B.R. at 839 ("attachment by the owner raises a presumption under Michigan law that the accession is to be permanent"); *Coleman* v. *Stearns Mfg. Co.*, 38 Mich. 30, 32, 38 (Mich. 1878) ("engine, boiler, saw-mill and incident machinery" installed by landowners were fixtures based on "the whole proof, actual and presumptive").

The presumption arises because "[t]he act of an owner of a building in annexing a fixture manifests his intention of whether it is to remain a chattel or become an accession to the realty." *Kent Storage Co.* v. *Grand Rapids Lumber Co.*, 214 N.W. 111, 112-13 (Mich. 1927). Thus, it is presumed that "whatever is affixed to a building by an owner in complement, to facilitate its use and occupation in general, becomes a part of the realty, though capable of removal without injury to the building." *Id.*

It is the intention of the owner at the time of installation that matters. *See, e.g.*, *Colton*, 255 N.W. at 434 ("it was the intention of the [owner] when they purchased such articles" that controls); *In re Joseph*, 450 B.R. 679, 694 (Bankr. E.D. Mich. 2011) ("evidence about what Debtors may have believed and intended" subsequently when articles were removed "has no probative value in trying to show what Debtors believed and intended *several years earlier, when they affixed the disputed items* to the [real estate]") (emphasis added); *Morris* v. *Alexander*, 175 N.W. 264, 264 (Mich. 1919) (classification depends on "intent of the defendant when the articles were installed").

Moreover, "[t]he permanence required is not equated with perpetuity." *Tuinier*, 599 N.W.2d at 119. Rather, "[i]t is sufficient if the item is intended to remain where affixed until worn out, until the purpose to which the realty is devoted is accomplished, or until the item is superseded by another item more suitable for the purpose." *Id.*; *In re Joseph*, 450 B.R. at 690.[8]

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[8] *Accord Brunt Assocs. Inc.* v. *Dep't of Treasury*, --- N.W.2d ---, 2017 WL 30049 (Mich. Ct. App. Jan. 3, 2017); *W. Shore Servs., Inc.* v. *Dep't of Treasury*, 2015 WL 4469666, at *2 (Mich. Ct. App. July 21, 2015); *Dick & Don's Greenhouses, Inc.* v. *Comstock Twp.*, 315 N.W.2d 573, 574 (Mich. Ct. App. 1982); *United States* v. *Five Parcels*, 765 F. Supp. 1283, 1285 (E.D. Mich. 1991); *United States* v. *0.88 Acres of Land*, 670 F. Supp. 210, 211 n.2 (W.D. Mich. 1987).

Courts have looked to a number of indicia of intent to determine whether this final element of the fixture test is satisfied:

First, intent may be inferred from "the purpose for which [the asset] was affixed," *Wayne Cty.* v. *Britton Trust*, 563 N.W.2d at 680, particularly where an asset is "necessary to the purpose to which the realty [is] adapted." *Atl. Die Casting Co.* v. *Whiting Tubular Prods., Inc.*, 60 N.W.2d 174, 179 (Mich. 1953). In *Lord* v. *Detroit Savings Bank*, for example, the court found the requisite intent to permanently affix a "cupola and crane" — assets of the very type involved here — where "without them the building in which they were would not be in condition for immediate use." 93 N.W. 1063, 1064 (Mich. 1903). Likewise, in *Sondreal*, the court held that the jetway was a fixture because, even though it "can be unbolted and removed," a "jetway is the only safe and direct means of egress and ingress between an aircraft and the terminal for both passengers and employees." 2005 WL 599752, at *3. And in *Michigan National Bank*, it was held that drive-up teller equipment was intended to be "permanent" because "the present use of these [bank] buildings [was] dependent on the presence of these items." *Mich. Nat'l Bank* v. *City of Lansing*, 293 N.W.2d 626, 627-28 (Mich. Ct. App. 1980), *aff'd by equally divided vote*, 322 N.W.2d 173 (Mich. 1982); *accord Mahon*, 20 B.R. at 840 (cranes were intended as fixtures because "[w]ithout the cranes[,] the value of the building as a manufacturing and industrial piece of property is . . . considerably lessened since any successor purchaser would be required to install cranes to carry on manufacturing processes").

Second, courts infer intent where an asset has been integrated with other on-site machinery or utilities. In *Johns-Manville*, for instance, the Sixth Circuit held that a contractor intended to permanently affix a lathe to the realty where the lathe was "an integral part of the plant" and "derive[d] its power from belts attached to overhead pulleys." 88 F.2d at 522; *see id*. (forge was a fixture in part because it was "connected with a flu pipe extending through the roof"). Similarly, in *Michigan National Bank*, the court held that a bank "inten[ded] to permanently affix" drive-up teller equipment because it had been "physically integrated" with a "pneumatic tube system," "roof-type canopy," and "specially constructed concrete island." 293 N.W.2d at 627;

accord Tuinier, 599 N.W.2d at 121 (greenhouses were "permanent enough to hold large fans and gas heaters" and were therefore "intended to be permanent accessions"); *Ottaco*, 574 N.W.2d at 396 (inferring intent to permanently affix mobile home from "connections to gas, electric, sewer, and water lines"); *Cincinnati Ins.*, 166 F. Supp. 2d at 1179, 1180 ("difficult[y] [of] determin[ing] where the machine begins and the [plant] begins" was "pertinent characteristic" of milling machine held to be a fixture).

Third, courts infer intent where either the asset has been customized to fit within the particular realty or the realty has been customized to house the asset. For example, in *In re Joseph*, the court held that "custom-sized" window blinds were intended to be permanent, as was a refrigerator that was "designed to blend with, and appear to be part of, the kitchen cabinetry." 450 B.R. at 696, 697; *see also Cliff's Ridge*, 123 B.R. at 759 (chairlift was a fixture in part because it was "engineered to be erected on the realty" and had been "specially modified to be attached to the realty").

Fourth, when considering the "nature of the article affixed" as "objective[,] visible" evidence of intent to create a fixture, courts often view the size and weight of an asset as the simplest evidence of its intended "permanence." *Wayne Cty.* v. *Britton Trust*, 563 N.W.2d at 680. In *Dehring*, for example, the Michigan Supreme Court held that in light of the "great size" of a brewery's storage tanks, fermenting tubs, and chip casks, it was "impossible to believe" that the assets, as well as other similar "heavy machinery," were anything other than fixtures. 110 N.W. at 57; *accord Cincinnati Ins.*, 166 F. Supp. 2d at 1180 (inferring "intent to make permanent" from "the fact that the machine weighs approximately 200 tons").

Finally, courts infer intent from "the manner of annexation." *Wayne Cty.* v. *Britton Trust*, 563 N.W.2d at 680. For example, the use of concrete footings is strong evidence that an asset was intended to be permanently attached. *See, e.g.*, *Tuinier*, 599 N.W.2d at 120 ("placement of numerous stubs in cement-filled holes is objective evidence" that greenhouses were permanent); *Mich. Nat'l Bank*, 293 N.W.2d at 628 ("specially constructed concrete island" was evidence that bank's deposit equipment was permanent); *Ottaco*, 574 N.W.2d at 396 ("concrete slab foundation" was evidence that mobile home was permanent); *Cincinnati Ins.*, 166 F. Supp. 2d at 1180 (finding "intent to make permanent" because milling machine was "affixed to [plant] with concrete").

Bolts and screws are likewise indicative of intended permanence. *See, e.g.*, *Mich. Nat'l Bank*, 293 N.W.2d at 628 ("steel bolts" were evidence of intent); *Pierce* v. *City of Lansing*, 694 N.W.2d 65, 69 (Mich. Ct. App. 2005) (elevator "not intended to be removed" from parking garage because "bolted to the structure"); *Johns-Manville*, 88 F.2d at 522 (lathe intended to be "part of the realty" because "bolted to the floor"); *Cincinnati Ins.*, 166 F. Supp. 2d at 1180 (inferring intent from, *inter alia*, "38 different bolts and anchors" used "to secure the machine into the cement foundation").

B. The applicable legal standard under Ohio law

The above discussion centers on Michigan law because, as noted, 83% of the 40 Representative Assets are governed by Michigan law. But the result from applying Ohio law (which governs the remainder) is not materially different.

Ohio, like Michigan, has a three-part test: (1) "annexation to the realty, or something appurtenant thereto"; (2) "[a]ppropriation to the use or purpose of the part of the realty with which it is connected"; and (3) the "intention of the party making the annexation, to make the article a permanent accession to the freehold." *E.g.*, *In re Szerwinski*, 467 B.R. 893, 902 (B.A.P. 6th Cir. 2012).

1. Annexation

As in Michigan, on the first element, "[s]light or constructive attachment is all that is required as long as the other two elements are established." *Id*. Fixtures, accordingly, may be annexed to the realty in many different ways. For example, the Ohio Supreme Court has held that a furnace attached to "warm-air registers or pipes" only "with metallic sleeves or sections of pipe" was a fixture. *Holland Furnace Co.* v. *Trumbull Sav. & Loan Co.*, 19 N.E.2d 273, 275 (Ohio 1939). *See also, e.g.*, *Whitaker-Glessner Co.* v. *Ohio Savings Bank & Trust Co.*, 22 F.2d 773, 773 (6th Cir. 1927) (machines in vegetable-canning plant annexed "by bolts or screws and connected together" held to be fixtures); *In re Kerr*, 383 B.R. 337, 342 (N.D. Ohio 2008) (cabinets and appliances "attached to . . . something attached to the real property" held to be fixtures).

2. Adaptation

The Ohio Supreme Court has explained that an asset satisfies the second element of the fixture test — "appropriate application to the use or purpose" of the realty — if it is an "integral and necessary part of the whole premises." *Holland*, 19 N.E.2d at 275. To determine whether an asset is "integral and necessary" to the realty, Ohio courts have considered the "lack of utility of the premises if [the asset] were severed" and "the necessity of replacing [the asset] with another or similar kind if it were removed." *Id*.

Ohio courts apply this test to conclude that manufacturing assets like those at issue here are fixtures. In *Mid-Ohio Mech., Inc.* v. *Carden Metal Fabricators, Inc.*, for example, a recent lien case, the court concluded that a paint line used to coat auto bumpers — far less extensive than the paint line in a GM plant — met the adaptation prong of the fixture test. 862 N.E.2d 543, 547 (Ohio Ct. App. 2006), *appeal denied*, 862 N.E.2d 118 (Ohio 2007). The paint line included a "cure oven," its "platform," "paint-sludge removal equipment," "paint booth scrubbers," "pollution control equipment," "robotic paint sprayers," and a "conveyor." *Id.* at 545. The court explained that all of this machinery was "essential to the use or purpose of the realty" because the entire line had been "integrated into the factory." *Id*. at 547; *see also id.* at 547-48 ("clamshell dredge" used in gravel pit "may well have met the definition of a fixture" because it was "fully integrated into" the "gravel-pit operations").

Mid-Ohio reaffirmed a longstanding principle of Ohio law: in lien disputes, industrial machinery is deemed a fixture when "integral and necessary" to the premises — particularly where the realty was originally designed for the industrial use to which the property is dedicated. *Holland*, 19 N.E.2d at 275. As early as 1864, in *Brennan* v. *Whitaker*, the Ohio Supreme Court held in a mortgage case that a "mill shafting," "drum," "balance wheel," "muley saw," and "gearing" were fixtures in a building that "was erected for a saw-mill, and, in the form and nature of its structure, was adapted to the business of a mill of that description." 15 Ohio St. 446, 452 (1864). The assets in *Brennan* "could not be removed without leaving the saw-mill incomplete," and "[t]he building, itself, for any other purpose, would, without material alterations and additions, be comparatively of little value." *Id.*

Similarly, in *Whitaker-Glessner*, the Sixth Circuit, applying Ohio law, held in another mortgage case that vegetable-canning machines were "devoted to the use to which the real estate was appropriated" because the building-owner "had acquired these properties for the sole purpose of establishing canning plants; and the buildings were thereafter constructed, or reconstructed, so that the machinery could be placed in them and used for the purpose for which they were acquired." 22 F.2d at 774; *accord Willis* v. *Beeler*, 90 F.2d 538, 541 (6th Cir. 1937) (machines were fixtures in Ohio mortgage dispute because property-owner "assembled the plant" for "the business in which the machinery was to be employed," and equipment was a "necessary factor" for its "operations").[9]

The Avoidance Trust may cite cases decided in the context of the Ohio *Tax Code*.[10] In the *tax* context, the "decisive test of appropriation is whether the chattel under consideration in

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[9] In *Teaff* v. *Hewitt*, which pre-dated *Brennan*, the Ohio Supreme Court had held in a mortgage case that machines were personal property in a wool factory. 1 Ohio St. 511 (1853). Citing English law, the court noted that authorities had sometimes characterized "manufacturing" as "a pursuit personal in its character." *Id.* at 535. The court ruled, however, that the "use to which the property in controversy in [that] case . . . was applied" was *not* "decisive of its legal character." *Id.* at 535. Instead, the court held that the machinery was not a fixture because, *inter alia*, it was "customar[ily] remov[ed] . . . from place to place." *Id.* at 536.

[10] In its June 15, 2016 preliminary brief (Docket No. 631 at 25-27), the Avoidance Trust purported to explain Ohio's "adaptation" test by citing seven tax cases and three unpublished decisions applying tax authorities, and no other Ohio precedent. *See Funtime, Inc.* v. *Wilkins*, 822 N.E.2d 781 (Ohio 2004) (tax); *Litton Sys., Inc.* v. *Tracy*, 728 N.E.2d 389 (Ohio 2000) (tax); *J.C. Penney Co., Inc.* v. *Limbach*, 495 N.E.2d 1 (Ohio 1986) (tax); *Buckley Bros., Inc.* v. *Clinton Cnty. Bd. of Revision*, 1974 WL 184314 (Ohio Ct. App. Oct. 15, 1974) (tax); *Roseville Potter* v. *Bd. of Revision of Muskingum Cnty.*, 77 N.E.2d 608 (Ohio 1948) (tax); *Zangerle* v. *Republic Steel Corp.*, 60 N.E.2d 170 (Ohio 1945) (tax); *Zangerle* v. *Standard Oil Co. of Ohio*, 60 N.E.2d 52 (Ohio 1945) (tax); *see also Perez Bar & Grill* v. *Schneider*, 2012 WL 6105324, at *5 (Ohio Ct. App. Dec. 10, 2012) (applying *Zangerle* v. *Republic Steel*); *Gen. Elec. Co., Lighting Div.* v. *Am. Mech. Contractors Corp.*, 2001 WL 1647158, *3 (Ohio. Ct. App. Dec. 21, 2001) (applying *Zangerle* v. *Standard Oil*); *Pine Creek Farms* v. *Hersey Equip. Co., Inc.*, 1997 WL 392767, at *3 (Ohio Ct. App. July 7, 1997) (applying *Zangerle* v. *Standard Oil*). To the extent lower courts have applied the Ohio tax test to lien disputes, those decisions are inconsistent with controlling authority from the Ohio Supreme Court.

any case is devoted primarily to the *business* conducted on the premises, or whether it is devoted primarily to the use of the *land* upon which the business is conducted." *Zangerle* v. *Standard Oil Co. of Ohio*, 60 N.E.2d 52, 57 (Ohio 1945) (emphases added). The Ohio tax test, however, is inapplicable to this lien dispute governed by the U.C.C. — a model code that, by definition, strives to implement common principles across the 50 states.

This peculiar adaptation test in Ohio tax cases is driven by express provisions of the Ohio Tax Code. As the Ohio Supreme Court has explained, a 1931 amendment to the Ohio Tax Code required "machinery installed on land *for the benefit of an industry located thereon*" to be classified as personal property for tax purposes (and thus taxed at the lower rate). *Id.* at 58 (emphasis added). More recently, the Ohio Tax Code was amended to add the concept of "business fixture" to the statute's definition of "personal property." Ohio Rev. Code Ann. § 5701.03(A); *see Funtime, Inc.* v. *Wilkins*, 822 N.E.2d 781, 784 (Ohio 2004) (summarizing statutory history). A "business fixture" is defined as "tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the *business* conducted by the occupant on the premises and not the *realty*." *Id.* § 5701.03(B) (emphases added). Accordingly, for tax purposes, process-specific machinery and equipment in Ohio is, by statute, labeled a "business fixture" but nonetheless defined as "personal property" that is taxed at a favorable rate. *See also Zangerle* v. *Standard Oil*, 60 N.E.2d at 58 (tax consideration "counterbalances, if not outweighs, any presumption of annexation" that would otherwise apply).

As the Ohio Supreme Court has recognized, application of the adaptation factor in tax cases "is not complicated by the conflicting interests of lienholders." *Id.* Indeed, in a leading tax decision cited by the Avoidance Trust, the court specifically held that the reasoning applied in *Brennan* (a mortgage dispute) should *not* be applied in tax cases. *Zangerle* v. *Republic Steel Corp.*, 60 N.E.2d 170, 178 (Ohio 1945). As the court explained, where "rights of lienholders or innocent third parties who have parted with value, are concerned," the analysis of whether "a manufacturing business becomes accessory to the land" differs from the analysis in tax cases. *Id.* Put another way, to "determin[e] what the security [is] that [is] to be covered" in a lien dispute, a court must consider "equities" that are not present in tax cases. *Id.*; *see also* Ohio Rev. Code Ann. § 1309.102(A)(41) (no concept of "business fixture" in Ohio U.C.C.).[11]

Thus, as discussed, Ohio courts have repeatedly classified process-specific machinery as fixtures in lien disputes. *See, e.g.*, *Brennan*, 15 Ohio St. at 452 ("mill shafting," "drum," "balance wheel," "muley saw," and "gearing"); *Whitaker-Glessner*, 22 F.2d at 774 (vegetable-canning machines); *Willis*, 90 F.2d at 541 (machines used for business "operations"). And in *Mid-Ohio*, a lien case, the court squarely rejected the argument that the paint line was "personal property because it is related to the owner's current business and is not essential to the use or purpose of the realty," reasoning that on that logic, the "entire [factory]" would not qualify as real property "because the factory is devoted to a particular business and could be demolished and the real estate used for some other purpose." 862 N.E.2d at 547.

Nevertheless, even if the Ohio tax concept of "adaptation" did apply to a lien dispute, the test would be satisfied by the Representative Assets in Ohio. As discussed below, six of the Ohio assets are located in a foundry (Defiance) and one was located in a now-demolished stamping plant (Mansfield). Foundries and stamping plants are extensively customized and purpose built exclusively for foundry and stamping operations. Indeed, as the Term Lenders' expert Max Miller will testify, when stamping operations were discontinued at Mansfield, the entire facility was demolished (and the site remains vacant to this day). Because it would be prohibitively expensive to repurpose these facilities for any other business, there is no meaningful distinction, with respect to those facilities, between assets that are "devoted primarily to the business conducted on the premises" and assets that are "devoted primarily to

11 The Ohio Supreme Court has also used a different formulation to determine which assets represent personal property for eminent domain — where the public fisc is at stake — but once again recognized that the test "applies differently in appropriation cases than in other situations." *Masheter* v. *Boehm*, 307 N.E.2d 533, 538-39 (Ohio 1974) (citing *Zangerle*, 60 N.E.2d at 171).

the use of the land." *Zangerle*, 60 N.E.2d at 57. Put simply, there is no other viable use of the "land" where these manufacturing plants are located.[12]

3. Intent

As for the third factor, intent, the owner's "apparent or legal intention to make [the asset] a fixture is sufficient," and this intent "may be inferred from," among other things, "the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, the purpose and use for which the annexation is made, [and] the utility in use or the indispensability of the [asset] . . . in the use of the whole." *Holland*, 19 N.E. at 275.

For example, the Ohio Court of Appeals held in *Mid-Ohio* that the paint line used to coat auto bumpers was intended to be permanent because it was installed by "welding and bolting items, including structural steel, to the building, so that the owner [could] produce the parts it need[ed] to conduct its business." 862 N.E.2d at 547. The *Mid-Ohio* court so concluded notwithstanding that the paint line "could be detached from the factory." *Id.* at 547.

Mid-Ohio is consistent with a long line of Ohio precedent making clear that "permanent accession" encompasses assets that are moveable and, indeed, have occasionally been moved. *See, e.g.*, *Willis*, 90 F.2d at 541 (machinery in plant was fixture though "some of the machinery was detachably connected"); *Whitaker-Glessner*, 22 F.2d at 774 (machines that "could be and occasionally [were] removed to meet the exigencies of the business" were fixtures).

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12 *Cf. Pine Creek Farms*, 1997 WL 392767, at *2-3 (chicken-caging system was not adapted to use of real property where farm-owner presented *no* evidence that "[w]ithout the caging system, the buildings on Pine Creek's property have no purpose"); *Perez Bar & Grill*, 2012 WL 6105324, at *7 (bar, ventilation hood, and sinks were not adapted where "over the years, the building has been occupied by various types of businesses, including a retail store and a photography studio that would have had no use for the bar, the ventilation hood, or the kitchen and bar sinks").

POINT II

THE EVIDENCE AT TRIAL WILL SHOW OVERWHELMINGLY THAT EACH OF THE REPRESENTATIVE ASSETS IS A FIXTURE.

As discussed above, under the case law, even "minimal" physical attachment suffices, and an asset that is not physically attached can be "constructively attached by its weight alone" or if its "removal from the realty would impair both [its] value and the value of the realty." That standard is easily met for all 40 Representative Assets. And properly understood, the adaptation test is easily met as well. Each of the 40 assets is "a necessary or useful supplement to the realty in light of the realty's purpose."

Thus, to the extent there is any real dispute at all, and respectfully, there should be none, the core issue at trial will focus on the intent of Old GM at the time the Representative Assets were installed. As noted, in deciding that issue, Michigan law requires that the Court start with the presumption that all of the Representative Assets were intended to remain in place, because all of them were installed by Old GM on Old GM-owned property. Thus, for the Michigan assets, the burden on the Avoidance Trust will be to overcome that presumption of intent. It will not be able to do so.

A. Old GM designed and built its plants to ensure that its manufacturing assets would remain in place for their useful lives.

The evidence of intent that will be presented at trial is overwhelming and starts from just a few basic, incontrovertible facts inherent in modern automobile manufacturing of the nature and scale conducted by Old and New GM.

1. Old GM's U.S. manufacturing plants, like New GM's, accommodate highly-integrated production systems. Old GM designed its plants and selected and installed the machinery and equipment that went into the plants to work efficiently as part of an integrated system. That was the "purpose for which the assets were affixed." That is why the assets are "integral parts of the plants." This level of integration allows GM, for example, to produce 1,100 SUVs per day at Lansing Delta Township. As part of this integrated process, each asset in a production line is designed to work with and depends upon every other asset in the line. The removal of any one production asset would typically render the rest useless. If Old GM were ever forced to remove one of its production assets, its only recourse would be to replace the removed asset with an identical one.

Thus, the Avoidance Trust has no answer to this simple question: After investing hundreds of millions of dollars into each plant to mass-produce automobiles, why would Old GM remove an asset that was essential to the plant's operation and render the remaining assets useless? Plainly, Old GM's intent when it built a factory was to utilize the factory for its useful life. The massive machinery and equipment was installed in these factories with this intention.

Old GM's capital equipment purchasing practices reinforce this point. The vast majority of capital assets that Old GM purchased, including a majority of the Representative Assets, are defined and approved as part of integrated bundles. A typical bundle includes a large number of integrated assets and often exceeds $250 million or more in a single appropriation request — requiring approval from Old GM's board. Just as the assets were designed to work together as an integrated whole, they were purchased together to meet that same objective. No single asset can be viewed in isolation from another.

2. Old GM designed its plants precisely to avoid having to move or replace its fixed assets. Old GM designed its plants to be flexible precisely to avoid having to move or replace fixed assets as its needs change. As part of this strategy, Old GM uses a "platform" approach. A vehicle platform is a common design that underpins many outwardly different models. By employing this platform approach, Old GM ensured that many different makes and models could be produced on a production line without modification to the underlying manufacturing assets. Indeed, Old GM's flexibility goes a step further. Modern plants that were designed and built to make mid-sized cars, for example, have the flexibility to make both compact and full-sized cars on largely the same production equipment. Similar flexibility was engineered into the machinery and equipment installed at GM's Warren Transmission plant when the obsolete "4-speed" transmission line was replaced with a "6-speed" line that incorporates technology capable of allowing GM to produce future 7-speed, 8-speed, and even 10-speed transmissions without relocating or replacing any of the production assets.

By the same token, the evidence will show that Old GM planned its manufacturing capacity as a whole so that it would have plants in place capable of responding to shifts in consumer demand. Old GM had a group specifically devoted to planning Old GM's production capacity to anticipate and deal with evolving needs. For example, if Old GM's strategic planning group viewed it as possible that small car demand would increase over the next decade, it took steps to ensure that the company had a plant in place that could meet that demand. Old GM did not and could not afford to undertake the 3+ year process of revamping all of the manufacturing equipment at an existing full-sized car plant — or building an entirely new plant — every time there was a shift in demand.

The evidence will show that in light of this planning, the only major equipment change required for Old GM to produce new vehicle models with the same fixed assets was the replacement of the dies and tooling that produce the distinctive appearance of a hood or door panel. Old GM's budgeting processes for model changes reflect this — while they would contain significant expenditures associated with new tools and dies for a new model, Old GM rarely budgeted for any new paint shop equipment, milling machines, stamping presses, or assembly conveyors to accommodate model changes.[13] Old GM's engine and transmission manufacturing assets, likewise, were designed to be versatile.

Thus, the intended purpose of Old GM's flexible, and highly planned, manufacturing processes was to enable Old GM to use the kinds of assets that have been selected as the Representative Assets in place for their useful lives.

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[13] The evidence will show that the only fixed assets that were regularly included in the estimates for capital expenditures associated with a model change were for new robots in the body shop of an assembly facility. None of the Representative Assets are from this area of the body shop, and even in the case of body shop robots, it was GM's standard practice to continue to use existing equipment in place for the manufacture of new models until close to the end of the body shop robots' useful lives — only those body shop robots near the end of their useful lives were regularly replaced as part of a model change.

3. Automobile manufacturing machinery and equipment is so massive that it is impractical to move it. The core assets involved in this dispute are so large that it is downright nonsensical to believe that Old GM installed them with the intent that they would be removed before the end of their useful lives. For instance, a AA-class transfer stamping press is approximately four stories high, requires a concrete foundation up to 100 feet deep, and weighs up to 5.6 million pounds. Huge paint and oven systems often span three stories with lengthy conveyors that pass through pre-designed openings in floors and ceilings to carry auto-bodies through the paint line, with heavily-integrated paint booths (larger than good-sized houses) that are integrated with waste processing systems designed to exceed environmental standards. General assembly conveyors must run for hundreds or even thousands of feet to allow multiple operations to be performed in a complex, highly-choreographed assembly process.

To accommodate this massive equipment, it is common for the machinery to be installed as the building is constructed around it. Thus, one of the very reasons why Old GM planned its factories to be flexible is because the removal of its fixed production assets would simply be impractical, prohibitively expensive and monumentally disruptive. The "nature of the equipment" thus compels the conclusion that Old GM intended for the assets to remain in place for their useful lives.

4. Old GM's manufacturing assets were required to be firmly attached to the realty in order to function properly and safely. Old GM's manufacturing requirements demand that the plants produce parts that meet exacting tolerances — sometimes thinner than the width of a human hair. Given the need for precision (particularly in modern engine and transmission manufacturing), Old GM often needed to pour a special, thick foundation under machining assets, and precisely level the foundations so that the assets could perform to these fine tolerances. The "manner of annexation" of assets, therefore, shows that they were meant to be permanently installed.

While the tolerances are not quite as exacting for conveyor systems, the basic concept is the same. Conveyors need to transport components from machine to machine seamlessly; to meet this end, conveyor systems are firmly attached to the realty so that they remain in place and can, in the case of Warren Transmission, operate 24 hours per day, 6 days per week. Safety too requires that assets be firmly affixed. Overhead cranes and transporters carrying vats of molten iron, stamping press dies, and thousand pound vehicle bodies are meant to stay fixed in place. Thus, the "degree of customization" in the selection, configuration, and integration of the assets, again, is compelling evidence of Old GM's intent.

B. The proof will establish that each of the Representative Assets is a fixture.

The Term Lenders have assembled a group of former GM executives who, collectively, have 200 years of experience in designing, purchasing, installing and operating precisely the kind of manufacturing equipment that makes up the Representative Assets. In addition to providing the Court with the overview of Old GM's manufacturing principles discussed above, those experts will present comprehensive, detailed testimony concerning each factor of the applicable test with respect to each of the Representative Assets and allow the Court to determine whether each is a fixture.

Submitted as an Appendix to this memorandum of law is a Handbook that explains on an asset-by-asset basis what each of the 40 Representative Assets is, what it looks like, what it does, and what the Term Lenders expect the evidence at trial will show with respect to that asset. The Handbook is organized into three sections to correspond to the three plants where the Representative Assets are located: (1) Lansing Delta Township; (2) Warren Transmission; and (3) Defiance Foundry.

C. Plaintiffs' expert, David Goesling, has applied a fixture test that is totally inconsistent with the applicable legal standards.

The Avoidance Trust will offer the testimony of an industrial equipment appraiser, David Goesling. Mr. Goesling — who is not an engineer and has no expertise in designing, installing or operating industrial machinery, let alone automobile manufacturing machinery — manages to opine that only 2 of the 40 Representative Assets (and certain components of 2 others) are fixtures. Mr. Goesling can only reach this conclusion because the tests he applies to determine whether an asset is attached, adapted, or intended to remain in place are irreconcilable with the governing case law.

Indeed, at deposition, when confronted with cases at total odds with his conclusions, all Mr. Goesling could say was that the courts are wrong and he is right. Mr. Goesling's disagreement with and lack of knowledge of the governing case law is especially notable given that he claims to be an expert in applying the legal test for fixtures. Cross-examination at trial will demonstrate that Mr. Goesling's opinions are entitled to no weight.

1. Mr. Goesling applies an erroneous annexation test.

On annexation, Mr. Goesling was "instruct[ed]" by the Avoidance Trust's counsel *not* to consider "constructive annexation" in forming his opinion as to the 40 Representative Assets. But as noted above, under settled law, the annexation requirement can be met through physical *or* constructive annexation. And numerous cases have found constructive annexation in circumstances far less compelling than those here. Thus, for example, the beer tanks in *Dehring*, the overhead cranes in *Mahon*, and even the elevator rugs in *Colton* were held to be constructively annexed to the realty and fixtures under the governing law. Not so for Mr. Goesling: unless there is "actual annexation," there is no attachment.

2. Mr. Goesling applies an erroneous adaptation test.

Also manifestly flawed was Mr. Goesling's understanding of the second element, "adaptation." As noted, the "adaptation" element looks to whether the asset is "a necessary or at least a useful adjunct to the realty, considering the purposes to which the latter is devoted." *Wayne Cty.* v. *Britton Trust*, 563 N.W.2d at 680. And Mr. Goesling was compelled to concede at deposition that all 40 of the Representative Assets were at least "a useful adjunct to the realty, considering the *purposes* to which GM devoted the realty," at the time they were installed.

Mr. Goesling, however, admitted at deposition that that was not "the nature of the test that [he] used." Although it is not entirely clear, it appears that Mr. Goesling applied two criteria, neither grounded in the case law, to determine whether an asset was adapted: (a) the asset must “become a necessary or useful adjunct to the *realty itself*,” *or* (b) Old GM must have “ma[de] some change to the machine so that it could be used as part of the business.”

Thus, under Mr. Goesling’s first invented test, a milling machine used to manufacture auto transmission components would not “satisfy the adaptation test,” because it “facilitate[s] GM’s use of the facility for manufacturing” but would not promote every other conceivable use of the building. Likewise, under his second invented test, an asset that was not physically modified by Old GM before or during installation could never be adapted.

The result of this was deposition testimony that drew distinctions without differences. For example, when shown an image of a massive, under-construction pit and foundation designed to accommodate a specific stamping press, Mr. Goesling conceded that the realty had been adapted to accommodate the press pit and foundation but asserted that the realty had not been adapted to accommodate the press itself, even though the only reason why the pit and foundation were built was to accommodate the press.

Similarly, Mr. Goesling strained to conclude that assets that were custom built for Old GM by equipment manufacturers were not “adapted” for Old GM’s use because they were merely built to Old GM’s “specifications,” not “customiz[ed].” Even if an asset were so specifically adapted for Old GM’s needs that it could not be used by another manufacturer, Mr. Goesling nonetheless concluded that the asset had not been “adapted” for Old GM’s use. And paradoxically, at the same time that Mr. Goesling is opining that adaptation is not met, he is simultaneously urging for any number of assets that they have no resale value to anyone else except as scrap on the premise that they are only useful to GM.

Mr. Goesling’s inventions led him into uncharted territory. Thus, as noted, in *Cincinnati Insurance*, the court held that a large milling machine (far smaller than the stamping presses at issue here) used by a manufacturer of automobiles and aerospace parts “in the regular course of its business” met the adaptation test and was a fixture. 166 F. Supp. 2d at 1180. Mr. Goesling was unwilling to concede that the milling machine at issue in the case was a fixture, offering that “Maybe the Court was wrong.”

Mr. Goesling is likewise off-the-mark when he applies the Ohio adaptation test. He first incorrectly looks to "the *use of the land* upon which the business is conducted" — the standard under the Ohio Tax Code[14] — rather than the business conducted on the land. But then, he misapplies even that (incorrect) standard. Thus, while Mr. Goesling conceded that *part* of the Defiance, Ohio foundry cannot be repurposed for anything other than foundry operations, he nevertheless opined that because *other* parts of the foundry could be repurposed, *no* foundry-specific assets in *any* part of the Defiance plant meet the adaptation test. Nothing in Ohio law so provides.[15]

3. Mr. Goesling applies an erroneous intent test.

On the third element of the fixture test, intent, Mr. Goesling again pits himself in a losing battle against the governing case law.

a. Mr. Goesling failed to apply the presumption of permanence, a presumption that is particularly applicable here.

As noted, "attachments to realty to facilitate its use" by the owner of the property are "*presumed* to be permanent." *Cliff's Ridge*, 123 B.R. at 759 (emphasis added). But Mr. Goesling admitted at deposition that counsel never told him about this presumption and that he did not apply it. So his views on intent are flawed from the start, a flaw that is particularly glaring here.

As Mr. Goesling conceded at deposition, he formed his opinion that 38 of the 40 Representative Assets were non-fixtures without considering the broader investments that Old GM made to enable those assets to accomplish the company's production goals or the impact that removal of the assets would have on its operations. Thus, in Mr. Goesling's view, the fact that Old GM would have to shut down a facility worth hundreds of millions of dollars if it were to remove an asset is not indicative of Old GM's intent to keep the asset in place. In fact, at

14 *Zangerle*, 60 N.E.2d at 57 (emphasis added).

15 The source of Mr. Goesling's unique understanding of the Ohio tax law adaptation test is a mystery. Initially, he denied that counsel provided it to him, later saying that he was unsure. He also conceded: "I have not reviewed caselaw [sic] or anything else" on the subject.

deposition, Mr. Goesling explained that he felt that it was inappropriate to even "*consider*[] . . . the assets in the context of [an] operating plant scenario."

Instead, ignoring the real world, Mr. Goesling stated that he conducted his analysis on the assumption that Old GM's secured creditors "would have unimpeded access to the property, and they would be able to remove it as they saw fit." By counterfactually analyzing the Representative Assets as if they existed in non-operating facilities, Mr. Goesling simply assumed away powerful evidence of Old GM's intent: the fact that it spent hundreds of millions of dollars to engineer, purchase and install its fixed assets to work together in an operating plant to manufacture automobiles.

b. Mr. Goesling failed to apply the correct definition of permanence.

As noted, under the governing case law: "The permanence required is not equated with perpetuity. It is sufficient if the item is intended to remain where affixed until worn out, until the purpose to which the realty is devoted is accomplished or until the item is superseded by another item more suitable for the purpose." *Tuinier*, 599 N.W.2d at 119. But for Mr. Goesling, that is not sufficient. Rather, he expressed at deposition that it is *not* "sufficient if the item is intended to remain where affixed until worn out."

Moreover, Mr. Goesling offered the curious opinion that because any business "cannot anticipate what will happen in the future," any "expectation of permanency is unrealistic." As he explained it: "At the time of installation, I believe that the business would accept and understand the fact that there will be changes in the future that they can't anticipate and that whatever they are doing may be appropriate for the present time but could very possibly change in the future." In his view, Old GM could never *intend* to keep its assets in place permanently because "GM had to anticipate that there would be circumstances that they could not anticipate." As an example, Mr. Goesling offered, "They could have a fire here."

As a threshold matter, Mr. Goesling did not disclose his "known unknown" theory in any of his expert reports. This novel theory thus is improper and should be excluded.[16] When it comes to expert testimony, parties are not required to cope with the risk of unknowns.

Mr. Goesling's failure to disclose his new theory is perhaps understandable, however, because it makes no sense. Mr. Goesling essentially believes that, because of these "known unknowns," it is well-nigh impossible for a business to intend to install any business-specific asset permanently. Thus, Mr. Goesling was willing to agree that Old GM "would *desire*" that its assets remain in place; that Old GM "*hoped*" and "*planned*" to "get as much utility out of them as possible"; and that GM buys assets with the "*idea*" that they will not need to be changed out or prematurely discarded. Taking this view seriously would mean that no company could ever "intend" to install something permanently — it could merely "hope," "plan" or "desire" to do so. Nothing is ever a fixture.[17]

This invention, like Mr. Goesling's others, is at odds with fixture law. The company in *Cincinnati Insurance* "hoped," "planned," and "desired" to use its milling machine to manufacture automobile and aerospace components. When the market changed and it decided to focus on aerospace only, the machine was no longer needed and it was sold. But that does not

16 An expert report must contain "a *complete statement* of all opinions the witness will express and the basis and reasons for them." *Morritt* v. *Stryker Corp.*, 2011 WL 3876960, at *5 (E.D.N.Y. Sept. 1, 2011) (emphasis in original) (quoting Fed. R. Civ. P. 26(a)(2)(B)) (precluding expert testimony that was not set forth in the expert's report); *see* Fed. R. Civ. P. 26 notes of adv. cmte. (1993) ("the report . . . is intended to set forth the substance of the direct examination" and noting that under Rule 37(c)(1), "a party will not ordinarily be permitted to use on direct examination any expert testimony not so disclosed"); *see, e.g.*, *Mead Johnson & Co.* v. *Barr Labs., Inc.*, 38 F. Supp. 2d 289, 297 (S.D.N.Y. 1999) (granting motion to strike expert testimony that was beyond the scope of the expert's report where the proffering party failed to offer "substantial justification" for the failure to include the testimony in the report).

17 This makes all the more puzzling Mr. Goesling's conclusion that a small handful of the Representative Assets are fixtures. The same "known unknowns" that could theoretically disrupt Old GM's plans for a stamping press — a change in consumer preferences, to use Mr. Goesling's examples — could also cause the premature removal of the pits and trenches that Mr. Goesling concedes are fixtures. Indeed, one trench that Mr. Goesling concedes was a fixture was later filled in.

mean that the milling machine was not intended to remain in place at the time it was installed. *See also Wis. Dep't of Rev.* v. *A. O. Smith Harvestore Prods., Inc.*, 240 N.W.2d 357, 362 (Wisc. 1976) (for silos that were "repossessed" or that "had to be taken down because of urban expansion," "the general inference [of intent] still prevails, because both of these situations are extraordinary events which would not be anticipated by the farmer at the time of annexation").

Similarly, when the Josephs moved into their home in 1997 and proceeded to hang their mailbox, put up their custom window blinds, and install a refrigerator to match the kitchen cabinets, they did not anticipate having to declare bankruptcy 12 years later amid the Great Recession and move out of their home after it was sold in a foreclosure sale. That is why the court held that any "evidence about what Debtors may have believed and intended" when they removed the articles "has no probative value" on "what Debtors believed and intended *several years earlier*, *when they affixed the disputed items* to the [real estate]." *In re Joseph*, 450 B.R. at 694 (emphasis added).

Moreover, as discussed above, on the facts, the Term Lenders' witnesses will explain that Old GM actively took steps to predict "known unknowns," and designed its plants and equipment precisely to anticipate future issues. Old GM engaged in this advance planning specifically to avoid having to move its highly-integrated, fixed manufacturing equipment — assets that Old GM spent a fortune to purchase and install and that need to operate continuously to make cars on a mass-produced basis. Thus, even if Mr. Goesling's "known unknowns" standard of intent were applied, it would be met.

c. Mr. Goesling's view of the significance that an asset can be moved or removed without damage to the realty is contrary to law and illogical in the extreme.

Mr. Goesling also opined that if an asset can be moved, it is not a fixture. Again, not so. As Michigan courts have flatly held, "that it is possible to remove an item is not dispositive." *W. Shore Servs., Inc.*, 2015 WL 4469666, at *2. Fixtures by definition start their lives as personalty that is then moved into location. The fact that a fixture may be moved at some later date as needs change does not mean that the asset was not a fixture when installed. *Cincinnati Insurance* proves the point.

So do many other decisions. The elevator rugs and entrance mats in *Colton* could of course be moved (quite easily) but were held to be fixtures. *Colton*, 255 N.W.2d at 434. The chairlifts in *Cliff's Ridge* were bought second hand and could be "severed . . . and sold" but were held to be fixtures. 123 B.R. at 756, 759. It was also "possible . . . to disassemble and move the greenhouses" in *Tuinier*, but they too were held to be fixtures. 599 N.W.2d at 120. The same was true for the jetway in *Sondreal*: It could be "detached and removed" — indeed it had "wheels" — but was held to be a fixture. 2005 WL 599752, at *1, 3. And in *Laraway & Sons* v. *B&B Enters. & Envtl., LLC*, the Michigan Court of Appeals held that "three *houses*" that had been "mov[ed] . . . from one location to another location" were "fixtures" at the new location. 2008 WL 2813343, at *5 (Mich. Ct. App. July 22, 2008) (emphasis added).

Once again, Mr. Goesling is relegated to simply disagreeing with the case law. Shown the *Sondreal* case, Mr. Goesling maintained that a jetway is *not* a fixture — at least not if the airport had been designed to accommodate a jetway — "[b]ecause, to [him], the method of attachment does not infer permanence." Instead, for Mr. Goesling, personal property apparently only becomes a fixture if it has been installed in such a way that its movement or removal would cause serious damage to the realty. And even then, it appears that only particular types of damage suffice.[18] Mr. Goesling goes so far as to claim that no damage would result from removal of a stamping press, though it would leave a 100-foot-long, 40-foot-wide and 20-foot-deep hole. Suffice to say that any employee who fell in the hole would beg to differ.

[18] For instance, Mr. Goesling opined that if the airport concourse in *Sondreal* had been designed to accommodate the jetway, the jetway would not be a fixture; but if the hole was cut in the building after the fact to accommodate the jetway, it would be a fixture. Similarly illogical is Mr. Goesling's belief that the mere act of filling in a pit or trench that housed a machine causes damage to the realty, whereas cutting a hole in the wall to remove a stamping press only causes damage to the building if the wall that is cut out is load bearing. The extent to which Mr. Goesling engages in mental gymnastics to draw imaginary distinctions reveals that he seems to have lost sight of the purpose of this prong of the test: to gauge whether the owner intended to make a permanent accession.

Mr. Goesling's views, again, do not square with the case law. It is true that the fact that the removal of an asset would cause physical damage supports a finding that the owner intended it to remain in place. *See, e.g.*, *Sondreal*, 2005 WL 599752, at *3 (asset was "clearly intended to remain in place" where if "removed an opening would remain on the side of the building that would need to be barricaded"). But the *absence* of physical damage does not mean that the owner did not so intend.

For instance, in *First Mortgage Bond Co.* v. *London*, the Michigan Supreme Court held that a variety of articles (including gas stoves, Murphy wall beds, radiator shields, and refrigerators) were fixtures, even though all of those articles could "be easily removed without damage to" the building that housed them. 244 N.W. 203, 203 (Mich. 1932). Similarly, in *West Shore Services*, the Michigan Court of Appeals held that poles with warning sirens were fixtures, even though they could be removed in about 50 minutes — and, upon their removal, "the ground [would] typically [be] returned to the same condition it was in before the installation." 2015 WL 4469666, at *1; *see also Williams* v. *Grand Ledge High School*, 2015 WL 3980517 (Mich. Ct. App. June 30, 2015) (choir risers that were not attached to the floor of the classroom and that could be taken apart were fixtures).

Under the Michigan fixture test, what *does* matter is that an item "is not disassembled and moved *on a regular basis*." *Cincinnati Ins.*, 166 F. Supp. 2d at 1181 (emphasis added); *see, e.g.*, *W. Shore Servs.*, 2015 WL 4469666, at *2 (same); *Williams*, 2015 WL 3980517, at *4 ("the trial court erred when it determined that the choir risers were not fixtures"; moves were "infrequent" and "only accomplished through significant effort"). As the Term Lenders will show, to the extent any of the Representative Assets or similar assets ever moved at all, they did so extremely infrequently.

In a misleading attempt to suggest otherwise, Mr. Goesling asserted that "more than 10,000 asset entries" in GM's fixed asset accounting system (eFAST) were "transferred between 2009 and 2015." Goesling Report at 21. Mr. Goesling conceded at deposition, however, that he failed to consider what kinds of assets were moved, or why. And as is explained in the Rebuttal

Report of the Term Lenders' expert Eric Stevens and as will be shown at trial, once non-fixtures and movements resulting from extraordinary events (such as unexpected plant closings) are taken out of the equation, only *one-quarter of one percent* (not more than 492 out of the more than 192,000 assets identified as fixtures by Term Lenders) *ever* moved in the six-year period 2009-2015.

In a similar vein, Mr. Goesling broadly asserted that "GM recorded more than 215,000 retirements of assets" from January 2004 to May 2009. Goesling Report at 21. That number includes all manner of plainly irrelevant assets, including over 7,000 leased cars. As shown in the Stevens Rebuttal Report and as will be shown at trial, the number of assets retired is consistent with what one would expect if fixed assets were simply retired at the end of their depreciable lives. Tellingly, at deposition, Mr. Goesling: (i) admitted that he had analyzed the normal rate of retirements; (ii) was aware that that information would be useful to the Court; but (iii) chose to omit that information from his report.

d. Mr. Goesling's view of the significance of a secondary market is contrary to law and illogical in the extreme.

Mr. Goesling also claims that there is a secondary market for certain of the assets, and that this supports his view that those assets are not fixtures. Again, Mr. Goesling's views do not square with governing law. As noted, the milling machine in *Cincinnati Insurance* was bought second-hand — *i.e.*, not only did a secondary market exist, but it was used to purchase the actual asset in question — yet it was held to be a fixture. 166 F. Supp. 2d at 1181-82. The chairlift in *Cliff's Ridge* was second hand too — it was held to be a fixture. 123 B.R. at 756. And no doubt there was a secondary market for the gas ranges in *Peninsular Stove* — and they were held to be fixtures. 226 N.W. at 226. Likewise the refrigerator that matched the cabinetry in *In re Joseph* — it was held to be a fixture. 450 B.R. at 697.

Moreover, as a matter of common sense, even if the existence of a secondary market were relevant to intent, its relevance would be limited at best. For example, if there is a large market for new goods, but a small secondary market for those goods, the existence of that secondary market would not be probative of intent. *See Wis. Dep't of Rev.* v. *A. O. Smith*

Harvestore Prods., Inc., 240 N.W.2d 357, 362 (Wisc. 1976) (grain silos were fixtures despite secondary market in part because "the sale of used [silos] only amount[ed] to 3.6 percent of total [silo] sales"). By his own admission, Mr. Goesling "didn't perform any discrete analysis" comparing the size of the primary and secondary markets for any assets. Nor did Mr. Goesling consider the size of the secondary market for any asset relative to the number of such units in use.

And while courts have found relevant the reasons that assets ended up on the secondary market, Mr. Goesling apparently does not. Thus, in *A.O. Smith Harvestore Prods*, 240 N.W.2d at 362, the court cogently reasoned: "Insofar as they are repossessed [silos], or [silos] which have had to be taken down because of urban expansion or the like, the general inference [of intent] still prevails, because both of these situations are extraordinary events which would not be anticipated by the farmer *at the time of annexation*." In Mr. Goesling's view, however, secondary-market sales in response to "an unexpected or unintended event" are determinative of the owner's intent when the asset was originally installed. Not so under the case law.

e. Mr. Goesling's reliance on Old GM's internal property tax classifications is demonstrably wrong and contrary even to the Avoidance Trust's own position.

Mr. Goesling also asserted that Old GM's classification of assets as either "personal" or "real" property for state tax assessment purposes was "extremely indicative of [its] intent" under the three-factor fixture test. Goesling Rebuttal at 10-11. The evidence at trial will show just how wrong this is.

As an initial matter, Mr. Goesling's *own* fixture classifications do not jibe with his avowed reliance on Old GM's property tax classifications. For example, Mr. Goesling classified several of the Representative Assets as fixtures even though Old GM reported them as personal property for tax purposes. Goesling Report at 72, 78. Likewise, Mr. Goesling classified one Representative Asset as a non-fixture even though Old GM classified it as real property on its tax forms. *Id.* at 117. These are not isolated incidents: the Avoidance Trust's provisional list of 5,370 conceded fixtures — which Mr. Goesling created — includes over 2,100 assets classified by Old GM for tax purposes as *personal* property. After being confronted with this statistic, Mr. Goesling acknowledged that if this analysis was accurate, he would "probably reconsider" his opinion. *Cf. Johns-Manville*, 88 F.2d at 522 (disregarding company's internal classifications where "the books also list as equipment items which admittedly are real estate").

But whether Mr. Goesling reconsiders or not, his view on the significance of Old GM's tax classification is demonstrably wrong. In lien disputes and elsewhere, courts have recognized that a company's property tax and accounting classifications are of limited, if any, use with respect to the three-part fixture test. In *Johns-Manville*, for example, the Sixth Circuit gave "little weight" under Michigan fixture law to a company's classification of assets for depreciation purposes. 88 F.2d at 522. Likewise, under Ohio fixture law, the Sixth Circuit again inferred no "great consequence" where a "company's books and its tax returns [had] listed [machinery] as personalty." *Willis*, 90 F.2d at 541; *see also Roberts* v. *Smithers*, 468 N.W.2d 32, *1 (Wis. Ct. App. 1990) (unpublished table decision) (whether assets "would have been included on income tax depreciation schedules" was "not the test"); *Vivid, Inc.* v. *Fiedler*, 497 N.W.2d 153, 158-59 (Wis. Ct. App. 1993), *aff'd as modified and remanded*, 512 N.W.2d 771 (1994) (signs that "have never been taxed as real property" were nonetheless fixtures, because the "assessment and taxing officials' intent is not the intent of the owner of the property").[19]

[19] The Avoidance Trust cited no published Michigan or Ohio decision to the contrary in its June 2016 preliminary brief (Docket No. 631 at 20-21), and the unpublished authorities it did cite are distinguishable. In *Controls Group*, for example, the printing press at issue was installed by a tenant that, obviously, did not intend to leave its single most important operating asset behind at the end of its lease. *Controls Grp., Inc.* v. *Hometown Commc'ns Network, Inc.*, 2006 WL 1691346 (Mich. Ct. App. June 20, 2006). In fact, there was "*no* evidence" that the tenant intended the printing units to be installed permanently, and because the tenant did not own the

This general admonition applies with particular force here. The evidence at trial will show that Michigan's prescribed tax form — the "Personal Property Statement" — requires manufacturers, in all cases and without discretion, to "report . . . all machinery and equipment" as "personal property" for tax purposes. This requirement expressly covers "manufacturing and fabricating," "crane and hoist," "painting," "computerized and mechanical handling," and "CNC controlled manufacturing" machinery and equipment. The form's instructions also refer taxpayers to a bulletin from Michigan's State Tax Commission, which lists additional examples of machinery that must be reported as personal property: "Conveyor Systems," "Gear hobbers, shapers and Testers," "Mills," "Presses," "Manufacturing Equipment (Computerized) such as Machining centers . . . [and] Profilers," "Painting Equipment such as Paint booths [and] Spray equipment," and "Robotics." In short, the very types of machinery and equipment at issue here were *required* to be reported as personal property without regard to the three-factor test.

Ohio law is likewise clear on this point. As explained above, it defines all "tangible personal property that has become *permanently attached or affixed* to the land or to a building, structure, or improvement, and that primarily benefits the business conducted by the occupant on the premises and not the realty" as "business fixtures," recognizing that the assets are "fixtures" but nonetheless will be treated as something else for tax purposes. Ohio Rev.

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real estate, no such intent could be presumed. *Id.* In any event, any fixture analysis in *Controls Group* was purely dicta: the court held, as a "threshold matter," that a subcontractor played an auxiliary role in a project and, therefore, had no construction lien. *Id. See Gurganus* v. *CVS Caremark Corp.*, 852 N.W.2d 103, 114 & n.48 (Mich. 2014) (when case is resolved at the "threshold," any "statements concerning a principle of law not essential to [that] determination . . . are obiter dictum"). In *Tennine Corp.* v. *Mich. City of Grand Rapids*, a tax case, a city merely sought to hold a taxpayer accountable for its prior tax classifications; the court even noted that "alternative findings could . . . have been supported." 2012 WL 1231937, at *2 (Mich. Ct. App. Apr. 12, 2012). *See also Pine Creek Farms*, 1997 WL 392767 (improperly applying Ohio tax test in negligence case); *Gen. Elec. Co.*, 2001 WL 1647158 (same).

Code Ann. § 5701.03(B) (emphasis added). The evidence will show that Old GM's tax classifications were simply made in accordance with these requirements.[20]

f. Mr. Goesling's view of the significance of modularity is also contrary to law and reveals his admitted lack of auto manufacturing expertise.

Mr. Goesling notes that some of the Representative Assets are modular, so they could be disassembled, and claims that this supports his view that they are not fixtures. Again, Mr. Goesling's idiosyncratic views do not square with the case law. The greenhouses in *Tuinier* could be disassembled and moved — yet they were fixtures. 599 N.W.2d at 120. So too the milling machine in *Cincinnati Insurance*. 166 F. Supp. 2d at 1180-81. Likewise the jetway in *Sondreal*. 2005 WL 599752, at *1. And in *State Employees Credit Union* v. *City of Lansing*, the tribunal specifically held, with respect to "heavy" partition walls that rested on "tracks," that "modular design is not in itself determinative, since such design may only be for the purpose of simplifying the installation of a permanent fixture." 1979 WL 2941, at *4 (Mich. Tax Tribunal Mar. 16, 1979). Small wonder then that Mr. Goesling, once again, simply disagrees with the precedents.

The evidence at trial will also show that Mr. Goesling's views on the significance of modularity are the product of his admitted lack of expertise in plant design and mechanical engineering. As the Term Lenders' expert Eric Stevens — a former GM employee, plant manager, and executive with 35 years of experience in multi-plant manufacturing, engineering assignments, quality, and both Operations and Engineering leadership roles around the world —

[20] Indeed, the tax forms require entire categories of assets to be reported as personal property, even where Michigan courts have deemed assets within those categories to be fixtures. For example, as noted, milling machines controlled by computerized controls must be reported as personal property for tax purposes — notwithstanding *Cincinnati Insurance*, where "a milling machine" which had "electronic controls" was held to be a fixture. 166 F. Supp. 2d at 1174. Likewise, the tax forms require taxpayers to report "ski lifts" as personal property — notwithstanding *Cliff's Ridge*, which held a ski lift was a fixture under the three-part fixture test. 123 B.R. at 759–60. And even in tax cases, when the question of "intent" is actually *litigated*, the leading authorities apply the three-factor test without regard to the tax forms. *See, e.g.*, *Mich. Nat'l Bank*, 293 N.W.2d at 627; *Tuinier*, 599 N.W.2d at 119.

will explain at trial, modularity is necessary for *installation*: because an asset is so large or weighty, it must be transported in pieces from the supplier to be installed in a plant. It has nothing to do with intent to move the asset. Mr. Goesling was compelled to concede that he had no basis as a matter of engineering practice or science to dispute Mr. Stevens' statement.

g. Mr. Goesling wrongly opines that lease provisions between GM and third parties would affect fixture status.

Mr. Goesling posits that two of the stamping presses (the AA Transfer Press (Asset 32) and the B3-5 Transfer Press (Asset 33)) are not fixtures because they became the subject of "sale/leaseback" transactions *after* they were installed. That claim is untenable. Old GM's manufacturing engineers installed presses unaware of and without consideration of after-the-fact lease terms. The presses were operated in place for their useful lives whether they were leased, financed, or owned outright. Nothing in the language of the leases, entered into as a means of raising capital, can change these facts.[21] And indeed, there is no indication that Old GM ever failed to exercise its right at the end of the lease term to repurchase a leased press and allow an asset so integral to its operations to be removed.[22] Even more illogical is Mr. Goesling's claim that because two presses were subject to sale/leaseback transactions, all of the presses that were not financed in this manner are personal property as well.

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[21] The case law recognizes that private contracts do not control whether an asset is a fixture. *See Woodliff* v. *Citizens' Bldg. & Realty Co.*, 215 N.W. 343, 344 (Mich. 1927); *Wood Hydraulic Hoist & Body Co.* v. *Norton*, 257 N.W. 836, 838 (Mich. 1934).

[22] Because the leases barred Old GM from granting any lien on those assets, the Term Lenders concede that they do not have a lien on these two particular assets under the Term Loan Collateral Agreement. However, per the Court's December 2, 2016 Scheduling Order, the parties agreed that the Court should decide whether these assets are fixtures so the principles established with respect to these two presses can be extended to others that are not subject to lease.

POINT III

THE REPRESENTATIVE ASSETS SOLD TO NEW GM SHOULD BE VALUED ON A GOING-CONCERN BASIS.

The Bankruptcy Code requires that the value of the Representative Assets be determined in light of the assets' "proposed disposition or use." 11 U.S.C. § 506(a)(1). As of the agreed-upon valuation date, June 30, 2009, the proposed disposition of all the Representative Assets (except two) was a sale to New GM to enable it to continue manufacturing automobiles. In light of that proposed disposition and use, the assets sold to New GM must be valued on a going-concern basis.

A. Section 506(a)(1) of the Bankruptcy Code requires collateral to be valued based on the actual disposition or use proposed by the debtor.

Section 506(a)(1) of the Bankruptcy Code governs the allowance of secured claims. After stating, in relevant part, that a claim secured by a lien on property is a secured claim "to the extent of the value of such creditor's interest in the estate's interest in such property," section 506(a)(1) 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.

11 U.S.C. § 506(a)(1) (emphasis added).

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *United States* v. *Kozeny*, 541 F.3d 166, 171 (2d Cir. 2008) (internal quotation marks omitted). Where the language of the Bankruptcy Code is "plain, the sole function of the courts is to enforce it according to its terms." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (construing section 506(b); internal quotation marks omitted).

Section 506(a)(1) has a plain meaning. As the Supreme Court has explained, the statute "expressly addresses how 'value shall be determined'" when a bankruptcy court is required to value a lender's collateral. *Assocs. Commercial Corp.* v. *Rash*, 520 U.S. 953, 962

(1997) (quoting 11 U.S.C. § 506(a)(1)). Under the statute, "the 'proposed disposition or use' of the collateral is of paramount importance." *Id*. Per the Supreme Court, "[t]hat *actual* use, rather than a foreclosure sale" or some other event "that *will not take place*, is the proper guide" in valuing collateral. *Id*. at 963 (emphasis added). The statute's "governing instruction" to focus on what the debtor actually proposes to do with its assets, and to ignore hypothetical alternatives, supplies a "simple rule of valuation" that fosters "predictability and uniformity." *Id*. at 965.

In *Rash*, the Supreme Court — applying its holding that collateral must be valued based on its "actual" disposition or use — concluded that a truck pledged as collateral by a chapter 13 debtor should be afforded its fair-market or "replacement value," not its liquidation or "foreclosure value," where the truck would continue to be used by the business conducted by the debtor. *Id*. at 963-64. The debtor in *Rash* sought to cram down a plan that allowed him to continue using his truck "to generate an income stream." *Id*. at 963. The secured creditor, therefore, was entitled to payments equal to the present value of its collateral. Based on section 506(a)(1), the Supreme Court rejected the debtor's assertion that the truck's present value should be limited to the amount the lender would receive in a foreclosure sale. The Court held instead that, in light of the statutory command that collateral be valued based on its "proposed disposition or use," the debtor's retention of his truck to generate income meant that the truck should be valued based on its "replacement value," namely the amount the debtor would have to pay for another income-generating truck. *Id*. at 963.

Although *Rash* did not involve a sale of collateral, the approach dictated by *Rash* — in particular, the requirement that the court value collateral in light of its "actual" disposition or use — applies equally in the context of a post-bankruptcy asset sale. Courts have consistently held that, under section 506(a)(1) and *Rash*, "going concern" value is applied to assets that are sold in bankruptcy "as part of the business as a going concern." *In re SK Foods, L.P.*, 487 B.R. 257, 263 (E.D. Cal. 2013); *accord, e.g.*, *In re Wendy's Food Sys., Inc.*, 82 B.R. 898 (Bankr. S.D. Ohio 1988) (rejecting liquidation value for fixtures and equipment sold as part of going concern); *In re United Puerto Rican Food Corp.*, 41 B.R. 565, 571 (Bankr. E.D.N.Y. 1984) (same). This approach is consistent with the notion that an increase in collateral value "during bankruptcy," including through a sale, "rightly accrues to the benefit of the [secured] creditor." *Dewsnup* v. *Timm*, 502 U.S. 410, 417 (1992); *see also Urban Communicators PCS Ltd. P'ship* v. *Gabriel Capital, L.P.*, 394 B.R. 325, 336 (S.D.N.Y. 2008) (valuing collateral in light of a post-bankruptcy sale is "consonant" with "the direction of *Dewsnup*").

This Court's decision in *Residential Capital* ("*ResCap*") is instructive. At issue in *ResCap* was whether second-lien creditors were entitled to adequate protection payments at the end of the case. To determine whether the collateral diminished in value during the case, the Court had to compare the value of the lenders' collateral as of the petition date with the value of that collateral on the effective date of the plan. The debtors argued that the value of the collateral as of the petition date should be tied to the lenders' limited rights as of the time — namely, the right to foreclose on the property. This Court rejected that position.

The Court concluded instead that, because the debtor did not contemplate a "foreclosure sale" as of the petition date, but rather intended "to market and sell" the collateral "as a going concern," the valuation of the collateral had to be "based on the proposed disposition of the collateral" — namely, its "fair market value" as a going concern. *In re Residential Capital, LLC*, 501 B.R. 549, 594-95 (Bankr. S.D.N.Y. 2013) (citing *In re Winthrop Old Farm Nurseries, Inc.*, 50 F.3d 72, 75-76 (1st Cir.1995)).

The Court went on to conclude that adjustments were necessary to the secured lenders' valuation of their collateral because it assumed that the collateral "could have been sold on the Petition Date by the Debtors," when in fact the Debtors had to expend "hundreds of millions of dollars" to acquire consents and "settle billions of dollars" of claims before selling the assets approximately six months after the petition date. *Id*. at 595-96. Thus, in *ResCap*, the assets for sale "could not simply be turned over to a buyer" prior to the significant "work conducted during the bankruptcy to make them saleable." *Id*. at 596. Here, in comparison, Old GM filed for bankruptcy with a fully-baked, pre-negotiated deal to sell its assets to New GM, without interrupting production or use of Old GM's facilities. The sale was not contingent on any material repairs or enhancements to the assets between June 30, 2009 — the agreed valuation date — and the closing on July 10, 2009.

B. In this case, the Bankruptcy Court has already recognized that discrete assets sold to New GM should be valued on a going-concern basis.

In analyzing how to value collateral transferred to New GM, this Court has the benefit of a prior decision that addressed the same threshold issue presented here. In that decision, Judge Gerber agreed that, as of Old GM's bankruptcy filing on June 1, 2009, the assets that Old GM proposed to sell to New GM should not be valued on a liquidation basis but, instead, must be valued on a going-concern basis. *See In re Motors Liquidation Co.*, 482 B.R. 485 (Bankr. S.D.N.Y. 2012) ("*Motors Liquidation I*").

As here, *Motors Liquidation I* addressed claims by secured creditors, known as the "TPC Lenders," that held liens on some (but not all) assets sold to New GM — a transmission manufacturing plant in White Marsh, Maryland and a parts distribution center in Memphis, Tennessee. *Id*. at 487. The TPC Lenders sought a valuation of their collateral to determine the extent to which they were entitled to payment in cash as opposed to New GM securities. *Id*. at 488.

Applying section 506(a)(1), Judge Gerber noted that the "purpose of the valuation" was "to determine the value of the TPC Properties" so that the secured creditors could be paid the appropriate amount in cash. *Id*. at 490. The Court agreed with the TPC Lenders that the "proposed disposition or use of" the collateral — as of the June 1 petition date (30 days before the valuation date here) — was that it would be sold, "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." *Id*. at 491 (emphasis added).

In light of this "proposed disposition or use" of the collateral, the Court further agreed that the collateral should be valued on a going-concern and *not* a liquidation basis: "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." *Id*. at 493 (emphasis added).

In *Motors Liquidation I*, while all agreed that the collateral should be valued as a going concern, the parties disagreed on the specific valuation metric. The Debtors proposed a "fair market value" standard that included deductions for functional and external obsolescence. The TPC Lenders, in contrast, argued for a valuation standard that would focus on the "[t]he value a specific property has to a specific person" — namely New GM — without deductions for obsolescence. *Id*. at 494. Based on negotiated language in the sale order as well as section 506(a)(1), Judge Gerber rejected the lenders' proposed standard in favor of a standard that included the obsolescence adjustments. *Id*. at 495.

As discussed in Point IV, the valuation evidence that the Term Lenders will present at trial is fully consistent with the approach adopted by Judge Gerber, because it includes deductions for obsolescence. And in any event, Judge Gerber rejected the TPC Lenders' proposed standard for reasons that are not present here, emphasizing that — as of June 1, 2009 — Old GM was conducting an auction process that would not necessarily end in a sale to New GM. *Id*. at 493. On that date, therefore, there was still some uncertainty regarding the disposition of Old GM's assets, including the identity of the purchaser. By contrast, as of June 30, the valuation date in this case, the June 22 deadline for competing bids had passed, no competing bidders had emerged, and the few remaining objectors did not oppose the creation of New GM and the continued use of Old GM's assets to manufacture cars. As a result, by June 30, it was as a practical matter certain that New GM would purchase and operate most of Old GM's assets.

C. As of June 30, 2009, Old GM proposed to sell the vast majority of the Representative Assets to New GM as part of a going concern.

The evidence at trial will confirm what this Court already knows: the entire premise of the sale was to enable New GM to operate the purchased assets as part of a going concern. It follows *a fortiori* from *Motors Liquidation I* that, as of June 30, 2009 — nearly one month after the June 1 valuation date considered by Judge Gerber, eight days after the due date for competing bids and only two business days before the approval of the sale to New GM — the assets sold to New GM should be valued on a going-concern basis.

The fact that Old GM proposed to sell its assets as a going concern is beyond dispute. Old GM expressly represented to the Court that the sale was intended to "preserve the going concern value" of the GM enterprise (Henderson Aff. ¶ 74) and was "the best . . . way for the Company's assets to retain going concern value." Sale Motion ¶ 62. The Avoidance Trust — successor to the Creditors Committee — can hardly argue otherwise. As of June 24, 2009, the Committee supported the proposed sale because it would "preserve the going-concern value of the Debtors' businesses" and provide unsecured creditors with a recovery in the form of equity in New GM. Docket No. 2362 ¶ 3.

By June 30, the going-concern sale was not only "proposed" to occur on an unknown future date, as in *ResCap*, but the conditions and potential obstacles to that sale had cleared away: the "intense arms-length negotiations" between the parties were done, the deadline for competing bids had passed, the Court had authorized the DIP financing from the U.S. Government that would be used for New GM's credit bid, and the DIP loans had been funded. *In re GMC*, 407 B.R. 463, 485, 494 (Bankr. S.D.N.Y. 2009). In short, as of June 30, liquidation was not even a remote possibility. In these circumstances, the assets sold to New GM must be valued on a going-concern basis.

D. The expert testimony advanced by the Avoidance Trust defies the Bankruptcy Code and is not probative.

The valuation-related opinions put forward by plaintiff's two main experts — Prof. Daniel Fischel and David Goesling — ignore the legal requirement of section 506(a)(1) and urge the Court to adopt a liquidation value for the Representative Assets that disregards the known facts as of June 30, 2009. This expert evidence is not probative of any issue before the Court.

1. Prof. Fischel's valuation opinion

In his expert report, Prof. Fischel opines that all of the Representative Assets, including the 38 assets sold to New GM, "should be valued based on the value that would be obtained in a liquidation, *i.e.*, the estimated price one would have expected to receive as of June 30, 2009 as part of a sale" in which the collateral "was disposed on a piecemeal basis through the appropriate secondary markets." Fischel Report ¶ 13; *accord id.* ¶ 16.

Prof. Fischel's opinion is based on a counterfactual: In a hypothetical world in which New GM did *not* agree to purchase Old GM's assets on a going-concern basis, he posits that the assets would have been liquidated. Based on that hypothetical, Prof. Fischel contends that the assets sold to New GM had no going-concern value as a "matter of economics" and should be valued as if they were liquidated. Fischel Report ¶¶ 16-39. But Prof. Fischel has it exactly backwards. That the U.S. and Canadian Governments would go to such great lengths to ensure that Old GM's best plants and brands continued as a going concern, because of the stark consequences to the economy if they did not, shows just how valuable the assets are.

More fundamentally, Prof. Fischel's opinion flies in the face of the statutory mandate that the collateral sold to New GM be valued in light of its "actual" disposition, not a hypothetical liquidation that did not "take place." *Rash*, 520 U.S. at 963. It is not the province of an expert to opine on "issues of law." *United States* v. *Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991); *accord, e.g.*, *Hygh* v. *Jacobs*, 961 F.2d 359, 363 (2d Cir. 1992). Nor is it the province of an expert to provide testimony that the law is wrong. Doing so "invade[s] the province of the court," *F.A.A.* v. *Landy*, 705 F.2d 624, 632 (2d Cir. 1983), and rather than being probative, such testimony is "superfluous." *Marx & Co.* v. *Diners' Club Inc.*, 550 F.2d 505, 510 (2d Cir. 1977). Prof. Fischel's testimony epitomizes that kind of improper opinion.

2. Mr. Goesling's valuation opinion

Mr. Goesling's valuation testimony is equally irrelevant because he too ignores the "proposed disposition" of the assets in urging that the Representative Assets be valued on a liquidation basis. In his opening report, Mr. Goesling bases his appraisal on a standard identified as "Orderly Liquidation Value," which he defines as the "gross amount, expressed in terms of money, that typically could be realized from a liquidation sale, given a reasonable period of time to find a purchaser (or purchasers) with the seller being compelled to sell on an as-is, where-is basis, as of a specific date." Goesling Report at 332. In so doing, Mr. Goesling assumes — contrary to fact — that each asset would be "removed from its current location and sold" in the secondary market, not as part of existing plants capable of producing tens of thousands of cars a month. *Id*. at 332-34.

As Mr. Goesling explained at deposition, his valuation approach is dictated by a set of non-facts that he has "been asked to assume" — namely, that "[O]ld GM [was] unable to continue as a going concern" because the U.S. Government was either unwilling or unable to facilitate the sale of Old GM as a going concern. As discussed above, however, section 506(a)(1) does not permit collateral to be valued based on imagined facts.[23]

In his rebuttal report, Mr. Goesling values the Representative Assets based on an alternative liquidation metric: "Liquidation Value in Place," which he defines as "the gross amount, expressed in terms of money, that typically could be realized from a properly advertised transaction, with the seller being compelled to sell, as of a specific date, *for a failed, non-operating* facility, assuming that the entire facility is sold intact." Goesling Rebuttal at 19 (emphasis added). Under this approach, Mr. Goesling estimates the replacement values of assets sold to New GM, but he then reduces those values by up to 95%, in light of the purported historical sale prices for *failed, non-operating* facilities. *Id*. at 45-48. Once again, this approach defies section 506(a)(1) because it ignores reality.[24]

23 In fact, the professional literature directs appraisers that they should not just assume away a government subsidy that enhances the value of an asset. The Uniform Standards of Professional Appraisal Practice specifically point out that the market value of property can be based on "non-market financing" (USPAP Standards Rule 7-2(c)(iv)) and directs that the appraiser estimate the incremental value the subsidy provided. Mr. Goesling — when confronted with this standard at deposition — testified that while he could have factored this into account in determining value, he was unable to do so because it was beyond his expertise.

24 In his rebuttal report, Mr. Goesling also claims — without support or explanation — that it was "contrary to facts known to exist as of the [June 30, 2009] Valuation Date" that "the assets would be sold in a Section 363 sale transaction to a buyer that intended to keep the assets in place and installed at the manufacturing facilities where they were located." Goesling Rebuttal at 7. In fact, the Sale Motion filed on June 1, 2009 proposed that the assets would be sold and used in precisely that way.

3. Mr. Goesling's post-report opinion

Long after reports were due, at deposition, Mr. Goesling offered up yet a different opinion — that because the assets subject to the Term Lenders' collateral comprised only a "fraction of [GM's] business enterprise," and did not comprise all "the property that's needed" to manufacture cars, the collateral should be valued on a liquidation basis rather than a going-concern basis. This opinion was not disclosed in Mr. Goesling's initial or rebuttal expert report, as required by the Federal Rules, and should be excluded.[25]

In any event, Mr. Goesling's latest opinion is wrong as a matter of law. Section 506(a)(1) requires estate property pledged as collateral to be valued in light of its "proposed disposition or use," regardless of whether the secured party has a lien on *all* the property that is necessary to that disposition or use. Accordingly, in *Motors Liquidation I*, Judge Gerber recognized that a transmission plant and distribution center sold to New GM should be valued on a going-concern basis, even though a host of other assets would be needed to have a complete car company. *See also ResCap*, 501 B.R. at 595 (valuing discrete assets owned by the debtor on a going-concern basis even though they did not comprise the entire business).

Other courts have likewise concluded that, where a lender's security interest extends to some but not all assets that are part of a going concern, the collateral is valued on a going-concern basis. For example, in *In re Chateaugay Corp.*, 154 B.R. 29 (Bankr. S.D.N.Y. 1993), lenders had a security interest in physical assets at a plant that the debtor proposed to continue operating following emergence from bankruptcy. Like Mr. Goesling, the debtor argued that "because the [mortgage] only granted . . . an interest in certain hard assets, such as buildings and machinery, the going concern value of [the plant] should not be considered in valuing the [creditors'] security interest," because the lien did not cover all the assets necessary to operate a

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[25] *See, e.g.*, Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information . . . as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."); *Franconero* v. *UMG Recordings, Inc.*, 542 Fed. Appx. 14, 16 (2d Cir. 2013) (affirming exclusion of expert affidavit that was "not included in [the expert's] earlier report").

going concern. *Id*. at 33. Judge Lifland rejected this argument and held instead that, under section 506(a)(1), the assets would be valued on a going-concern basis in light of their "proposed disposition." *Id*.[26]

The same approach has been applied where the debtor sells a business that includes both encumbered and unencumbered assets. For example, in *In re Wendy's Food Sys., Inc.*, 82 B.R. 898 (Bankr. S.D. Ohio 1988), the debtor sold nine restaurants; the secured lenders had a lien on the fixtures and equipment in six of the nine. The debtor urged the court to value the collateral on a liquidation basis. The lenders argued for going-concern value. Agreeing with the lenders, the court held that the fixtures and equipment should be valued on a "going concern" or "in-place" basis because the restaurants were being sold based "upon the ability of the entire mix to turn a profit." *Id*. at 899-900. *See also, e.g.*, *In re LTV Steel Co.*, 285 B.R. 259, 268-69 (Bankr. N.D. Ohio 2002) (valuing real and personal property at steel plants on a going-concern basis where the "[p]ersonal property, fixtures, real estate, and intangibles were sold together to be operated as a going concern" and their "positive and negative values were inextricably intertwined."); *In re United Puerto Rican Food Corp.*, 41 B.R. 565, 571 (Bankr. E.D.N.Y. 1984) (valuing equipment and fixture collateral in supermarket on an "in-place" basis where the store was being sold as a "functioning enterprise").[27]

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[26] *See also, e.g.*, *In re Hawaiian Telcom Commc'ns, Inc.*, 430 B.R. 564, 602-04 (Bankr. D. Haw 2009) ("In apportioning going concern value of a company between encumbered and unencumbered assets, going concern value should be attributed to an asset in proportion to that asset's value in relation to the total value of all of the assets"); *In re Fiberglass Indus., Inc.*, 74 B.R. 738, 740-42 (Bankr. N.D.N.Y. 1987) (ascribing "going concern" rather than "liquidation" values to "personal property and fixtures" within a glass production facility that the debtor proposed to retain and use post-confirmation).

[27] Indeed, given the critical — in fact, indispensable — role that the Term Lenders' collateral played in New GM's business, it could readily be concluded that the entire value of the resulting enterprise should be ascribed to those assets. Undoubtedly, this is one reason why the case law recognizes in disputes of this nature, the going-concern value of a business needs to be allocated between encumbered and unencumbered assets.

POINT IV

THE ASSET VALUATIONS CONDUCTED BY KPMG AND THE TERM LENDERS' EXPERT APPRAISER ARE RELIABLE AND SHOULD BE CREDITED.

Because the Bankruptcy Code requires that the Representative Assets sold to New GM be valued on a going-concern basis, the next step is to determine how to value those assets on that basis.

As will be shown at trial, there are two reliable ways for this Court to value Representative Assets on a going-concern basis. Both are commonly used and accepted in the business world, and they yield similar results. *First*, the Court can and should rely upon the Replacement Cost New Less Depreciation ("RCNLD") assigned by KPMG in its contemporaneous "fresh start" valuation, which applies to all but 6 of the Representative Assets. *Second*, the Court can and should rely on the expert appraisal conducted by Carl C. Chrappa, which covers all of the Representative Assets.

Unlike the valuation methods proposed by the Avoidance Trust, both the KPMG RCNLD and the Chrappa valuations are not only reliable but are also replicable across the collateral package as a whole. By contrast, Mr. Goesling's approach — which is based on an asset-by-asset search for supposed market sale comparables — simply cannot be replicated in any reasonable timeframe and, if adopted, would be a prescription for endless litigation. Mr. Goesling admitted as much.

Exhibit 1 to this brief shows the RCNLD values ascribed to the Representative Assets by KPMG (excluding any TIC adjustment, discussed below) and all of the assets by Mr. Chrappa. For the assets valued by KPMG on a RCNLD basis, the Court should find that those values are reliable and adopt them for purposes of section 506(a)(1). For the remaining six assets, the Court should find that Mr. Chrappa's appraisal values are reliable and adopt those values.

A. The purchase price paid by New GM is the best indicator of value.

Where assets pledged as collateral are sold by the debtor as a going concern, it is well-established that the sale price is the best indicator of value. As explained by Collier, under section 506(a), the value of collateral that the debtor proposes to sell should be "based on the consideration to be received by the estate in connection with the sale, provided that the terms of the sale are fair and were arrived at on an arm's length basis." 4 COLLIER ON BANKRUPTCY § 506.03[6][b] (16th ed.) (citing cases); *accord, e.g., In re SW Boston Hotel Venture*, 748 F.3d 393, 411 (1st Cir. 2014) ("Courts have routinely held that so long as the sale price is fair and is the result of an arm's-length transaction, courts should use the sale price, not some earlier hypothetical valuation, to determine whether a creditor is oversecured." (internal quotation marks omitted)); *Urban Communicators PCS Ltd.*, 394 B.R. at 336 ("actual sale price" paid by buyer in section 363 sale, rather than "some earlier hypothetical valuation," was proper measure of value under section 506(a) (citing *Dewsnup*, 502 U.S. at 417)).[28]

In this case, there can be no dispute that New GM paid a fair price for Old GM's assets and that the sale was negotiated at arms'-length. In approving the Section 363 sale, Judge Gerber expressly found that the sale "was the product of intense arms'-length negotiations" and that he was "equally satisfied" with the "purchase price." 407 B.R. at 494. Judge Gerber also observed that "the GM Board even secured a fairness opinion from reputable advisors, expressing the opinion that the consideration was, indeed, fair." *Id*.

The purchase price paid by New GM to Old GM implies that 100% of New GM's equity had a value of $65 billion.[29] The total purchase price is higher (Evercore's estimate exceeded $90 billion), because it also includes liabilities assumed by New GM.

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[28] *See also, e.g.*, *Ford Motor Credit Co.* v. *Dobbins*, 35 F.3d 860, 870 (4th Cir. 1994) ("the sale price . . . is conclusive evidence of the property's value" for purposes of section 506 (internal quotation marks and citation omitted)); *In re Alpine Group, Inc.*, 151 B.R. 931, 935 (B.A.P. 9th Cir. 1993) ("offered price . . . is conclusive evidence of the property's value").

[29] The Treasury loaned $49.9 billion to Old GM. In connection with the sale, which included a credit bid, the Treasury received $6.7 billion in New GM debt, $2.1 billion in preferred equity, $986 million in Old GM debt, and $361 million in cash, as well as 60.8% of the equity of New GM. Accordingly, the value ascribable to 60.8% of New GM's equity is $39.7 billion. That makes 100% of New GM's equity worth approximately $65 billion.

The Avoidance Trust seeks to discard the purchase price on the theory that the U.S. Government had interests that were different from those of a private investor. Section 506(a)(1), however, does not focus on a purchaser's motives; it focuses on the "proposed disposition or use" of collateral. "Where, as here, an asset is sold in an arm's-length transaction, the fair market value of such asset is conclusively determined by the price paid." *In re Residential Capital*, 501 B.R. at 603; *see also In re Toy King Distribs.*, 256 B.R. 1, 191 (Bankr. M.D. Fla. 2000) (price received in bankruptcy sale was dispositive because the "sale was noticed to all creditors," "each was given an opportunity to object" and it "brought the highest and best price; there were no higher offers").

Valuing the enterprise and equity values of New GM based on the price paid makes sense. Regardless of the Government's motivation, there is no dispute that Old GM received the full purchase price — its debt to the Government was reduced on a dollar-for-dollar basis, and it received 10% of the equity in New GM. The value received by Old GM here, regardless why, "rightly accrues to the benefit of the [secured] creditor," not to the debtor or unsecured creditors. *Dewsnup*, 502 U.S. at 417.[30]

By contrast, ignoring the purchase price on the ground that New GM "overpaid," for public policy reasons or otherwise, is inconsistent with section 506(a)(1) and would open the floodgates to litigation regarding section 363 sales. Under the Avoidance Trust's approach, if an internet billionaire buys a money-losing newspaper to communicate his or her opinions — understanding that the paper will never turn a profit — the sale price would have to be disregarded in favor of an expert-derived liquidation value. Likewise, unsecured creditors could challenge the price paid for a sports team if the price was motivated by a desire to fulfill a childhood dream rather than the team's potential earnings. There could also be a challenge

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[30] *See also In re Winthrop Old Farm Nurseries, Inc.*, 50 F.3d 72, 75-76 (1st Cir.1995) (rejecting use of liquidation value that would "allow a reorganizing debtor to reap a windfall by stripping down the lien to liquidation value and quickly selling the collateral at fair market value, thus pocketing equity that would have been completely beyond reach save for the filing of the bankruptcy petition").

where, for example, a patent was purchased solely for "defensive" purposes. And how would a court value an aircraft carrier, an asset with enormous value to a government but no practical value to a private citizen? These sorts of inquiries into a buyer's motives have no support in section 506(a)(1), which focuses objectively on the debtor's disposition or use of its collateral.

In addition, even if the purchase price *were* modified to account for the U.S. Government's public policy goals, the evidence at trial will show that the U.S. Government expected to (and did) recoup most of its investment. As the Term Lenders' expert Prof. Glenn Hubbard, the Dean of Columbia Business School, will show, public-policy motivations accounted for, at most, approximately $15.3 billion to $19.4 billion of the $39.7 billion that the U.S. Treasury paid for 60.8% of New GM's common equity. This implies that, excluding any premium paid for public policy reasons, the U.S. Treasury valued 100% of New GM's common equity at between $33.4 billion and $40.1 billion.[31]

B. KPMG's contemporaneous valuations of the Representative Assets it valued — before the imposition of its TIC adjustment — were reliable and should be adopted.

While the purchase price paid is the correct reference point for valuing the Representative Assets, it does not directly provide the answer to the question before the Court: What is the value of each asset? As Judge Gerber observed on the record in *Motors Liquidation I*, it is relatively "rare" for bankruptcy courts to value collateral in "situations like this one," where the secured creditor's lien extends only to a "subset" of the assets sold by the debtor. Docket No. 10086 at 24; *see also In re LTV Steel Co.*, 285 B.R. 259, 266 (Bankr. N.D. Ohio 2002) ("few cases deal with valuation in the allocation context"). In these situations, as confirmed by *Motors Liquidation I*, the particular assets subject to the Term Lenders' lien have to be valued, separately, in light of their sale as part of a going concern. 482 B.R. at 491, 493.

[31] *See* David Laro and Shannon P. Pratt, *Business Valuation and Federal Taxes: Procedure, Law, and Perspective*, 2nd Ed. (Wiley, 2011) at 9 ("An arm's-length sale of property close to a valuation date is indicative of its fair market value. If an actual arm's-length sale is not available, a hypothetical sale is analyzed.").

It should be noted at the outset that — apart from liquidation value, which should be rejected for the reasons set forth above — the Avoidance Trust's experts did not present any report, even in the alternative, valuing the Representative Assets based on going-concern value. So if the Court concludes that going-concern value is the correct metric, the Term Lenders' evidence is the only proper evidence of that valuation.

As discussed below, the valuation of the specific assets sold to New GM on a going-concern basis here does not have to be reinvented years after the fact, because KPMG (on behalf of New GM) already valued most of the assets on a Replacement Cost New Less Depreciation basis. That is the value that the Court should adopt as to the Representative Assets valued by KPMG.[32]

1. KPMG's RCNLD values were reliable.

Companies that emerge from bankruptcy are often required to engage in a process called "fresh start accounting." New GM hired KPMG in April 2009 to assist with that process. The evidence will show that KPMG's work and its approach to determine RCNLD values were thorough and sound.

Fresh start accounting generally requires entities to measure the *fair value* of their assets, liabilities and equity interests as of the date of a bankruptcy sale or emergence from bankruptcy. This contrasts with accounting in other contexts, where *historical cost* is typically used.

As part of the fresh start accounting process, KPMG had to value New GM's property, plant and equipment ("PP&E"), as well as other assets, at fair value. To determine the fair value of PP&E, including fixtures, KPMG concluded that it was appropriate to assume "the continued utilization of the assets as a component of the business in connection with all other

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[32] While KPMG's valuation was done as of July 10, 2009, the proof at trial will show that nothing happened between June 30 and July 10 that would affect the value of the Representative Assets in light of their proposed disposition.

assets." Based on that assumption, KPMG employed a "replacement cost approach" in valuing particular physical assets.

Using this approach, KPMG determined the Replacement Cost New Less Depreciation ("RCNLD") for hundreds of thousands of individual physical assets (and a "relief from royalty" method for the intangibles, *i.e.*, brands and technology). To do so, KPMG first calculated the Replacement Cost New of each asset. It then adjusted the Replacement Cost New as necessary to reflect actual age ("physical deterioration"), functionality ("functional obsolescence"), and expected future utilization in light of external factors, including economic conditions ("capacity-based economic obsolescence"). These obsolescence adjustments comport with Judge Gerber's decision in *Motors Liquidation I*. The RCNLD amount is what the purchaser would have to pay to obtain, install and integrate the same or an equivalent machine for its business, and is the valuation most closely analogous to the "retail Blue Book" method utilized in *Rash*.

The evidence at trial will show that this approach is commonly used in valuing machinery and equipment, particularly in situations involving large volumes of assets. Indeed, Mr. Goesling used a similar cost approach in valuing the hundreds of thousands of manufacturing assets of Ford Europe. The evidence will also show that KPMG's work in calculating the RCNLD values was thorough and made appropriate use of detailed information provided at the time by New GM management.

As reflected in Exhibit 1, KPMG calculated the total Replacement Cost New for 33 of the Representative Assets at $137.5 million.[33] Physical deterioration cut that value by $30.5 million. Capacity-based economic obsolescence reduced it further by $22.4 million. (Although KPMG also considered functional obsolescence and applied it to some assets, it concluded that no further such adjustment should be applied to the Representative Assets.) Thus, the total RCNLD computed by KPMG for 33 Representative Assets was $84.6 million (*i.e.*, $137.5 million, minus

[33] The parties have agreed that they will not present evidence at trial on the value of one of the Representative Assets (Number 39, the Core Box Robot), which was also valued by KPMG.

$30.5 million, minus $22.4 million). The RCNLD amount ascribed by KPMG to these Representative Assets is the best evidence of that asset's value as of June 30, 2009.

2. The TIC adjustment should not factor into the Court's valuation of the Representative Assets.

As part of the fresh start accounting, KPMG estimated New GM's "Total Invested Capital," or "TIC." Despite the apparent meaning of "Total Invested Capital," the TIC used by KPMG was not based on the actual price paid by New GM for the purchased assets. Rather, it was based on a discounted cash flow valuation performed by KPMG, which yielded a total enterprise value of approximately $60 billion. As discussed in detail below, in performing this DCF, KPMG used a high discount rate that reduced its estimate of Total Invested Capital. Against this TIC value, KPMG calculated the amount of New GM's debt and preferred stock; the residual was deemed to be New GM's equity value of $19.9 billion. This equity value is far lower than the $65 billion equity value implied by the purchase price, or the $33.4 to $40.1 billion equity value calculated by Prof. Hubbard to account for the Government's public-policy objectives.

After calculating the $60 billion TIC value, KPMG compared that value to the aggregate value of New GM's net working capital and tangible and identifiable intangible assets. The TIC was significantly lower than KPMG's "bottom up" asset values. KPMG thus concluded that it had to reduce asset values to match its TIC estimate.

KPMG did this by substantially reducing the values of PP&E held by particular business segments, including General Motors North America ("GMNA"), by what it called a TIC-based economic obsolescence factor (the "TIC adjustment"). For GMNA, the TIC adjustment was $6.4 billion — all of which was applied to reduce the PP&E values.

The TIC adjustment should have no bearing on this Court's determination of the value of the Representative Assets.

a. The assumed discount rate was too high.

KPMG's TIC calculation was driven by its use of a 23% Weighted Average Cost of Capital ("WACC") in its DCF calculation. The 23% WACC was the result of KPMG's decision to apply a 27% company-specific risk premium to the cost of equity of GMNA. (A similarly large company-specific risk premium was assigned to other business units of New GM.) As a result of the WACC, KPMG calculated the value of GMNA's TIC to be $21.7 billion, and the resulting value of GMNA's equity to be *negative* $4.3 billion.

Evercore, Old GM's financial advisor, in performing its DCF analysis of New GM, used a WACC range of 9.5%-11.5%. Using this WACC, Evercore calculated an equity value for New GM of $38 billion to $48 billion, far higher than the $19.9 billion equity value for New GM derived by KPMG.

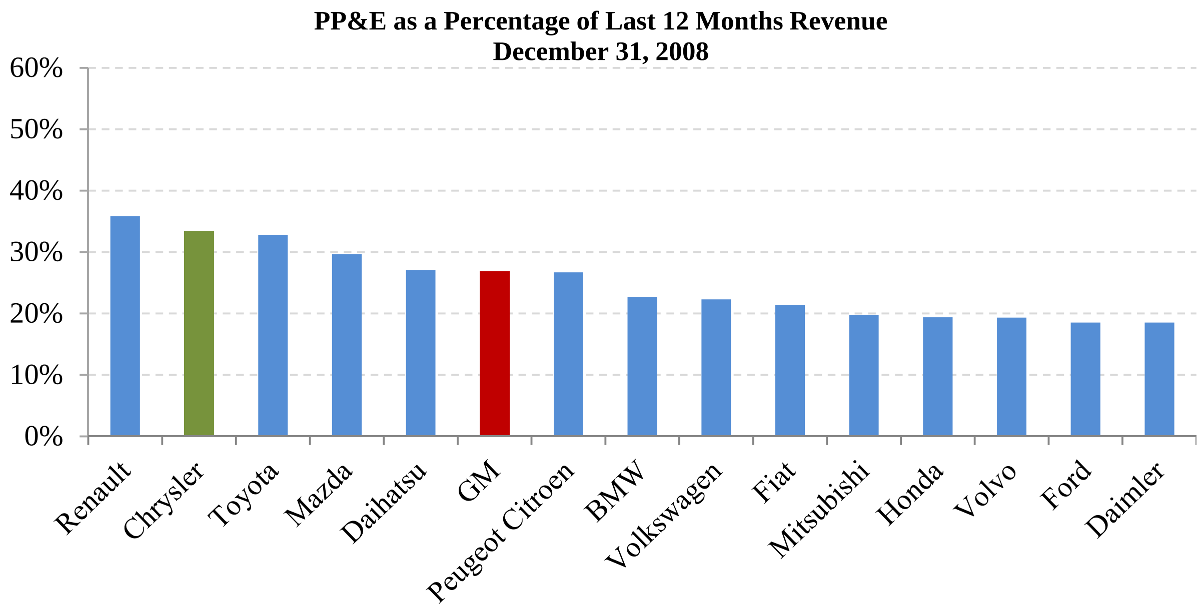
Evercore's WACC range is in line with the range calculated by the Term Lenders' expert witness, Prof. Hubbard (8.3%-11.5). As Prof. Hubbard will testify, company-specific risk premiums of the kind used by KPMG — which resulted in its WACC range — have not been favored by economists.[34] Indeed, the valuation resulting from KPMG's WACC implies that New GM would not even have been a viable entity (as noted, it resulted in GMNA having a *negative* $4.3 billion equity value) — a conclusion that cannot be squared with the entire exercise that drove the formation of the company.

A second Term Lender expert, Maryann Keller, will show that KPMG's stated justification for applying a company-specific risk premium — namely, that New GM's projections

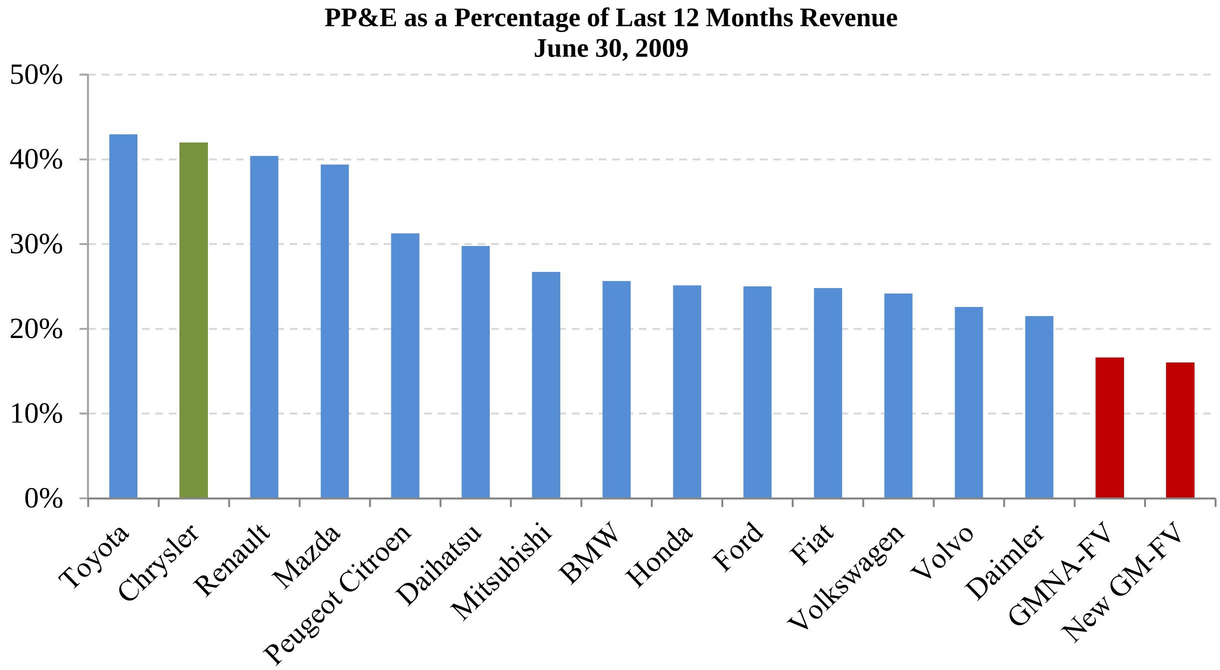
34 Company-specific risk premiums have also been met with skepticism by courts. *See, e.g.*, *In re Sunbelt Beverage Corp. S'holder Litig.*, 2010 WL 26539, at *12 (Del. Ch. Jan. 5, 2010) ("proponents of a [company-specific risk premium] . . . not only bear a burden of proof but also must overcome some level of baseline skepticism founded upon judges' observations over time."); *In re Appraisal of The Orchard Enterprises, Inc.*, 2012 WL 2923305, at *20 (Del. Ch. July 18, 2012) (rejecting 1% company-specific risk premium suggested by an expert and stating that "the calculation of a . . . discount rate should not include company-specific risk for the obvious reason that it is inconsistent with the very theory on which the model is based"); *Del. Open MRI Radiology Assocs., P.A.* v. *Kessler*, 898 A.2d 290, 339 (Del. Ch. 2006) ("To judges, the company specific risk premium often seems like the device experts employ to bring their final results into line with their clients' objectives, when other valuation inputs fail to do the trick.").

and future outlook were too optimistic — was not reasonable. Ms. Keller, who has over 40 years of experience analyzing the auto industry, will confirm what the Evercore witness, Stephen Worth, testified in explaining Evercore's WACC estimate: That New GM, by virtue of having been freed of tens of billions of dollars of residual liabilities, presented a fundamentally different risk profile than Old GM. As Ms. Keller will testify, through the section 363 sale, New GM was freed from the structural costs, union restrictions, pension and healthcare obligations, an inefficient dealership network and failed brands that had overburdened Old GM. In short, it was a new, far less risky, GM.

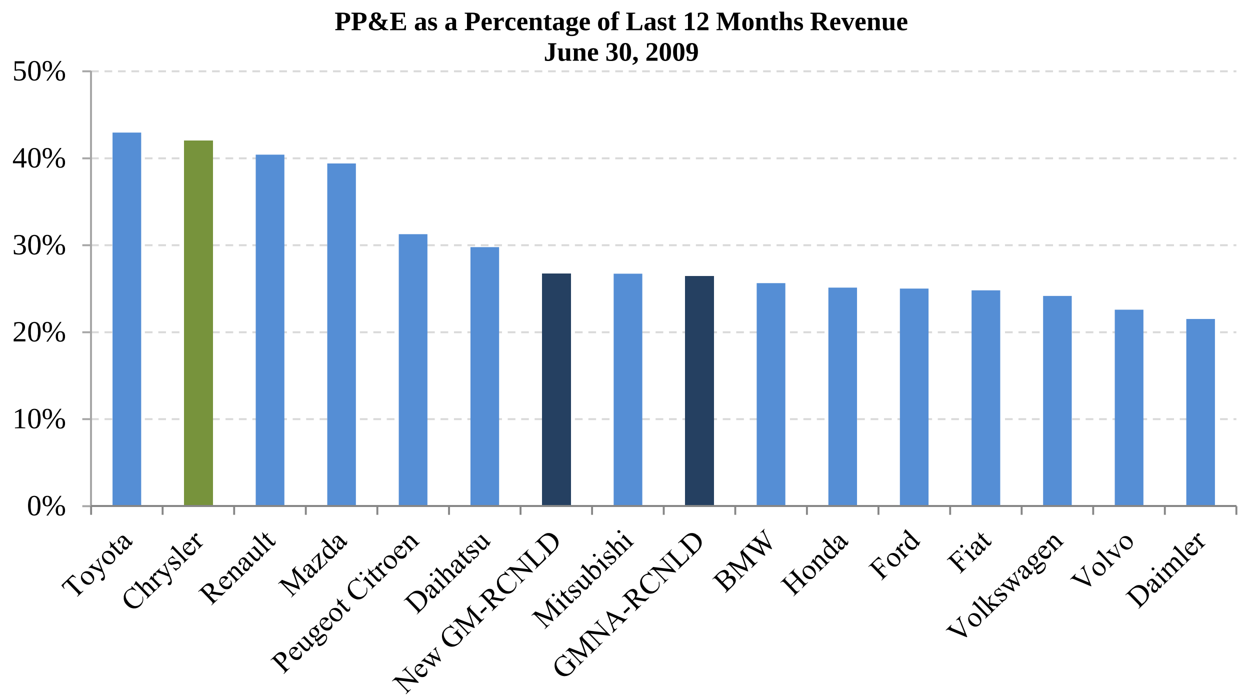
Further, due to KPMG's TIC adjustment, KPMG's PP&E values became low *vis-a-vis* other auto manufacturers. Thus, as shown in the chart below, before Old GM filed for bankruptcy, its total PP&E as a percentage of revenues was 26.8%, right in line with its peers, with Chrysler near the high end of the range.



As a result of KPMG's TIC adjustment, as shown below, New GM's total PP&E as a percentage of last 12 months' revenue dropped to only 16.1% for New GM as a whole and 16.6% for GMNA. By contrast, New GM's peers all ranged from 21.5% to 43.0%, with a mean of 30.1%, almost twice the level of New GM's.



Once the TIC adjustment is eliminated (as in the chart below), the percentages are 26.8 % for New GM and 26.4 % for GMNA, putting New GM back in among its auto manufacturing peers, including the post-filing reorganized Chrysler.



But even more fundamentally, as explained in Point III, section 506(a)(1) of the Bankruptcy Code requires a bankruptcy court to value collateral based on its "proposed" disposition. In this case, the proposed disposition was a sale to new GM. The implied purchase price of the common equity of New GM was approximately $65 billion. And as Prof. Hubbard will testify, even if this purchase price were adjusted downward to account for the Government's public policy objectives, the adjusted purchase price still indicates a common equity value for New GM in the range of $33.4 billion to $40.1 billion.

If KPMG had used the equity value implied by the actual purchase price, or even the lower equity value reflecting the downward adjustments made by Prof. Hubbard to account for the Government's policy objectives, there would have been no TIC adjustment.

b. Allocation and sequencing issues related to the TIC adjustment.

In addition, the Term Lenders' accounting expert Abdul Lakhani – a retired Ernst & Young partner who led the firm's West Coast National Office professional practice group, an "accountant's accountant" and who has extensive experience advising on fresh-start accounting – will testify at trial about certain allocation and sequencing issues related to the TIC adjustment that eliminate the need for any adjustment to the value of the subject fixtures.

C. The appraisal conducted by Carl C. Chrappa is reliable and confirms the reasonableness of KPMG's values.

As explained above, KPMG's RCNLD values for the Representative Assets, without any TIC adjustment, are reliable and should be credited by the Court in valuing the Representative Assets. However, as an alternative to KPMG's RCNLD values — and also to corroborate those values and fill in gaps for the six out of the 40 Representative Assets that KPMG did not value — the Term Lenders will present valuation evidence from Carl C. Chrappa.

Mr. Chrappa is a professional appraiser with over 40 years of experience appraising industrial machinery & equipment. He has certifications from the American Society of Appraisers (the "ASA") and the Royal Institution of Chartered Surveyors, credentials that Mr.

Goesling lacks. Mr. Chrappa conducted independent appraisals of each of the 40 Representative Assets, including the 34 valued by KPMG, the four sold to New GM that were not valued by KPMG, and the two that were left behind to be liquidated by Motors Liquidation.

Consistent with the proposed disposition of the 38 assets sold to New GM for continued use, Mr. Chrappa applied the ASA's "Fair Market Value in Continued Use with Assumed Earnings" premise of value. For the two assets not sold to New GM but left behind to be liquidated, Mr. Chrappa — like Mr. Goesling — applied the ASA's "Orderly Liquidation Value" premise of value.

For the 38 assets he valued on a going-concern basis, Mr. Chrappa used the cost approach — a standard and broadly accepted method for calculating the going-concern value of installed equipment. In applying this approach, Mr. Chrappa first calculated the replacement cost new of each of the assets. Mr. Chrappa next applied a deduction for physical obsolescence, based on each asset's age, condition, expected useful life and major maintenance requirements. Mr. Chrappa then evaluated each asset for functional obsolescence, applying deductions where appropriate. Finally, Mr. Chrappa evaluated each asset for economic (or external) obsolescence, using the projected utilization of each asset by New GM over five years, a standard tool for estimating external factors that could reduce the going-concern value of the asset.

Mr. Chrappa's application of the cost approach for the 38 representative assets sold to New GM is broadly consistent with the approach used by KPMG in calculating its RCNLD values. It is also consistent with Judge Gerber's decision in *Motors Liquidation I*, including in applying obsolescence deductions in calculating fair market value.

Exhibit 1 shows Mr. Chrappa's valuations of each of the Representative Assets, as well as KPMG's RCNLD values for the assets it valued.

POINT V

THE TERM LENDERS HAD A PERFECTED SECURITY INTEREST IN THE FIXTURES LOCATED AT LANSING DELTA TOWNSHIP.

Twenty-three of the forty Representative Assets, including stamping, paint, body shop, and general assembly assets, are located in GM's Lansing Delta Township facility. The Avoidance Trust does not dispute that the Term Lenders, by contract, were granted a security interest in fixtures at the entirety of the LDT complex, including both the stamping and assembly portions of this 3.4 million square foot facility. It contends, however, that the Term Lenders' security interest in the fixtures at LDT was not perfected as of June 1, 2009, when Old GM commenced its bankruptcy case.

As a matter of law, the Avoidance Trust's challenge to the perfection of the Term Lenders' lien on fixtures at LDT is time-barred. *See* Point V.A, below. Even if that challenge were timely, the evidence at trial will show that the security interest was perfected. *See* Point V.B, below.

A. The Avoidance Trust is time-barred from challenging the perfection of the Term Lenders' security interest in fixtures at LDT.

The Avoidance Trust now argues that the Term Lenders "did not have a perfected security interest" in any fixtures at LDT based on a purported defect in the LDT fixture filing. *See* Docket No. 837 at 3. The Avoidance Trust, however, never raised a formal challenge to the perfection of the lien on fixtures at LDT. Its attempt to repackage that argument as a contention that "there are no fixtures located at the parcel that is the subject of the" LDT fixture filing confuses basic law. *Id.* The result is that this belated challenge to the Term Lenders' security interest is barred by the statute of limitations.

1. Any attempt to use the trustee's avoidance powers under § 544(a) must be brought as a claim in an adversary proceeding.

Proceedings to determine the "validity, priority, or extent of a lien" are "adversary proceedings" governed by Part VII of the Bankruptcy Rules. Fed. R. Bankr. P. 7001(2). This rule "expressly requires initiation of an *adversary proceeding* 'to determine the validity, priority, or extent of a lien.'" *Cen-Pen Corp.* v. *Hanson*, 58 F.3d 89, 93 (4th Cir. 1995) (emphasis in original); *see, e.g.*, *In re Layo*, 460 F.3d 289, 294 (2d Cir. 2006) ("[C]hallenges to the validity of a lien must be brought through an adversary proceeding."); *In re Haber Oil Co.*, 12 F.3d 426, 437-38 (5th Cir. 1994) (explaining that an adversary proceeding, with the formality required by the Bankruptcy Rules, is necessary to determine the validity, priority, or extent of a lien).

Courts so read Rule 7001(2) because of the "general rule that liens pass through bankruptcy unaffected," which means that, "to extinguish or modify a lien during the bankruptcy process, some affirmative step must be taken." *Cen-Pen Corp.*, 58 F.3d at 92. And "[w]here such a proceeding is required to resolve the disputed rights of third parties, the potential defendant has the right to expect that the proper procedures will be followed." *Id.* at 93 (internal quotation marks omitted).

The Bankruptcy Rules incorporate many of the Federal Rules of Civil Procedure, including the requirement that an adversary proceeding commence with the filing of a complaint according to the standards in those rules. *See* Fed. R. Bankr. P. 7008, 7012(b). This means that the priority of a lien must be challenged in a complaint — with a claim distinctly alleging sufficient facts that, if proven, "show[ ] that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *id.* 12(b)(6).

Given Rule 7001(2), courts have rejected efforts of a trustee to use the avoidance powers under section 544(a) when the challenge was not brought as a formal claim in an adversary proceeding. In *In re Davis*, for instance, the court rejected an effort to avoid an unperfected lien where the "Trustee's complaint [did] not allege an avoidance claim under § 544," because section 544 is "not self-executing." 2014 WL 5306088, at *3 (Bankr. N.D. Ohio Oct. 15, 2014). So too in *In re Burks*, where the court determined that whether the trustee could avoid a lien was "irrelevant" because section 544(a)'s avoidance powers "require[d] affirmative actions taken by the Trustee as prescribed under the Bankruptcy Rules," and the Trustee had not taken those required actions. 181 B.R. 303, 307 (Bankr. N.D. Ohio 1995); *see also* 4 William L.

Norton, Jr., *Norton Bankruptcy Law & Practice* § 63:4 (3d ed. 2016) ("[T]o exercise the avoidance powers under . . . § 544, [absent consent], the trustee must file a complaint under Bankruptcy Rule Part VII's adversary proceedings.").

2. The Avoidance Trust's challenge to the perfection of the LDT fixture lien is time-barred because it never filed a claim against that filing, even though it knew of the liens for years and otherwise amended its complaint.

Here, the Avoidance Trust has taken affirmative steps, through Count I of its original and amended complaints, to challenge the liens granted under the Collateral Agreement — to the extent perfected solely by the "Main UCC-1." It has never done so, however, with respect to any perfection created by the fixture filings, including the LDT fixture filing. Under settled law, it is barred by the applicable two-year statute of limitations from challenging the perfection of the LDT fixture lien.

In the DIP Order, Judge Gerber authorized Old GM to repay the Term Loan out of the proceeds of the DIP loan. *See* DIP Order ¶ 19(a); Am. Compl. ¶ 575. At the same time, the Court authorized the Creditors Committee to "investigate" and bring an action contesting "the perfection of [the] first priority liens" of the Term Lenders, but only if brought "not later than July 31, 2009." DIP Order ¶ 19(d). That day, the Avoidance Trust filed its original complaint, which (i) discussed the Term Loan Credit Agreement and the Collateral Agreement, (ii) focused only on the purported termination of the Main UCC-1, (iii) alleged that that termination made the liens granted under the Collateral Agreement unperfected as of the Petition Date, and (iv) asserted a claim under section 544(a) to avoid those liens based on the termination. *See* Compl. ¶¶ 7-8, 426, 433-37, 439-41.

But the Term Loan Credit Agreement also required the filing of financing statements perfecting the liens on fixtures at specified facilities deemed to have collateral with a net book value of at least $100 million, among which was LDT. *See* Term Loan Credit Agreement § 3.12 & sch. 3.12; Avoidance Trust's Feb. 3 Letter, Docket No. 837 at 2 (explaining this).

The Avoidance Trust's original complaint did not challenge the perfection of the Term Lenders' lien on fixtures at LDT or contain any allegations regarding these fixture filings, notwithstanding that it was on notice of the existence of those liens. For example, in October 2009, three months after the original complaint was filed, JPMorgan in its answer pointed to the additional fixture filings. *See* Docket No. 12, at 81 (alleging that JPMorgan "was a secured party and [it] had a perfected security interest . . . as set forth in multiple UCC-1 financing statements filed throughout the United States, *including, but not limited to*" the Main UCC-1 filing) (emphasis added). Likewise, in July 2010, JPMorgan argued in its motion for summary judgment that the Term Lenders' security interests "remained perfected by . . . [the] twenty-six fixture filings," attaching the LDT filing as an exhibit. Docket No. 29, at 13, 51-54; *see* Docket No. 37-2, at 24-26.

And the Avoidance Trust in fact was otherwise inquiring into the fixtures. In a February 2, 2010 letter to New GM, for instance, counsel to the Avoidance Trust sought "information with respect to the collateral that secured the Term Loan," including "copies of all 'Collateral Value Certificates' provided to the lenders per the Term Loan," without seeking information on the fixture filings themselves. Likewise, a few weeks after JPMorgan filed its summary judgment motion, the Avoidance Trust's counsel further corresponded with New GM regarding the value of those fixtures — again without asking about their respective filings.

Five years later, in May 2015, the Avoidance Trust filed its Amended Complaint. That too did not challenge the perfection of the LDT fixture lien. Like the original complaint, the Amended Complaint does not mention the LDT lien, much less any potential issue with the property description in the LDT fixture filing. Indeed, to the extent it touches on the filings, the Amended Complaint (in Count II), acknowledges their existence, but then only addresses the value of the underlying assets, implicitly conceding that the fixture liens in fact were in force.[35]

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[35] It alleges that, "[t]o the extent that some portion of the Collateral was secured and perfected by filings other than the Financing Statement, the value of the Surviving Collateral was less than the amount of the Term Loan Lenders' claim under the Term Loan Agreement." Am. Compl. ¶ 601 (parenthetical omitted).

And in the meantime, even putting aside the DIP Order's requirement that the Committee pursue any challenge by July 31, 2009, the statute of limitations had expired. *See* 11 U.S.C. § 546(a) (requiring action under section 544 to commence within "2 years after the entry of the order for relief").

Only in May 2016, a year after it filed the Amended Complaint, did the Avoidance Trust first raise any issue with the perfection of the LDT fixture lien. Even then, it did so only informally, in a letter. *See* Letter from Avoidance Trust to Court (May 19, 2016), Docket No. 613. That attack is both procedurally improper and woefully late. Like the trustee in *In re Davis*, the Avoidance Trust cannot now seek to challenge a lien when it has never raised its challenge in a claim under section 544(a). 2014 WL 5306088, at *3; *see also In re Burks*, 181 B.R. at 307 (similar).

3. The Avoidance Trust's assertion that it is not actually seeking to challenge the perfection of the LDT fixture lien is incorrect.

The Avoidance Trust in its letter of February 3, 2017 asserts that it actually "does not challenge the validity or enforceability of the [LDT fixture filing] or the perfection of the lien on any property covered by [that filing]," but rather just contends that "there are no fixtures located at the parcel" described in that filing. Docket No. 837, at 2. This assertion not only implicitly concedes the Avoidance Trust's failure to adequately challenge perfection, it also fails on its own terms.

It is blackletter law that "[t]he scope of a security interest is determined by the security agreement and not by the financing statement." 8A *Lawrence's Anderson on the Uniform Commercial Code*, § 9-203:42 (3d. ed. Supp. 2016). The language in the security agreement "defines what the collateral is so that, if necessary, the creditor can identify and claim it," whereas a financing statement "put[s] subsequent creditors on notice that the debtor's property is encumbered." *Thorp Commercial Corp. v. Northgate Indus., Inc.*, 654 F.2d 1245, 1248 (8th Cir. 1981). So whether a party "did or did not perfect its security interest is immaterial to the determination of [its] secured status." *In re Chase*, 37 B.R. 345, 347 (Bankr. D. Vt. 1983).

Here, there is no doubt that the Collateral Agreement granted the Term Lenders a lien on the fixtures at LDT.[36] The metes-and-bounds property description on the LDT fixture filing cannot change that fact. The only question is whether the lien on fixtures at LDT granted by the Collateral Agreement was perfected prior to the Petition Date. The metes-and-bounds description on the fixture filing is only relevant to the extent that it supports an argument that the lien was not perfected. Accordingly, the Avoidance Trust's challenge is to the perfection of the lien and so falls squarely within Bankruptcy Rule 7001(2).

B. The LDT fixture filing put third parties on actual, constructive, and inquiry notice of the Term Lenders' security interest.

Even if plaintiff's challenge were timely, the evidence at trial will show overwhelmingly that the Term Lenders' security interest in fixtures at LDT was perfected by the LDT fixture filing and, therefore, is not subject to avoidance under Bankruptcy Code section 544(a).

1. The LDT fixture filing needed only to put a potential purchaser or lender on constructive or inquiry notice of the Term Lenders' lien on fixtures at LDT.

The perfection of the Term Lenders' security interest is, in the first instance, a question of New York law. *See* Collateral Agreement § 7.10. Pursuant to N.Y.U.C.C. § 9-301(c)(1), however, the perfection of a security interest in fixtures is governed by the law of the jurisdiction where the collateral is located, here the law of Michigan. Under Michigan law, an effective fixture filing must "[p]rovide a description of the real property to which the collateral is related sufficient to give constructive notice of a mortgage under the law of [Michigan] if the description were contained in a record of the mortgage of the real property." M.C.L.A. § 440.9502(2)(c). Accordingly, the issue for the Court is whether the real-property

36 LDT was included on the list of 42 plants whose assets were subject to the Term Lenders' security interest, and the Collateral Agreement grants the Term Lenders a lien on all equipment and fixtures there. *See* Collateral Agreement, art. II & sch. 1.

description set forth on the LDT fixture filing was sufficient to put a potential purchaser or lender on "constructive notice of a mortgage" recorded against LDT.

Under Michigan law, when a person has knowledge of "any" recorded facts that "would lead [an] honest man, using ordinary caution, to make further inquiries concerning the *possible* rights of another in real estate, and fails to make them, he is chargeable with notice of what such inquiries and the exercise of ordinary caution would have disclosed." *Kastle* v. *Clemons*, 46 N.W.2d 450, 451 (Mich. 1951) (emphasis added); *see In re Mich. Lithographing Co.*, 140 B.R. 161, 166, 167 (Bankr. W.D. Mich. 1992) (applying *Kastle* to "facts of record"), *aff'd*, 997 F.2d 1158 (6th Cir. 1993).

This is especially true for constructive notice of mortgages — which, as noted, is the standard that applies in determining the effectiveness of the LDT fixture filing. Michigan law does not require mortgages to contain "a precise legal description" of the subject property. *In re Brandt*, 434 B.R. 493, 498 (W.D. Mich. 2010) (citing M.C.L.A. § 565.151 *et seq.*). Rather, notice of a mortgage is "simply whatever is sufficient to direct the attention of a purchaser to the prior rights or equities of third persons, and to enable him to ascertain their nature by inquiry." *Prime Fin., Inc.* v. *Comerica Bank*, 2015 WL 998493, at *4 (E.D. Mich. Mar. 5, 2015) (internal quotation and alteration marks omitted).[37]

As a corollary to this, an ambiguity in a filing creates a duty of further inquiry. *See, e.g.*, *Am. Fed. Sav. & Loan Ass'n* v. *Orenstein*, 265 N.W.2d 111, 112 (Mich. Ct. App. 1978)

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[37] A purchaser or lender is deemed to be on constructive notice of liens identified by its title agent. *See, e.g.*, *Royce* v. *Duthler*, 531 N.W.2d 817, 821 (Mich. Ct. App. 1995) (constructive notice of easements listed on "title insurance policy"); *Wash. Mut. Bank* v. *JPMorgan Chase Bank*, 2009 WL 3365865, at *2 (Mich. Ct. App. Oct. 20, 2009) (constructive notice of contents of "title commitment"). But a title company's "failure . . . to discover [a] recorded prior mortgage does not serve to nullify the constructive notice provided by the recordation." *Richards* v. *Bank of N.Y. Mellon*, 2013 WL 4054586, at *2 (E.D. Mich. Aug. 12, 2013) (quoting *Ameriquest Mortg. Co.* v. *Alton*, 731 N.W.2d 99, 105 (Mich. Ct. App. 2006)). The factual question in each case is thus whether a "*diligent* title searcher" would have "discover[ed] the [recorded document]" and "recogniz[ed] its applicability." *Am. Fed. Sav. & Loan Ass'n* v. *Orenstein*, 265 N.W.2d 111, 112 (Mich. Ct. App. 1978) (emphasis added).

(a "title searcher" is "chargeable with inquiry notice when an ambiguity is encountered"); *In re Mich. Lithographing Co.*, 140 B.R. at 167 ("*any* facts must be investigated if they reasonably suggest that some third party has an interest in the property at issue"), *aff'd* 997 F.2d 1158; *see also id.* at 165 ("Matters of record may precipitate a duty to inquire further . . . .").

The seminal case in this area is *Schweiss* v. *Woodruff*, where the Michigan Supreme Court considered the effect of an "imperfect or indefinite description" of real property in a recorded document. 73 Mich. 473, 479 (1889).[38] The recorded deed in the case referred to land "in a subdivision of the south-easterly part of the south-east quarter of Sec. 20" and further described that land as "Block Number Six." *Id.* at 475. However, in the original recorded description for that property, the subject land was not described by block numbers. *Id.* Thus, "[f]rom mere inspection" of the official record, a subsequent purchaser "could not locate block 6." *Id.* at 477. Nonetheless, the *Schweiss* court held that, because of the reference to "Block 6" on the face of the deed, a subsequent purchaser was obligated to "inquir[e] as to the extent of [the] prior right" to determine "where [the prior holder] claimed [her] particular parcel . . . was located." *Id.* at 478.

Similarly, in *Novastar Home Mortgage, Inc.* v. *DC Acceptance, LLC*, two purchasers claimed an interest in real property with a "commonly known" street address. 2009 WL 249394, at *1 (Mich. Ct. App. Feb. 3, 2009), *leave to appeal denied*, 483 Mich. 1113 (2009). The first purchaser, Belvedere, acquired its interest through a mortgage that (i) identified the street address, (ii) described the property as "N 5'L 201" (*i.e.*, the north five feet of Lot 201), and (iii) listed the "Parcel identification number" as "Ward 22 Item 188373." *Id.* Later, when another party (Novastar) acquired a separate interest in the same property, the relevant mortgage

[38] *Schweiss* is cited routinely, as recently as 2012, and in a 2017 treatise. *See, e.g.*, *St. Paul Comm. Christian Church* v. *GMAC Mortg., L.L.C.*, No. 301749, 2012 WL 247784, at *3 (Mich. Ct. App. Jan. 26, 2012) (citing *Schweiss* to determine whether purchaser had "actual or constructive" notice of title "defect"); 21 *Mich. Civ. Jur. Recording of Instruments and Notice of Rights* § 33 (2017) (citing *Schweiss*: "sufficient notice" exists where "errors or mistakes may be reasonably construed from the language or state of the record").

(i) likewise identified the correct street address but (ii) further described the covered property as "*Lot 202 and* North 5 feet of Lot 201," and (iii) listed a different parcel number. *Id* (emphasis added).

In a subsequent title dispute, Novastar claimed that Belvedere's prior encumbrance was limited to Lot 201 and did not cover Lot 202. *Id.* The Michigan Court of Appeals rejected Novastar's claim: "given the ambiguity in the description," Novastar had "at least, inquiry notice that the Belvedere mortgage might encumber the property in its entirety" — notwithstanding that Belvedere's mortgage expressly mentioned Lot 201 but not Lot 202. *Id.* at *3.[39]

Neither of the cases cited by the Avoidance Trust in its pre-motion letter to the Court is to the contrary. Docket No. 837 at 3-4. In *In re Hudson*, a recorded mortgage did not provide constructive notice of a prior interest in "platted property" because the mortgage did not contain the correct "lot" number. 455 B.R. 648 (W.D. Mich. 2011). By statute, however, when property in Michigan has been divided into lots in a "subdivision plat," all "recorded sales, conveyances or mortgages *must* contain the caption of the plat and the lot number." *Id.* at 653 (citing M.C.L.A. § 560.255 ("Description of lots")); *see Brandt*, 434 B.R. at 499 ("an *additional* requirement" applies to platted property") (emphasis in original). LDT, however, is not located on platted property and there is no reference to plats or lot numbers in the LDT fixture filing. And in *In re Vandenbosch*, 405 B.R. 253, 264 (Bankr. W.D. Mich. 2009), it was "undisputed" that a mortgage described a vacant lot "rather than" a residence. The court thus had no occasion to consider what a diligent searcher would have uncovered by searching the street address.

2. The LDT fixture filing provided the requisite notice of the Term Lenders' security interest.

The evidence at trial will establish that the LDT fixture filing put a diligent title searcher on actual, constructive and inquiry notice of the Term Lender's security interest. On its

[39] *See also First Nat'l Bank of Chicago* v. *Dep't of Treasury*, 760 N.W.2d 775, 782 (Mich. Ct. App. 2008), *rev'd on other grounds*, 485 Mich. 980 (2009) (other documents recorded by register of deeds created "constructive notice" of prior mortgage, notwithstanding that prior mortgage "described the property as lot 88 instead of lot 66").

face, the filing states that it covered "all fixtures located on the real estate described in Exhibit A." The "real estate described in Exhibit A" refers to "**GM Assembly Lansing Delta**" in large, bold-faced text:

EXHIBIT A

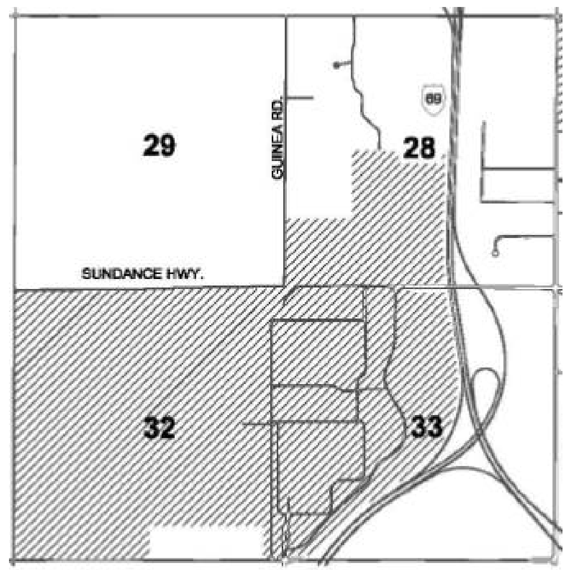
8400 MILLETT HWY, LANSING TOWNSHIP, LANSING MI 48917-9549

S 1/2 SEC 28 LYING W OF W LINE HWY I-96/69, EXC NW 1/4 OF SW 1/4, AND EXC PARTS S & E OF LINE COM 100 FT W OF S 1/4 COR SAID SEC, TH N 50 FT, E 400 FT, N 25 FT, E 188.65 FT TO W LINE SAID HWY R/W & POE, EXC LANDS USED FOR GUNIEA RD & MILLETT HWY; 144 ACRES +/-; SEC 28 T4N R3W

GM Assembly Lansing Delta
8400 Millett Hwy
Lansing, Easton County, MI
LandAmerica File No. 100729

At trial, the Term Lenders will present expert testimony from James Marquardt — an experienced real-property searcher who has performed hundreds of title searches and interpreted countless recorded documents, and who owned and operated a respected Michigan title company for many years. Mr. Marquardt will testify that, before commencing a search for liens recorded against LDT, a diligent title searcher would have obtained the name of the property owner (here, "General Motors Corporation") and the relevant street address (here, 8175 Millett Highway and/or 8001 Davis Highway). The title searcher also would have learned that the subject property was a manufacturing facility, and likely would have been given a version of the facility's common name — *i.e.*, "GM Lansing Delta Township," or "LDT," or "GM Lansing Delta Township Assembly," or "GM Lansing Regional Stamping."

With this information, the searcher would access the records of the Delta Township tax assessor to identify the "tax parcel" and "Section" of the assessor's tax map that correspond to the given street address. In this case, the searcher would have learned that the street address for LDT (8175 Millett Highway and/or 8001 Davis Highway) corresponds to land in Sections 28, 32, and 33 of the Delta Township tax maps. The maps, as published, also show that much of the land in those Sections was labeled as the "General Motors LDT Plant."



Having tied the relevant street addresses to the corresponding tax parcels and Sections, a diligent title searcher then would have searched the real-property records where the LDT plant is located. To do so, the searcher would input "General Motors" or "GM" into the grantor-grantee index, which would reveal the fixture filing that, on its face and in bold letters, refers to "**GM Assembly Lansing Delta**."[40] Thus, a diligent searcher would have been on constructive, if not actual, notice that a lien had been placed on the LDT plant. As discussed,

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[40] In Michigan, the applicable "real-property search system" is a county-specific grantor-grantee index, which is searched with reference to the names of the parties to agreements recorded in the county's real estate records. M.C.L.A. § 565.28. Michigan counties are permitted by statute to maintain an additional "tract index," in which all transactions involving a given parcel of land are indexed together, but Eaton County, where LDT is located, does not have one. *See United States* v. *Grossman*, 501 F.3d 846, 850 (7th Cir. 2007) ("grantor-grantee index is the only searchable method" in Michigan county that did not maintain a tract index).

that notice would create an obligation for the searcher to investigate further. And, of course, that investigation would have revealed the existence of the $1.5 billion Term Loan.

The Avoidance Trust points to the fact that the LDT fixture filing also refers to "metes-and-bounds" and a street address corresponding to a vacant lot. But that, in itself, is of little moment here. The fixture filing expressly refers to the relevant facility by name; the name would put a reasonable title searcher — tasked with determining whether a purchaser of or lender secured by the LDT plant would be subject to a prior lien — on notice. The Avoidance Trust's further claim that "**GM Assembly Lansing Delta**" is not the correct formal name for the plant is likewise amiss. Again, that phrase would put a title searcher on notice that his or her client could be subject to a prior lien on the GM manufacturing plant in Lansing Delta Township.

This conclusion is reinforced by the fact that a title searcher would not even discover the filing and its metes-and-bounds description and street address until after he or she had already examined the assessor's maps. And, as Mr. Marquardt will explain, those maps labeled the vacant land covered by the metes-and-bounds description on the LDT fixture filing as part of the LDT plant. Thus, again, a diligent searcher would at a minimum be put on notice that the LDT plant at least *could be* burdened by a filing that, on its face, refers to "**GM Assembly Lansing Delta**." Accordingly, the LDT fixture filing would have been adequate to perfect the Term Lenders' security interest in the LDT plant in accordance with Michigan Law and, thus, is not subject to avoidance under Bankruptcy Code section 544(a).

POINT VI

THE TERM LENDERS HAD A SECURITY INTEREST IN THE FIXTURES LOCATED AT GM POWERTRAIN ENGINEERING PONTIAC.

The parties agree that the Term Lenders had a perfected security interest in fixtures at GM Metal Fabricating Division ("MFD") Pontiac, a manufacturing plant located in Oakland County, Michigan. The parties disagree, however, as to whether the Term Lenders also held a perfected security interest in fixtures at GM Powertrain Engineering Pontiac, a facility that is located on the same parcel as GM MFD Pontiac and that is covered by the metes-and-bounds description on the MFD Pontiac fixture filing. Thus, unlike the dispute concerning LDT, the only question here is whether the Collateral Agreement in fact granted a security interest in fixtures at Powertrain Engineering Pontiac. The evidence at trial will show that it did.

Article II(a) of the Collateral Agreement grants a security interest in all fixtures located at "any plant or facility of [GM] listed on Schedule 1, *including all related or appurtenant land, buildings, Equipment and Fixtures*." Collateral Agreement § 1.01 (emphasis added). Thus, under the Collateral Agreement, the Term Lenders have a security interest in the fixtures located at GM Powertrain Engineering Pontiac if *either* the plant itself, *or* the land on which it sits, is "related or appurtenant" to GM MFD Pontiac.[41]

The interpretation of the Collateral Agreement is a question of New York law. *See* Collateral Agreement § 7.10. Under Section 9-108(a) of the New York U.C.C., a "description" of collateral in a security agreement "is sufficient, whether or not it is specific, if it reasonably identifies what is described." This provision expressly "rejects any requirement that a description is insufficient unless it is exact and detailed." N.Y.U.C.C. § 9-108 cmt. 2. Instead, the relevant collateral is reasonably identified if the applicable agreement describes the assets by "any . . . method, if the identity of the collateral is objectively determinable." *Id.* § 9-108(b)(6).

"In various contexts, courts have recognized that the term 'relate to' has a 'broad' meaning, including merely having 'a connection with' the designated item." *Allied Irish Banks, P.L.C.* v. *Bank of Am., N.A.*, 875 F. Supp. 2d 352, 356 (S.D.N.Y. 2012); *accord Morales* v. *Trans World Airlines*, 504 U.S. 374, 383 (1992) ("relating to" means "to stand in some relation"); *Black's Law Dictionary* (10th ed. 2014) (defining "related" to mean "[c]onnected in some way"). And where, as here, a contract does not specifically define a term, "that contractual

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[41] The Avoidance Trust also disputes whether the Term Lenders held a perfected security interest in fixtures at five other "related or appurtenant" facilities. With the benefit of the Court's ruling on Powertrain Engineering Pontiac, it is believed that the parties will be able to resolve the remaining disputes.

term logically acquires its widely used meaning." *Ragins* v. *Hosps. Ins. Co.*, 4 N.E.3d 941, 942 (N.Y. 2013).[42]

The evidence at trial will show, at a minimum, that the fixtures at GM Powertrain Engineering Pontiac are located on land that is "related" to GM MFD Pontiac. The two facilities are located next to one another and were mapped on the same tax parcel at all relevant times. Courts routinely acknowledge that tax parcel numbers are used to identify plots of land for non-tax purposes. *See, e.g.*, *Shiel* v. *Deuel*, 40 Misc.3d 1021, 1022 (N.Y. Sup. Ct. Warren Cty. 2013) ("identif[ying]" two plots by their tax parcel numbers in easement dispute). Thus, it follows that all land covered by a single tax parcel number is "related" by virtue of that fact alone.[43]

Moreover, on each of three separate occasions between July 26, 2000 and March 23, 2007, title to the entire parcel — covering both facilities — was transferred from one Old GM affiliate to another. Each time, a single deed of conveyance transferred title to *all* of the land where *both* MFD Pontiac *and* Powertrain Engineering Pontiac are located. The shared tax parcel number (14-21-101-004) was even used in connection with the Term Loan itself.

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42 "Appurtenant," by contrast, is a more limited concept. New York courts have defined "appurtenant" to mean "a thing used with *and* related to or dependent upon another thing more worthy." *In re Phillips*, 101 A.D.3d 1706, 1708 (4th Dep't 2012) (quoting *Woodhull* v. *Rosenthal*, 62 N.Y. 382, 390 (1875)). Thus, by specifying in the *disjunctive* that the Term Lenders had a security interest in fixtures located anywhere "related *or* appurtenant" to a facility listed on Schedule 1, Old GM expressly granted the Term Lenders a security interest in fixtures located on land, or in buildings, that were "related to" but, in the words of *Woodhull* and its progeny, *not* necessarily "used with" *or* "dependent upon," a scheduled plant. *See Perlbinder* v. *Bd. of Managers of 411 E. 53rd St. Condo.*, 65 A.D.3d 985, 986-87 (1st Dep't 2009) ("An interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation.").

43 Mr. Marquardt will also establish that on December 19, 2008, GM deeded the City of Pontiac a "part" of that shared parcel so the City could develop a road between Powertrain Engineering Pontiac and MFD Pontiac. The deed was recorded on June 1, 2009, but the shared parcel was not officially split until July 20, 2011. *Id.* ¶ 78. In other words, even after a new road was set to be constructed between Powertrain Engineering Pontiac and MFD Pontiac, the two facilities remained on a shared tax parcel for two more years.

The recorded version of the Pontiac fixture filing contains, in addition to a typed metes-and-bounds description, a precise, handwritten reference to the shared tax parcel (14-21-101-004) where *both* Powertrain Engineering Pontiac *and* MFD Pontiac are located. Put differently, the Pontiac fixture filing recorded in connection with the Term Loan referred to the land where *both* facilities are located as a *single* unit.

The legal relationship as reflected in the real estate records does not stand alone. John Buttermore, the former Vice President of GM's Powertrain Global Manufacturing Operations, will present testimony demonstrating that Powertrain Engineering Pontiac and MFD Pontiac are "related" as they were actually used by Old GM. The area of land on which both facilities are located has been described for decades as the "Pontiac Campus" (or "Pontiac North Campus") by GM personnel and other members of the local community. Moreover, the two facilities were, themselves, physically and operationally connected both as of November 29, 2006, when the Term Loan was extended, and as of June 1, 2009, when Old GM filed for bankruptcy. As Mr. Buttermore will testify, prior to the Old GM bankruptcy, a single central utility complex provided utilities to both Powertrain Engineering Pontiac and MFD Pontiac. Mr. Buttermore will also testify that, in his role as Vice President of Labor Relations for North America, he treated Powertrain Engineering Pontiac and MFD Pontiac as a single unit for purposes of union negotiations on topics such as wages, benefits, and seniority.

CONCLUSION

We end where we began: General Motors manufactures automobiles. It did so before the bankruptcy that precipitated this suit, and continued to do so after. In that four-word sentence lies the essence of what is necessary to answer the principal issues presented in this trial. The machinery and equipment that New GM needed to continue the business of Old GM are, with rare exception, still in place precisely because they are fixtures. And because that is the case, liquidation value is entirely inappropriate. Going-concern value is proper.

Dated: New York, New York
March 24, 2017

Respectfully submitted,

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Exhibit 1
Valuations of the Representative Assets

	Representative Asset Number and Description	Replacement Cost New (KPMG)	Deductions for Physical Deterioration, Capacity Based Economic Obsolescence, and Functional Obsolescence (a)	Final RCNLD Values (KPMG)	Appraised Value - Carl C. Chrappa
1	OP-150 Shims Station	370,491	(163,491)	207,000	345,000
2	Pits & Trenches	2,657,266	(216,376)	2,440,890	2,285,000
3	Power Zone Conveyor	916,043	(363,043)	553,000	825,000
4	Electro-Coat Paint Operations (“ELPO”) Waste System	1,076,977	(87,377)	989,600	890,000
5	Paint Circulation Electrical System	2,094,451	(612,181)	1,482,270	1,745,000
6	ELPO Oven Conveyor	1,439,474	(475,054)	964,420	930,000
7	Top-Coat Software	200,000	(138,600)	61,400	145,000
8	Paint Mix Room	898,733	(262,733)	636,000	750,000
9	Top-Coat Bells	3,093,300	(905,100)	2,188,200	2,270,000
10	Opticell Robotic System	N/A	N/A	N/A	420,000
11	Central Utilities Complex	71,188,330	(19,978,330)	51,210,000	64,770,000
12	Overhead Body Shop Welding Robot	30,348	(11,138)	19,210	18,100
13	Weld Bus Ducts	4,671,375	(1,451,375)	3,220,000	3,750,000
14	Leak Test Machine	952,495	(323,495)	629,000	810,000
15	Soap, Mount and Inflate System	2,091,607	(689,107)	1,402,500	1,715,000
16	Skid Conveyor	3,241,555	(1,068,955)	2,172,600	2,290,000
17	Power and Free Conveyor	2,143,504	(703,984)	1,439,520	1,445,000
18	Vertical Adjusting Carriers	5,306,253	(1,726,853)	3,579,400	3,600,000
19	Full Body Coordinate Measurement Machine (“CMM”)	386,879	(112,879)	274,000	285,000
20	Wheel & Tire Conveyor	1,491,445	(491,345)	1,000,100	970,000
21	Final Line Skillet Conveyor	1,921,707	(634,707)	1,287,000	1,235,000
22	Fanuc Gantry Robot	207,745	(81,745)	126,000	190,000
23	Aluminum Machining System	1,542,094	(680,094)	862,000	1,475,000
24	Base Shaping Machine	814,753	(281,453)	533,300	810,000

Representative Asset Number and Description		Replacement Cost New (KPMG)	Deductions for Physical Deterioration, Capacity Based Economic Obsolescence, and Functional Obsolescence (a)	Final RCNLD Values (KPMG)	Appraised Value - Carl C. Chrappa	
25	Liebherr Hobb Machine	896,459	(305,459)	591,000	965,000	
26	Core Delivery Conveyor System	331,411	(241,011)	90,400	100,000	
27	Emissions System	10,291,529	(7,471,229)	2,820,300	3,130,000	
28	Holding Furnace	4,264,407	(3,053,307)	1,211,100	1,515,000	
29	GG-1 Transfer Press (Grand Rapids)	N/A	N/A	N/A	930,000	(b)
30	TP-14 Transfer Press (Mansfield)	N/A	N/A	N/A	500,000	(b)
31	Danly Press	N/A	N/A	N/A	880,000	
32	AA Transfer Press	N/A	N/A	N/A	27,860,000	
33	B3-5 Transfer Press	N/A	N/A	N/A	22,455,000	
34	Build Line w/ Foundation	4,718,282	(4,576,282)	142,000	100,000	
35	Button Up Conveyor System	2,448,216	(1,077,416)	1,370,800	2,005,000	
36	Helical Broach	1,165,175	(511,745)	653,430	1,080,000	
37	Courtyard Enclosure	1,447,463	(1,235,743)	211,720	410,000	
38	Gas Cleaning System	2,299,670	(2,230,670)	69,000	0	
39	Core Box Robot	N/A	N/A	N/A	N/A	(c)
40	Charger Crane	899,879	(785,879)	114,000	160,000	

<u>Totals</u>

I. KPMG RCNLD values for the 33 Representative Assets it valued totaled <u>$84,551,160</u>.

II. The appraisal values calculated by Carl C. Chrappa for those same assets totaled <u>$103,013,100</u>.

III. KPMG did not value 6 Representative Assets. Using Carl C. Chrappa's appraisal values for these 6 Representative Assets and KPMG's RCNLD for the 33 relevant Representative Assets it did value gives a total value of <u>$137,596,160</u>.

<u>Notes:</u>

(a) These figures do not include the TIC Adjustment, see Defendants' Pre-trial Brief at IV.B.2.

(b) Mr. Chrappa appraised these assets based on Orderly Liquidation Value because they were not included in the bankruptcy sale.

(c) The parties have agreed that they will not present evidence on the value of Representative Asset 39, Core Box Robot, at trial.