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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

Chapter 11

MOTORS LIQUIDATION COMPANY, f/k/a GENERAL MOTORS CORPORATION, *et al.*,

Case No. 09-50026 (MG)
(Jointly Administered)

Debtors.

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MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST, by and through the Wilmington Trust Company, solely in its capacity as Trust Administrator and Trustee,

Adversary Proceeding

Plaintiff,

Case No. 09-00504 (MG)

against

JPMORGAN CHASE BANK, N.A., *et al.*,

Defendants.

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PLAINTIFF'S PRETRIAL BRIEF

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Plaintiff Motors Liquidation Company Avoidance Action Trust (the "**Trust**" or "**Plaintiff**") respectfully submits this pretrial brief (the "**Pretrial Brief**") pursuant to the *Stipulation and Order Amending and Superseding Certain Prior Orders Regarding Discovery And Scheduling* (the "**Order**") entered by the Court on December 2, 2016. Adv. Pro. Dkt. No. 805. This Pretrial Brief addresses the evidence and legal arguments that the Trust will present at the upcoming trial (the "**Representative Assets Trial**") on the 40 representative assets selected by the parties (the "**Representative Assets**"), including whether each of the Representative Assets is a fixture and the value of each of the Representative Assets. In addition, the parties' presentations of their respective cases at the Representative Assets Trial will also address: (1) whether three assets included among the Representative Assets are fixtures in which the defendants (the "**Term Lenders**" or "**Defendants**") had a perfected security interest; (2) whether Defendants had a perfected security interest in the fixtures at the Lansing Delta Township Assembly and Lansing Regional Stamping facilities as of June 1, 2009; and (3) whether Defendants had a perfected security interest in the fixtures at the GM Pontiac Powertrain Engineering Building.[1]

PRELIMINARY STATEMENT

Defendants were paid approximately $1.5 billion on June 30, 2009, even as the creditors' committee was still investigating the circumstances that led to the filing of a UCC-3 termination statement that, on its face, seemed to terminate Defendants' perfected security interest as to most of the collateral securing the Term Loan.[2] Had the General Motors bankruptcy been a more

[1] On February 14, 2017, the Court denied leave to file summary judgment motions on these issues in advance of the Representative Assets Trial.

[2] Capitalized terms not defined in the Preliminary Statement are defined in later sections of this Pretrial Brief.

typical bankruptcy, this valuation dispute would have been litigated before Defendants were paid in full *as if* the Term Loan were fully secured.

But the General Motors bankruptcy was no typical bankruptcy. The evidence before the Court showed that if the United States and Canadian governments' rescue of General Motors' business through a sale of substantially all of Old GM's assets to a government-owned and subsidized entity was not approved and consummated with great speed, then the business faced certain liquidation, which would have caused terrible harm to this country's economy and perhaps irreparable harm to this country's manufacturing sector.

To facilitate this historic sale of assets to a government-sponsored acquisition vehicle and avoid potentially disruptive objections, the Term Lenders were paid off in full, subject to a carve-out in the DIP order that allowed the creditors' committee to challenge the Term Lenders' right to receive an enormous postpetition payment *after* that payment was already in their hands. Litigating the effectiveness of the UCC-3 termination statement in the first phase of this adversary proceeding required appellate trips to the U.S. Court of Appeals for the Second Circuit and the Delaware Supreme Court. The Second Circuit, relying on guidance from the Delaware Supreme Court, ultimately ruled that the UCC-3 termination statement was legally effective, meaning that the Term Lenders did not have a perfected security interest in any personal property at any of the 42 Old GM plants that previously had secured the loan. As a consequence of that ruling, the value of the Term Lenders' perfected collateral as of the June 30, 2009 payoff date is limited to fixtures only, and only those fixtures at the subset of plants where JPMorgan, as collateral agent, filed fixture filings covering fixtures included within the Collateral Agreement's grant of collateral.

Plaintiff, as successor to the creditors' committee's right to prosecute this action, now has the opportunity to address at trial, on a representative asset basis, the questions of: (i) what assets

are fixtures included within the Collateral Agreement's grant of collateral and as to which JPMorgan caused fixture filings to be filed; and (ii) how should any surviving collateral be valued. The upcoming Representative Assets Trial is the first occasion when the Term Lenders will have ever been put to their burden of proving what perfected collateral secures the Term Loan and the value of that collateral. This Pretrial Brief provides an overview of what Plaintiff will prove with respect to the surviving collateral and the proper way to value that collateral.

There are at least three important issues that will allow the Court to decide that certain assets are not collateral without the Court even having to wade into the question of what is (and is not) a fixture:

First, three of the Representative Assets are excluded from the grant of collateral under the Collateral Agreement, and thus, as a matter of law, cannot be part of the Term Lenders' collateral. Two of the presses among the Representative Assets are leased, and, accordingly, Defendants have admitted in response to interrogatories that these leased presses are excluded from the Term Loan collateral. In addition, a substantial asset known as the Central Utilities Complex is excluded from the Collateral Agreement's grant of collateral because it too was not owned by Old GM.[3] Alternatively, the Central Utilities Complex is excluded from the Collateral Agreement's grant of collateral because it would be a default under the various agreements concerning the operation and financing of the Central Utilities Complex for the Central Utilities Complex to be pledged as Term Loan collateral. The Term Loan collateral agreement expressly excludes from the definition of collateral those assets that, if pledged for the Term Loan, would constitute a breach under some other agreement, like those agreements governing the Central Utilities Complex. *See* Argument Section II.A.

[3] Notwithstanding the status of the Central Utilities Complex, unlike the two presses, Defendants do not concede that this asset is excluded from the collateral.

Second, there is no surviving collateral at the GM Powertrain Engineering facility in Pontiac, Michigan, because that facility is not identified in the Collateral Agreement; further, contrary to Defendants' contention, it is not a facility that is related or appurtenant to the GM Metal Fabrication Division facility in Pontiac. As will be shown at the Representative Assets Trial, there simply is no functional or operational relationship between these two facilities. *See* Argument Section II.B.

Third, as a matter of law, Defendants do not have a perfected security interest in any Representative Assets located in the Lansing Delta Township Assembly facility or the Lansing Regional Stamping facility. JPMorgan, as collateral agent, never caused any fixture filing to be filed that identified the parcels of land where those facilities were located. Defendants argue that one of their 26 fixture filings covers fixtures at those two facilities. However, the metes and bounds description and the street address in that fixture filing consistently identify a vacant parcel of land to the north of the parcels where the facilities are located. Accordingly, under Michigan's enactment of the Uniform Commercial Code, that fixture filing does not perfect any interest in any assets at the Lansing facilities because it is insufficient to provide constructive notice of a lien against the fixtures located at the Lansing facilities. To the extent that the Court decides that this issue cannot be decided as a matter of law, then Plaintiff will offer expert testimony at trial from a Michigan title expert establishing that the fixture filing at issue does not provide constructive notice of a lien against the parcel where the facilities are located. *See* Argument Section III.A.

* * *

In Section III.B of this Pretrial Brief, Plaintiff then provides an overview of what it plans to show at trial with respect to the fixture classification dispute. In that section, Plaintiff discusses how to apply the three-part fixture test to each of the Representative Assets and

previews its conclusion that 36 of the 40 Representative Assets are not fixtures, two are fixtures, and two contain components that are fixtures. Plaintiff also explains how Ohio's articulation of the adaptation prong of the fixture test differs from Michigan's, showing how that difference plays out with respect to the classification of those Representative Assets located in Defiance, Ohio. Along with this Pretrial Brief, Plaintiff has submitted to the Court an Asset Appendix with a tab for each of the 40 Representative Assets. The Asset Appendix provides a summary of Plaintiff's fixture-classification analysis for each asset, along with a selection of photographs of each asset.

Plaintiff's approach to the asset classification task, consistent with the case law, adopts a fact-specific, context-driven approach to the issue, emphasizing objective facts that bear specifically on each asset's proper classification as fixture or non-fixture. Plaintiff's approach contrasts sharply with Defendants' ambitious, but misguided, categorical approach to the issue. Defendants' position, which is based on a number of subjective considerations concerning General Motors' corporate intent when installing manufacturing assets, is that all installed manufacturing assets in Old GM's automotive plants are fixtures. As will be demonstrated at trial, Plaintiff's asset-by-asset approach, which considers the relevant objective facts pertaining to each asset, is consistent with how courts have tackled the issue of fixture classification under Michigan and Ohio law. The Court should reject Defendants' invitation to write new bright-line Michigan and Ohio law with regard to this issue.

* * *

Finally, in Section IV of this Pretrial Brief, Plaintiff sets forth its approach to valuation of the Representative Assets. The Trust has valued the Representative Assets in compliance with Section 506(a) of the Bankruptcy Code, which requires that the Representative Assets be valued "in light of the purpose of the valuation and of the proposed disposition or use of such property."

The proposed disposition of the Representative Assets was to sell them to the government-sponsored entity in a 363 sale. Therefore, to value the assets, the Court should look to the fair market value of the Representative Assets in the hands of the debtor, Old GM. Put differently, the value of the Representative Assets is the amount Old GM would command for those assets in an open and competitive market.

As set out below, as of the June 30, 2009 valuation date, Old GM had no going concern value. Its prepetition efforts to secure private financing to continue operations and its extensive efforts to sell its operations or to merge with another automotive manufacturer all failed. There was no amount that a commercial market participant was willing to pay for Old GM's assets as part of a going concern. The only value that Old GM could obtain for its assets was through a liquidation, and it is on that basis that the Representative Assets are properly valued.

Of course, the Representative Assets continued to be used by New GM after the 363 sale, but this fact did not increase the fair market value of those assets from Old GM's perspective. New GM was a new business that existed—and was able to put the Representative Assets to use—only because the government injected tens of billions of dollars into it as part of its effort to rescue the company. The amounts contributed to New GM were motivated not by a potential return on investment, but to achieve policy objectives. The government's subsidy was of value to the New GM business, but it did not increase the value of the Representative Assets.

No commercial actor would have paid more than the liquidation value to obtain the Representative Assets (or any assemblage of Old GM's assets) in the market because they were not worth anything more. Thus, the fair market value of the Representative Assets is the value of those assets in liquidation. Specifically, the premise of value that would yield the highest actual market value for the Representative Assets is what appraisers refer to as "orderly liquidation value in exchange." This valuation premise is appropriate because, given the absence of a

market for a sale of these Representative Assets as part of a going concern, their market value can only be determined by considering their value if they had been removed and sold in market transactions.

To that end, the Trust's appraisal expert determined through, among other things, his analysis of market evidence what a buyer would have paid for each of the Representative Assets as of June 30, 2009. This appraisal was performed in compliance with the relevant appraisal standards, comports with economic principles, and reflects the highest actual market value for the Representative Assets as of June 30, 2009.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Term Loan Agreement and the Collateral Agreement

In 2006, approximately three years before it filed for bankruptcy, General Motors Corporation ("**Old GM**") entered into an approximately $1.5 billion syndicated commercial financing term loan (the "**Term Loan**") with a group of bank lenders, who ultimately assigned some or all of their interests to over 500 Term Lenders. To secure their obligations under the Term Loan, pursuant to a November 29, 2006 collateral agreement (the "**Collateral Agreement**"), Old GM[4] granted to JPMorgan Chase Bank, N.A. ("**JPMorgan**"), as Administrative Agent for the Term Loan, a first-priority security interest in certain equipment, fixtures, documents, general intangibles, all books and records and their proceeds at 42 Old GM facilities throughout the United States (the "**Collateral**"). Adv. Pro. Dkt. No. 643 at 6-7; Adv. Pro. Dkt. No. 91 ¶ 572; Declaration of Eric B. Fisher, dated March 1, 2017 ("**Fisher Declaration**") Ex. K (Collateral Agreement Article II & Schedule 1).

[4] Debtor Saturn Corporation also pledged collateral as part of the Term Loan, which is not at issue in the Representative Assets trial.

As contemplated by the term loan agreement, dated as of November 29, 2006, and amended as of March 4, 2009 (the "**Term Loan Agreement**"), on November 30, 2006, JPMorgan caused a UCC-1 financing statement to be filed with the Secretary of State of Delaware, which perfected the Term Lenders' security interest in all equipment and fixtures at 42 facilities owned by Old GM and its affiliates (the "**Delaware Financing Statement**"). Adv. Pro. Dkt. No. 643 at 7; Adv. Pro. Dkt. No. 91 ¶ 581.

Although the Delaware Financing Statement secured the Term Lenders' interest in fixtures at the 42 plants, in order to ensure that the Term Lenders had a first-priority lien on the fixtures, JPMorgan also had to file a fixture filing in the county where the property was located. Accordingly, the Term Loan Agreement also contemplated that JPMorgan would file UCC-1 financing statements as fixture filings for each of the "Material Facilities"—defined in the Term Loan Agreement as manufacturing facilities where collateral with a net book value of at least $100,000,000 was installed or located—in the corresponding office of the County Clerk for the counties where the Material Facilities were located. *See* Fisher Decl. Ex. J (Term Loan Agreement Schedule 3.12). Accordingly, JPMorgan also caused the filing of twenty-six fixture filings (the "**Fixture Filings**"), which were intended to provide first-priority perfected security interests in the fixtures located in the plants described therein. Adv. Pro. Dkt. No. 643 at 8 n.8.

On October 30, 2008, JPMorgan authorized the filing of a UCC-3 termination statement with the Delaware Secretary of State (the "**2008 Termination Statement**") in connection with the payoff of an unrelated synthetic lease transaction. As the Second Circuit has ruled, this 2008 Termination Statement terminated the Delaware Filing Statement, causing a substantial portion of Defendants' security interest to become unperfected and giving rise to this action.

II. Old GM's Troubles Prior to Its Bankruptcy Filing

In the period leading up to its bankruptcy filing in June 2009, Old GM was struggling. *See In re General Motors Corp.*, 407 B.R. 463, 476 (Bankr. S.D.N.Y. 2009). With the growth of competitors with far lower cost structures and dramatically lower benefit obligations, Old GM's position in the U.S. began to decline. *Id.* Between 1980 and 2009, Old GM's market share for new vehicle sales dropped from 45% to 19.5%. *Id.*

In 2008 and 2009, economic conditions worsened and Old GM suffered a major capital shortfall. Competition from foreign automakers, poor decisions by Old GM management, and high costs put pressure on Old GM. The pressure mounted in the fall of 2008 with an increase in gas prices, contraction of the credit markets, lowering of consumer confidence, high unemployment, and a further drop in consumer discretionary spending. These factors contributed to a serious downturn in auto sales. As a consequence, industry analysts recognized that Old GM was facing a capital shortfall of $10 billion or more. "[E]specially in 2008 and 2009, [Old] GM suffered a steep erosion in revenues, significant operating losses, and a dramatic loss of liquidity, putting its future in grave jeopardy." *Id*.

In response to its deteriorating financial situation, Old GM, with the help of restructuring advisors, sought various private solutions but none was successful. Old GM explored sales of certain business units and auto brands, strategic combinations with other auto manufacturers, and major restructuring. For example, in early August 2008, Chrysler approached Old GM to discuss a possible combination of the two companies. Old GM hoped such a combination would help it obtain additional financing from Old GM's and Chrysler's lenders. However, by early November 2008, merger talks were suspended. Lenders expressed their unwillingness to provide sufficient liquidity to the proposed merged company. Moreover, the business environment and Old GM's operating performance had continued to decline so severely that there was a risk that

Old GM would exhaust its liquidity prior to the consummation of any combination of the firms. Similarly, Old GM attempted to raise capital by selling business units and brands, including Saturn, Saab, Hummer, Opel, and AC Delco. Due to market conditions, concerns about Old GM's performance, and various deal-specific problems, Old GM was unable to complete sales of these units.

The price of Old GM's common stock had declined by 49% to $11.75 from May 1, 2008 to July 1, 2008. The price of Old GM's long-term unsecured bonds had reportedly traded down from the mid-70s in early May 2008 to the mid-50s by early July 2008. Old GM's credit default swaps had widened 1,832 bps by July 1, 2008, and then further widened to 9,097 bps by the end of 2008.

By early July 2008, Old GM was unable to enhance its liquidity through either a public equity offering or an unsecured debt financing. That summer, Old GM attempted to raise $3 billion of common and mandatory convertible preferred stock. Despite its efforts, Old GM, its advisers, and potential underwriters concluded that proceeds that could be raised by the offering would not provide sufficient liquidity and that such financing would be too expensive. In early September 2008, Old GM attempted to pursue secured financing. However, Old GM's existing secured facilities and restrictive provisions in its various bond indentures prevented such financing. For the year ending December 31, 2008, Old GM had negative cash flow of over $12 billion.

The ongoing failure of Old GM to resolve its problems meant that in early November 2008, Old GM was forced to seek the help of the U.S. Government (the "**Government**"). This was considered the choice of "last resort" for funding Old GM. Unlike an ordinary market participant, the Government was worried about the economy-wide consequences of Old GM, and other automotive companies, failing, and the Government expressed concerns about the impact

of any such failure on auto dealers and the states and municipalities who looked to those companies, their suppliers, and their employees for tax revenues. *See In re General Motors*, 407 B.R. at 477.

As of March 31, 2009, approximately two months prior to its filing under chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**"), Old GM employed approximately 235,000 employees worldwide, with approximately 91,000 of those employed in the U.S. *Id.* at 475. At the time, Old GM utilized the services of thousands of different suppliers, resulting in approximately $50 billion in annual supplier payments from Old GM. *Id.* at 476. Of these, approximately 11,500 suppliers were in North America. *Id*. Over 600 of Old GM's suppliers had sales to Old GM that represented over 30% of the suppliers' annual revenues. *Id.* "Thus hundreds, if not thousands, of automotive parts suppliers depend, either in whole or in part, on GM for survival." *Id.*

The Government was concerned about "systemic failure throughout the domestic automotive industry and the significant harm to the overall U.S. economy that would result from the loss of hundreds of thousands of jobs and the sequential shutdown of hundreds of ancillary businesses if GM had to cease operations." *Id.* at 477. In response to its concerns about the automotive industry, the Government implemented programs to assist the automotive industry through the U.S. Treasury and its Presidential Task Force on the Auto Industry. *Id*.

In December 2008, the Government extended credit to Old GM under the Troubled Asset Relief Program ("**TARP**"). *Id.* At the time, "there was absolutely no other source of financing available. No party other than Treasury conveyed its willingness to loan funds to GM and thereby enable it to continue operating." *Id*. Old GM submitted a proposed viability plan to Congress that included a request for emergency funding in the form of an $18 billion federal loan. *Id*. The Government declined to extend financing of that magnitude, but eventually, on

December 31, 2008, agreed to provide Old GM with financing up to $13.4 billion on a senior secured basis (the "**Treasury Prepetition Loan**"). *In re General Motors*, 407 B.R. at 477. Old GM drew $4 billion on that facility in December 2008. It then drew $5.4 billion more, and the remaining $4 billion on February 17, 2009. *Id.* "At the time this loan was made, [Old GM] was in very weak financial condition, and the loan was made under much better terms than could be obtained from any commercial lender—if any lender could have been found at all." *Id.*

In March 2009, the Government indicated that if Old GM was unable to complete an effective out-of-court restructuring, it should file for bankruptcy protection. *Id.* at 478. The President of the United States indicated that the Government would extend to Old GM adequate working capital for a period of another 60 days to enable it to continue operations, and that it would work with Old GM to develop and implement an appropriate viability plan. *Id.* at 479. The Government and Old GM then entered into amended credit agreements for the Treasury Prepetition Loan. Old GM borrowed $2 billion more on April 24, 2009, and then $4 billion more on May 20, 2009. *Id.* Old GM had borrowed $19.4 billion total from the Government by the end of May 2009. *Id.*

Old GM also attempted a public exchange offer to provide equity to its outstanding bondholders. On April 27, 2009, Old GM announced the exchange offer plan and stated that if the tender offer was unsuccessful, it would expect to enter into bankruptcy. The exchange offer proved unsuccessful.

On May 8, 2009, Old GM announced its first quarter 2009 results. *Id.* They presented a "grim financial picture, and equally grim trends." *Id.* As of March 31, 2009, Old GM had consolidated reported global assets of approximately $82 billion and liabilities of $172 billion. *Id.* at 475. Old GM's total net revenue had decreased by 47.1% in the first quarter of 2009, as compared to the same period in 2008. Its operating losses increased by over $5 billion from the

prior quarter. Old GM had negative cash flow of $9.4 billion, and its available liquidity had dropped by $2.6 billion. Vehicle sales dropped by 49% as compared to the same quarter in 2008. *Id.* at 476. From January 1, 2009 through July 9, 2009, Old GM had negative cash flow of $18.3 billion.

Old GM ultimately submitted five versions of its viability plan to the Government, with each being rejected for not meeting the necessary viability standard. Through the first four iterations of Old GM's plan, the firm was deemed not to be "financially viable" even *after* the projected receipt of Government assistance. It was not until the fifth submission that Old GM's plan was deemed potentially viable by the Government, and even subsequent to that Old GM worked with the Government to assess the ever-changing funding requirements of the company. Even after deeming the final plan viable, the amount of assistance required from the Government increased, and, without this assistance, Old GM's operations could not have continued.

III. Old GM's Bankruptcy, the DIP Financing, and the 363 Sale

At the Government's request, on June 1, 2009 (the "**Petition Date**"), Old GM and certain of its subsidiaries filed voluntary petitions for relief under the Bankruptcy Code in this Court. In connection with the bankruptcy process, substantially all of Old GM's assets would be purchased by a Government-sponsored entity in an expedited sale under section 363 of the Bankruptcy Code (the "**363 Sale**"). The Government-sponsored entity would be a new company, NGMCO, Inc. ("**New GM**") that would operate into the future. The proposed sale would have Old GM selling substantially all of its assets to New GM, while certain of its assets remained behind with Old GM.

On the Petition Date, Old GM also filed a motion for debtor-in-possession ("**DIP**") financing seeking interim postpetition financing up to a maximum aggregate amount of $15 billion and final postpetition financing up to a maximum aggregate amount of $33.3 billion.

Adv. Pro. Dkt. No. 643 at 9; Adv. Pro. Dkt. No. 91 ¶ 574. The Government also agreed to provide New GM with adequate post-acquisition financing. Adv. Pro. Dkt. No. 643 at 9.

Between the Petition Date and continuing until approval of the 363 Sale, market participants had an opportunity to bid to acquire substantially all of Old GM's assets. If any bid was more favorable than the existing terms of the 363 Sale proposed by the Government, that bid would be selected, and Old GM's assets sold to that bidder. The Court described this as "a full, fair, and reasonable opportunity for any entity to make an offer to purchase the Purchased Assets." Bankr. Dkt. No. 2968 at 4. However, no other bids for Old GM's assets were received. Nor did any commercial firms express any willingness to provide DIP financing to Old GM. Accordingly, the Government DIP financing was the only DIP financing option available. *See In re General Motors*, 407 B.R. at 480. This is unsurprising, given that Old GM had already tested the market for an extended period of time before its last-resort bankruptcy filing and determined that no private solution was available.

The Court approved the DIP facility, first on an interim and then on a final basis. Bankr. Pro. Dkt. Nos. 292 & 2529. On July 5, 2009, the Court entered an order approving the 363 Sale (the "**363 Sale Order**"). [5] *In re General Motors*, 407 B.R. at 463. In approving the 363 Sale, the Court noted that Old GM "cannot survive with its continuing losses and associated loss of liquidity, and without the governmental funding that will expire in a matter of days." *Id.* at 474. It further concluded that:

[5] At the time the Court approved the 363 Sale, there were approximately 850 outstanding objections to the sale. *In re General Motors*, 407 B.R. at 520. The objections generally fell into eleven categories, which included (i) bondholder objections; (ii) dealer-related objections involving state franchise law issues; (iii) liability and consumer objections involving successor liability, tort, asbestos, environmental and other products liability claims; (iv) objections regarding specific plant closures; (v) objections filed by splinter union representatives of retirees; (vi) objections regarding workers' compensation issues; (vii) objections regarding tax issues; (viii) objections by holders of construction and mechanic's liens; (ix) objections by stockholders; (x) objections relating to assumption and assignment of contracts, including cure amounts; and (xi) miscellaneous objections.

> [T]here are no options to this sale—especially any premised on the notion that the company could survive the process of negotiations and litigation that characterizes the plan confirmation process . . . . As nobody can seriously dispute, the only alternative to an immediate sale is liquidation—a disastrous result for GM's creditors, its employees, the suppliers who depend on GM for their own existence, and the communities in which GM operates.

Id.

IV. This Adversary Proceeding

A. The Payoff of the Term Loan Prior to the Approval of the 363 Sale

As of the Petition Date, the outstanding principal balance on the Term Loan was in excess of $1.4 billion. Adv. Pro. Dkt. No. 643 at 8; Adv. Pro. Dkt. No. 91 ¶ 573. The Court, in conjunction with entry of the final order approving DIP financing (the "**Final DIP Order**"), authorized Old GM to repay the Term Loan subject to a carve-out for permitting this action (the "**Avoidance Action**") to proceed. Adv. Pro. Dkt. No. 643 at 5-6; Adv. Pro. Dkt. No. ¶ 578. Following entry of the Final DIP Order, Old GM paid $1,481,656,507.70 to the Term Lenders in full satisfaction of all claims arising under the Term Loan Agreement. Adv. Pro. Dkt. No. ¶ 578.

B. The Initial Complaint and the Entry of Summary Judgment for the Trust

On July 31, 2009, the Committee filed the Adversary Complaint in the Avoidance Action challenging the liens securing the Term Loan on the ground that the 2008 Termination Statement caused the liens on the Collateral to become unperfected. Adv. Pro. Dkt. No. 1 ¶¶ 433, 440, 449. On June 12, 2015, following the Delaware Supreme Court's ruling and issuance of the Second Circuit's mandate, the Court entered partial summary judgment in favor of the Trust as to the termination of the Delaware Financing Statement. Adv. Pro. Dkt. No. 96.

C. The Amended Complaint and the Upcoming Representative Assets Trial

On May 20, 2015, the Trust filed its amended complaint (the "**Amended Complaint**"), Adv. Pro. Dkt. No 91, seeking, among other relief: (a) avoidance of the Term Loan's lien as unperfected pursuant to Section 544(a) of the Bankruptcy Code; (b) avoidance and recovery of all postpetition transfers to Defendants in excess of the value of any surviving perfected collateral, pursuant to Sections 549 and 550 of the Bankruptcy Code; and (c) disallowance of any claims the Defendants may have against the debtors pursuant to Section 502(d) unless and until they disgorge the avoidable transfers alleged in the second and third claims for relief.

On May 4, 2016, the Court entered an order setting a schedule for proceedings to adjudicate the Representative Assets selected by the parties. Specifically, the schedule was intended to govern resolution of: (a) which of the 40 Representative Assets constitute collateral in which the Defendants have a perfected security interest ("**Surviving Collateral**"), including (i) which Representative Assets at plants named in the Fixture Filings are fixtures; (ii) whether fixtures in certain additional facilities identified by Defendants also constitute Surviving Collateral; (iii) whether fixtures subject to capital leases or sale/leasebacks constitute Surviving Collateral; and (b) what principles should be applied in valuing the Surviving Collateral, including what date should be used for purposes of valuation. Adv. Pro. Dkt. No. 547. The parties agreed to use June 30, 2009, the date the Term Loan was repaid in full, as the date as of which the Surviving Collateral will be valued (the "**Valuation Date**"). Adv. Pro. Dkt. No. 641.

The Representative Assets Trial is scheduled to commence on April 24, 2017.

ARGUMENT

I. Defendants Bear the Burden of Proof

For purposes of the Representative Assets Trial, Defendants bear the burden of proof to establish the extent and value of their Surviving Collateral. Pursuant to Rule 6001 of the Federal

Rules of Bankruptcy Procedure, "[a]ny entity asserting the validity of a transfer under § 549 of the Code shall have the burden of proof." Fed. R. Bankr. P. 6001. Section 549 of the Bankruptcy Code sets forth the trustee's authority to avoid and recover unauthorized postpetition transfers. 11 U.S.C. § 549 (2016).

Here, because the Trust seeks to avoid and recover the postpetition transfers made to Defendants on June 30, 2009, and because Defendants are the parties asserting the validity of the postpetition transfers, Defendants bear the burden to prove that the transfers to them were valid. *See Hirsch v. Penn. Textile Corp., Inc. (In re Centennial Textiles, Inc.),* 227 B.R. 606, 610 (Bankr. S.D.N.Y. 1998) (placing burden of proof on defendant to establish validity of postpetition transfers); *Dobin v. Presidential Fin. Corp. of Del. Valley (In re Cybridge Corp.),* 304 B.R. 681, 685-86 (Bankr. D.N.J. 2004) (concluding that it is defendants' burden of proof to demonstrate the validity of the postpetition transfers received). To prove their entitlement to retain these postpetition transfers, Defendants must demonstrate the extent to which they were secured creditors entitled to receive repayment under the Final DIP Order. Therefore, they must prove the extent and value of their Surviving Collateral.

Accordingly, at the Representative Assets Trial, Defendants must establish the assets as to which they held a valid, first priority security interest (*i.e.*, which assets constitute Surviving Collateral) and the value of such collateral. To meet their burden, Defendants must prove that, with respect to each Representative Asset, such asset was within the grant of collateral under the Term Loan, covered by a valid, first priority Fixture Filing, and a fixture under applicable state law. And as to each of the Representative Assets that Defendants prove to be Surviving

Collateral, Defendants then bear the burden to prove the value of each such Representative Asset.[6]

II. Three Representative Assets and Assets at GM Powertrain Engineering Are Excluded From the Grant of Collateral Under the Collateral Agreement

For the reasons discussed below, certain assets are not Surviving Collateral because they are excluded from the grant of collateral in the Collateral Agreement. First, certain of the Representative Assets are not within the grant of collateral because the Collateral Agreement excluded from collateral assets that (i) were not owned by Old GM; or (ii) were subject to a preexisting lien and an agreement that prohibits the granting of additional liens on the assets. Second, certain assets are not within the grant of collateral because they are located at a facility that is neither "related" nor "appurtenant" to a plant within the grant of collateral.

A. The Representative Assets Not Owned by Old GM or Subject to a Preexisting Lien Are Excluded From the Grant of Collateral

The Collateral Agreement excludes from the grant of collateral assets that are not owned by Old GM. It also excludes assets that are subject to a lien (a) existing at the time of acquisition of such property, or (b) to secure indebtedness incurred prior to or within 180 days after the asset is placed in service, where the agreement creating the lien prohibits the creation of additional

[6] Some courts outside this jurisdiction have held that in an adversary proceeding to avoid and recover a postpetition transfer, the initial burden of proof under Rule 6001 is on the trustee to establish that the transfer was an unauthorized postpetition transfer before the burden shifts to the transferee to establish the ultimate validity of the postpetition transfer. *See e.g., Sklar v. Susquehanna Bank (In re Global Protection USA, Inc.),* 546 B.R. 586, 626 (Bankr. D.N.J. 2016). Even if the Trust bears this burden, it has met it. The Second Circuit held that the 2008 Termination Statement terminated Defendants' security interest in the equipment at 42 Old GM facilities, which comprised the vast majority of its security interest, as is evidenced by JPMorgan's vigorous defense of the issue of whether the 2008 Termination Statement was effective. Accordingly, the Trust has established that the transfers made to Defendants after the Petition Date were not authorized and it therefore, for purposes of the Representative Assets Trial, has met any initial burden with respect to the elements of its claim. *See e.g., In re Hampton*, No. 99-60376, 2001 WL 1860362, at *2 (Bankr. M.D. Ga. Jan. 2, 2001) (shifting burden to prove claim was secured after trustee established that a termination statement was filed, even if in error); *see also Fursman v. Ulrich (In re First Protection, Inc.),* 440 B.R. 821 (B.A.P. 9th Cir. 2010) (holding that once a trustee establishes a prima facie case, "the ultimate burden . . . is on [the transferees]"). The Trust has also met its initial burden of proof that Defendants' claim was overvalued under Section 506(a). *See e.g., In re Heritage Highgate, Inc.*, 679 F.3d 132, 139-40 (3d Cir. 2012). To conclude otherwise would be to render the burden-shifting framework meaningless.

liens on the asset. The following three Representative Assets (the "**Excluded Assets**") fall within these exclusions and, accordingly, do not constitute Surviving Collateral: (1) Asset ID BUYR503469FA (Representative Asset No. 32) (the "**2003-A Leased Schuler Transfer Press**"); (2) Asset ID BUYR503481FA (Representative Asset No. 33) (the "**2003 C-1 Leased B3-5 Transfer Press**"); and (3) Asset ID 100045909 (Representative Asset No.11) (the Lansing Delta Township Assembly's Central Utilities Complex (the "**CUC**" or the "**Central Utilities Complex**")).

Specifically, Article II of the Collateral Agreement grants a security interest to JPMorgan, for the benefit of the Term Lenders, in all "Equipment" and "Fixtures" owned or in which Old GM has right, title, or interest in, subject to certain exceptions, including to the extent that:

> (ii) such asset or property is subject to a Lien permitted under clause (vii) of Section 6.01(b) of the [Term Loan] Agreement and the grant of a security interest in such asset or property is prohibited by, or constitutes a breach or default under or requires any consent not obtained under, any contract, agreement, instrument or document creating such Lien or evidencing or governing the Indebtedness secured by such Lien; or
>
> (iii) in the case of any assets consisting of rights under a contract, agreement, instrument or other document, such grant of a security interest is prohibited by, or constitutes a breach or default under or results in the termination of or requires any consent not obtained under, such contract, agreement, instrument or other document; . . . .

Fisher Decl. Ex. K (Collateral Agreement Article II clauses (ii) & (iii)). Section 6.01 of the Term Loan Agreement does not have a clause (b)(vii) and does not relate to permitted liens. However, it is clear from the context and content of the Section 6.01 and 6.02 that the reference

was intended to be to Section 6.02(b)(vii), and that the reference to Section 6.01(b)(vii) is merely a scrivener's error.[7]

Section 6.02 of the Term Loan Agreement, titled "Limitations on Liens," provides:

> (b) Notwithstanding the foregoing, each Loan Party agrees not to, directly or indirectly, create, incur, assume or suffer to exist any Lien upon any of the Collateral or upon any facility or other real property on or at which any Collateral is installed or located, except:
>
> . . .
>
> (vii) Liens on property existing at the time of acquisition of such property by [Old GM], or Liens to secure the payment of all or any part of the purchase price of such property upon the acquisition of such property by [Old GM] or to secure any Indebtedness incurred prior to, at the time of, or within 180 days after, the later of the date of acquisition of such property and the date such property is placed in service, for the purpose of financing all or any part of the purchase price thereof, or Liens on such acquired property to secure any Indebtedness incurred for the purpose of financing the cost to [Old GM] of improvements to such acquired property; . . . .

Fisher Decl. Ex. J (Term Loan Agreement § 6.02(b)(vii)).

[7] Preceding the reference to "clause (vii) of Section 6.01(b)," Article II clause (ii) of the Collateral Agreement states "such asset or property *is subject to a Lien permitted under* clause (vii) of Section 6.01(b)." Fisher Decl. Ex. K (Collateral Agreement Article II clause (ii)) (emphasis added). However, Section 6.01 of the Term Loan Agreement is titled "Merger, Consolidation, etc." and relates solely to restrictions placed on Old GM and its guarantors relating to mergers and consolidations. Fisher Decl. Ex. J (Term Loan Agreement § 6.01). Furthermore, as Defendants admit, there is no "clause (vii) of Section 6.01(b)" of the Term Loan Agreement, as Section 6.01 is a one-paragraph provision with no subsections. *Id.*; Fisher Decl. Ex. R (Defendants' Responses & Objections to Plaintiff's Interrogatories at 6). On the other hand, Section 6.02 of the Term Loan Agreement is titled "Limitations on Liens" and it contains multiple subsections, including a subsection (b)(vii), which sets forth an exception to the general prohibition of liens for purchase money financing liens. *Id.* (Term Loan Agreement § 6.02(b)(vii)). "Under New York law, the doctrine of scrivener's error allows contracts to be reformed when there is a mistake in the writing that memorialized the contract." *Wells Fargo Bank N.A. v. Sovereign Bank, N.A.*, 44 F. Supp. 3d 394, 407 (S.D.N.Y. 2014) (internal quotations omitted). "Where there is no mistake about the agreement and the only mistake alleged is in the reduction of that agreement to writing, such mistake of the scrivener, or of either party, no matter how it occurred, may be corrected." *In re Am. Home Mortg. Inv. Trust 2005-2*, No. 14 Civ. 2494 (AKH), 2014 WL 3858506, at *23 (S.D.N.Y. July 24, 2014) (internal quotations omitted). To interpret the reference to "clause (vii) of Section 6.01(b)" as anything more than a typographical error would render the entire clause meaningless in contradiction of basic contract principles under New York law. *See e.g.*, *Lehman Bros. Holdings v. Matt*, 824 N.Y.S.2d 78, 79 (1st Dep't 2006) (reforming contract due to scrivener's error where contract referred to "nonexistent subsection" and countenancing defendant's interpretation would render the provision meaningless); *see also see Two Guys from Harrison-N.Y. v. S.F.R. Realty Assoc.*, 63 N.Y.2d 396, 403 (1984) (holding that courts should not construe an agreement in such a way as to render it meaningless).

Defendants admitted in discovery that the Collateral Agreement did not grant JPMorgan a security interest in the 2003-A Leased Schuler Transfer Press or the 2003 C-1 Leased B3-5 Transfer Press (together, the "**Leased Transfer Presses**"), and claim a security interest only in the CUC. The evidence will show that the CUC also was not within the grant of a security interest under the Collateral Agreement and is therefore not Surviving Collateral.

1. Defendants Admit that the Leased Transfer Presses Are Not Within the Grant of Collateral

The Leased Transfer Presses are subject to leases that were entered into prior to the Term Loan Agreement that expressly prohibit Old GM from creating or assuming any liens on the assets. Fisher Decl. Ex. C (2003-A Lease Agreement § 6); Fisher Decl. Ex. B (2003 C-1 Lease Agreement § 6).[8] Defendants admitted, in response to an interrogatory served by Plaintiff, that they do not have a security interest in the Leased Transfer Presses. Specifically, Plaintiff served the following interrogatory on JPMorgan and Defendants represented by the Defendants' Steering Committee:

> Interrogatory No. 1:
>
> State whether you contend that the Collateral Agreement granted a security interest in any of the Leased Representative Assets [defined as the CUC and the Leased Transfer Presses], and, if so, identify each such Leased Representative Asset and state the basis for your contention, including why each such Leased Representative Asset was not excluded from the grant of security interest pursuant to Article II, Section (ii) or (iii) of the Collateral Agreement.

Fisher Decl. Ex. P (Plaintiff's Fifth Set of Interrogatories to JPMorgan and Second Set of Interrogatories to Certain Defendants, dated January 4, 2017 ("**Plaintiff's Interrogatories**") at 4). In response, Defendants identified only the CUC as an asset in which they contend the Collateral Agreement granted JPMorgan a security interest:

[8] The Leased Transfer Presses are subject to lease agreements between U.S. Bank Trust, N.A., as lessor, and Old GM, as lessee. *See* Fisher Decl. Ex. C (2003-A Lease Agreement) & Ex. B (2003 C-1 Lease Agreement).

> Response: Defendants incorporate their foregoing General Objections. Subject to and without waiving their objections, Defendants state that the Term Loan Collateral Agreement granted a security interest in the asset with Asset ID "100045909" (the "CUC") . . . .

Fisher Decl. Ex. R (Responses & Objections of (i) Defendant JPMorgan to Plaintiff's Fifth Set of Interrogatories to JPMorgan and (ii) Other Members of Defendants' Steering Committee to Plaintiff's Second Set of Interrogatories to Certain Defendants, dated February 3, 2017 ("**Defendants' Responses and Objections to Plaintiff's Interrogatories**") at 5-6). By Defendants' response, Defendants admit that the Collateral Agreement did not grant them a security interest in the Leased Transfer Presses and claim to have a security interest in the CUC only.

2. The CUC Is Not Surviving Collateral

Pursuant to the terms of the governing agreements, Old GM did not own the CUC and, for that reason alone, could not have granted a security interest in the CUC to the Term Lenders. Moreover, even if Old GM did own the CUC (which the agreements make clear it did not), the CUC was excluded from the grant of collateral pursuant to clauses (ii) and (iii) of Article II of the Collateral Agreement. Finally, even if Defendants have an interest in the CUC, their interest is subordinate to the perfected, first priority interest of GMAC.

a. The CUC Agreements

The CUC is subject to three agreements relating to its construction, financing, maintenance, and use: (i) the Utilities Services Agreement between Delta Township Utilities II, LLC ("**Delta II**") and Old GM – Worldwide Facilities Group ("**Old GM - WFG**"), dated April 14, 2004 (the "**USA**"); (ii) the Tri-Party Agreement by and among Delta II, as debtor, GMAC Commercial Holding Capital Corp. (together with its successors in interest, "**GMAC**"), as lender, and Old GM, dated as of April 14, 2004 (the "**Tri-Party Agreement**"); and (iii) the Loan

and Security Agreement by and between GMAC, as lender, and Delta II, as debtor, dated as of April 14, 2004 (the "**LSA**" and collectively with the USA and the Tri-Party Agreement, the "**CUC Agreements**").

(1) The USA

Delta II and Old GM entered into the USA in connection with the construction of the Lansing Delta Township Assembly plant. Fisher Decl. Ex. F (USA Preamble). Pursuant to the USA, Delta II was to design, construct, own, operate, and maintain the CUC and provide certain utility services to Old GM. *Id.* The USA provides for the CUC to be built on property encumbered by a license granted from Old GM to Delta II. *Id.* In exchange for its services, Old GM provided monthly payments to Delta II. *Id.*

The USA sets forth numerous provisions relating to the ownership, operation, and maintenance of the CUC. Specifically, the USA provides that Delta II "shall own and be solely responsible for the operation, repair and maintenance of the [CUC] . . . ." *Id.* (USA § 11.03(a)). Delta II is "solely responsible for the design, construction, start-up and placement into commercial operation of the [CUC] in accordance with [Schedule 1 of the USA]." *Id.* (USA § 3.02). Furthermore, the USA provides that "[f]rom and after the Commercial Operation Date [the date on which the CUC was to be in operation], [Delta II] shall be solely responsible for the operation, repair and maintenance of the [CUC] and shall operate and maintain the [CUC] in accordance with the terms [of the USA]." *Id*. (USA § 4.01). The USA also provides that Delta II "shall obtain and maintain throughout the Term of [the USA] all Permits and applicable easements or licenses from all applicable Governmental Authorities, or other Persons, necessary for the construction and/or commercial operation of the [CUC]," other than those permits and licenses required to be held by Old GM. *Id.* (USA § 8.01). Except when the law requires the filing of joint permits, Delta II was required to be "the point of contact with the EPA, MDEQ,

Delta Township (Michigan) and other Governmental Authorities for all communications concerning" environmental permits. *Id.* (USA § 11.03(b)).

(2) The LSA

To finance the construction of the CUC, Delta II entered into the LSA with GMAC, pursuant to which GMAC loaned funds to Delta II in exchange for monthly payments of principal and interest. Fisher Decl. Ex. D (LSA Recital C). The loan was evidenced by a note and secured by a first priority interest in the following Delta II's right, title, and interest in certain collateral (collectively defined in the LSA as "Collateral"), including "Tangible Personal Property." *Id.* (LSA § 2.02(a)(iv)). "Tangible Personal Property" is defined in the LSA as "any and all equipment, furniture, fixtures, furnishings and other tangible personal property now or hereafter acquired by [Delta II] in connection with the use, operation or maintenance of the [CUC]." *Id.* (LSA Article I Definitions).

Pursuant to the LSA, Delta II represented and warranted that as of the date of the agreement, subject to certain setoff rights of Old GM:

> [T]itle to the Collateral that exists as [of] the date of Closing is vested in [Delta II], free and clear of all liens, encumbrances, charges and security interests of any nature whatsoever other than those related to the Permitted Debt. Upon Closing and filing of UCC-1 Financing Statements in the filing offices set forth on Schedule VI(i), [GMAC] shall have a first priority lien on and security interest in the Collateral . . . .

Id. (LSA § 6.01(i)). Delta II covenanted that from and after the closing date of the LSA and until payment in full of the loan and satisfaction of all other obligations pursuant to the agreement:

> [Delta II] shall remain the owner of the Collateral . . . free from any lien, security interest or encumbrance except those in favor of Lender and those related to Permitted Debt, and [Delta II] shall not execute or permit the filing of any other such financing statement thereon other than the UCC-1 Financing Statements [to be filed pursuant to the LSA].

Id. (LSA § 7.01(g)(vi)).

In accordance with these provisions of the LSA, on July 7, 2004, GMAC caused to be recorded with the Eaton County Registry of Deeds a UCC-1 fixture filing (the "**Delta II Fixture Filing**") on the subject collateral, including the CUC. *See* Fisher Decl. Ex. G (Delta II Fixture Filing at 1). On February 10, 2009, a continuation statement was recorded with respect to the fixture filing, filed by Lehman Commercial Paper, Inc. (the "**Delta II Continuation Statement**"). *See* Fisher Decl. Ex. O (Delta II Continuation Statement at 1).

(3) The Tri-Party Agreement

Delta II, GMAC, and Old GM also entered into the Tri-Party Agreement. Among other things, the Tri-Party Agreement provides that Old GM, Delta II, and GMAC desire for Old GM to pay directly to GMAC the monthly utility and system capacity payments owed by Old GM to Delta II under the USA. Fisher Decl. Ex. E (Tri-Party Agreement Recital C). Article V of the Tri-Party Agreement sets forth Defaults and Remedies under the agreement. Section 5.01 therein sets forth certain events that are defined as events of default by Old GM. In relevant part, Section 5.01 states:

> **Section 5.01 GM Default Defined**. For the purpose of this Agreement, each of the following events is hereby defined as, and is declared to be, a "**GM Default**":
>
> . . .
>
> (f) GM shall, except as specifically provided herein with respect to the USA Monthly Payments, any applicable Lender Termination Payment or the GM Independent Obligations or with the express prior written consent of Lender, in any manner (voluntarily, by operation of law or otherwise) (i) *assign, hypothecate, pledge, transfer or create a lien on or security interest in this Agreement, the USA Documents, the USA Monthly Payments, any applicable Lender Termination Payment, any GM Independent obligation or any of the Collateral, or any right or interest therein* or any rights of Lender, or its successors or agents hereunder . . . .

Id. (Tri Party Agreement § 5.01(f)) (emphasis added). "Collateral" has the meaning set forth in Section 2.02 of the LSA (and includes Tangible Personal Property and the CUC). *Id.* (Tri Party Agreement Article I Definitions); Fisher Decl. Ex. D (LSA § 2.02).

b. The CUC Was Not Owned by Old GM

As an initial matter, the CUC is not Surviving Collateral because it was not the property of Old GM as of June 1, 2009. The plain language of the Collateral Agreement makes clear that Old GM only granted a security interest to the extent of its interest in an asset or property. The Collateral Agreement granted a security interest in "Equipment" and "Fixtures" "now owned or at any time hereafter acquired . . . or in which [Old GM] has or at any time in the future may acquire any right, title or interest . . . ." Fisher Decl. Ex. K (Collateral Agreement Article II). Thus, the grant of security only applies to the extent of Old GM's interest in the collateral.

Indeed, Old GM could not have granted a security interest in property it did not own. "[A] security interest is enforceable against the debtor and third parties with respect to the collateral only if . . . the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party . . . ." N.Y. U.C.C. § 9-203 (McKinney 2016); *see also Montco, Inc. v. Glatzer (In re Emergency Beacon Corp.)*, 665 F.2d 36, 40 (2d Cir. 1981) ("[I]f the debtor has no rights in the collateral, no security interest in that collateral comes into existence.").

Here, based on the plain language of the CUC Agreements, Delta II was the owner of the CUC as of June 1, 2009. The Trust anticipates that Defendants will contend at trial that the CUC is within the grant of security interest under the Collateral Agreement because the CUC Agreements are nothing more than a "financing lease" that made Old GM the "true owner" of the CUC. However, Delta II owned, operated, maintained, and possessed the CUC and had all responsibilities and privileges associated with ownership. *See* Fisher Decl. Ex. F (USA Preamble). Old GM paid for certain utility services pursuant to the USA but it had no right to

enter the CUC without reasonable prior notice to Delta (except for emergencies). *Id.* (USA § 11.12). Delta II was responsible for obtaining required permits and licenses with local, state, and federal regulators. *Id.* (USA § 8.01 & § 11.03(b)). Moreover, GMAC filed the Delta II Fixture Filing, expressly covering the CUC, against Delta II—not Old GM. Fisher Decl. Ex. G (Delta II Fixture Filing at 1). Accordingly, by the plain language of the CUC Agreements, the CUC was not owned by Old GM.

c. The CUC Was Excluded from the Grant of Collateral Pursuant to Article II Clause (ii) of the Collateral Agreement

As set forth above, clause (ii) of Article II of the Collateral Agreement excludes from the grant of collateral assets subject to pre-existing liens where the grant of a security interest is prohibited by or constitutes a default under the agreement creating such lien. Similar to the Leased Transfer Presses, both of those conditions are met by the CUC Agreements. First, if the CUC was the property of Old GM, then the CUC was subject to a lien permitted by Section 6.02(b)(vii) of the Term Loan Agreement. JPMorgan and the Defendants represented by members of the Defendants' Steering Committee conceded this point.[9] Second, the creation of additional liens on the CUC is prohibited by or would constitute a default under the CUC Agreements. As set forth above, Section 5.01(f) of the Tri-Party Agreement states that Old GM will be in default under the agreement if it "create[s] a lien on or security interest in [the Tri-

[9] In response to Plaintiff's Interrogatories seeking the basis for their contention that the Collateral Agreement granted a security interest in the CUC, Defendants stated that "to the extent [Old GM's] interest in the CUC was subject to a 'Lien,' as defined by the [Term Loan Agreement], such Lien was permitted by Section 6.02(b)(vii) of the [Term Loan Agreement]." Fisher Decl. Ex. R (Defendants' Responses and Objections to Plaintiff's Interrogatories at 6). Even if Defendants did not concede this point, any financing arrangement established by the CUC Agreements created a lien permitted by Section 6.02(b)(vii) because the CUC Agreements created a lien to secure indebtedness incurred in connection with the purchase and construction of the CUC. The LSA states that it was entered into in order to finance the costs to construct the CUC. Fisher Decl. Ex. D (LSA Recital C). The LSA, together with the note, granted GMAC a first priority security interest in the CUC as security for the loan it provided to finance the construction of the CUC. *Id.* (LSA § 6.01(i)). Thus, the plain language of the CUC Agreements created a lien permitted by Section 6.02(b)(vii) of the Term Loan Agreement.

Party Agreement], the [USA], . . . or any of the Collateral, or any right or interest therein . . . ." Fisher Decl. Ex. E (Tri Party Agreement § 5.01(f)). "Collateral" includes the CUC. *Id.* (Tri-Party Agreement Article I Definitions); Fisher Decl. Ex. D (LSA § 2.02). Section 7.01(g)(vi) of the LSA similarly prohibits the creation of liens on the Collateral. Fisher Decl. Ex. D (LSA § 7.01(g)(vi)).

Thus, the CUC was subject to a lien permitted by Section 6.02(b)(vii) and the CUC Agreements creating such lien prohibit the creation of additional liens on the CUC itself and also to "any right or interest therein." Fisher Decl. Ex. E (Tri Party Agreement § 5.01(f)). As such, regardless of whether Old GM owned the CUC, the CUC was excluded from the grant of collateral of the Collateral Agreement pursuant to Article II clause (ii).

d. Any Interest of Old GM in the CUC Was Excluded from the Grant of Collateral Pursuant to Article II Clause (iii) of the Collateral Agreement

The CUC is also excluded from the grant of a security interest pursuant to clause (iii) of Article II of the Collateral Agreement. Clause (iii) excludes assets from the grant of collateral that are "assets consisting of rights under a contract" where such contract prohibits or would be in default or breached by the creation of additional liens on the asset. Fisher Decl. Ex. K (Collateral Agreement Article II clause (iii)). To the extent Defendants establish that Old GM had an interest in the CUC pursuant to the CUC Agreements, the evidence will establish that any such interest of Old GM was an "asset[] consisting of rights under a contract" and such contract prohibited the creation of additional liens on such interest. Section 5.01(f) of the Tri-Party Agreement expressly provides that Old GM may not create a lien on "the Collateral, *or any right or interest therein*." Fisher Decl. Ex. E (Tri Party Agreement § 5.01(f)) (emphasis added). Thus, the plain language of the Tri-Party Agreement prohibits the creation of liens not only on the

CUC itself, but on any "right or interest therein" that Old GM may have had. Accordingly, the CUC is excluded from the grant of a security interest pursuant to this provision as well.

e. As Defendants Admit, to the Extent Defendants Have a Perfected Security Interest in the CUC, Such Interest Is Subordinate to the First Priority Interest of GMAC

Even if Defendants were granted a security interest in the CUC under the Collateral Agreement, and even if they had a perfected security interest in the CUC, such interest would be subordinate to GMAC's first-priority interest in the asset. Indeed, though Defendants contend that they have a perfected security interest, they admitted in their responses to Plaintiff's Interrogatories that such interest was not a first priority interest. Fisher Decl. Ex. R (Defendants' Responses & Objections to Plaintiff's Interrogatories at 7).

As of June 1, 2009, GMAC had a perfected, first priority security interest in the CUC. As set forth above, the LSA granted GMAC a security interest in the CUC. Fisher Decl. Ex. D (LSA § 5.01(i)). GMAC perfected its security interest on July 7, 2004 by filing a fixture filing with the Eaton County Register of Deeds. Fisher Decl. Ex. G (Delta II Fixture Filing at 1). The Delta II Continuation statement was recorded on February 10, 2009.[10] Fisher Decl. Ex. O (Delta II Continuation Statement at 1). JPMorgan did not file the Eaton County Fixture Filing until April of 2007. Fisher Decl. Ex. M (Eaton County Fixture Filing at 1). Therefore, GMAC perfected its security interest prior to the filing of the Eaton County Fixture Filing and its interest remained perfected through June 1, 2009. Because a first-in-time perfected security interest takes priority over later-perfected security interests in the same collateral, any interest Defendants have in the CUC is subject to the interest of GMAC and its successors. *See* N.Y. U.C.C. § 9-322 (McKinney 2016) ("Conflicting perfected security interests . . . rank according to

[10] A fixture filing is effective for five years and may be continued by the filing of a continuation statement within six months before the expiration of the five-year period. N.Y. U.C.C. § 9-515(a), (d) & (e) (McKinney 2016).

priority in time of filing or perfection."); *see also id.* § 9-317 ("A security interest . . . is subordinate to the rights of . . . a person that becomes a lien creditor before the earlier of the time: (A) the security interest or agricultural lien is perfected; or (B) one of the conditions specified in Section 9-203(b)(3) is met and a financing statement covering the collateral is filed."). Therefore, even if Defendants had a perfected security interest in the CUC, the value of that interest would only be the value remaining after taking full account of the GMAC's interest in the CUC as of June 30, 2009.

B. Assets at GM Powertrain Engineering Are Not Collateral Because the Facility Is Not an Appurtenant Facility to MFD Pontiac

The Collateral Agreement excludes from the grant of collateral all "Equipment" and "Fixtures" that are not located at a "U.S. Manufacturing Facility." Fisher Decl. Ex. K (Collateral Agreement § 1.01 & Article II). "U.S. Manufacturing Facility" is defined in pertinent part as the 42 facilities listed on Schedule 1 to the Collateral Agreement, including any "related or appurtenant" land, buildings, equipment and fixtures. *Id.* (Collateral Agreement § 1.01 & Schedule 1). Defendants assert that they have a perfected security interest in the GM Powertrain Engineering Pontiac facility ("**Powertrain Engineering**") because it is "related" or "appurtenant" to the Metal Fabricating Division Pontiac facility ("**MFD Pontiac**"). For the reasons set forth below, Defendants' argument is without merit.

In interpreting the scope of the security interest granted to Defendants under the Term Loan Agreement and Collateral Agreement, the Court must consider all provisions of the agreements and "words and phrases . . . should be given their plain meaning." *LaSalle Bank Nat'l Ass'n v. Nomura Asset Capital Corp.*, 424 F.3d 195, 206 (2d Cir. 2005) (internal quotations omitted). "A written agreement that is clear, complete and subject to only one reasonable interpretation must be enforced according to the plain meaning of the language chosen by the

contracting parties." *Dev. Specialists, Inc. v. Peabody Energy Corp. (In re Coudert Bros.),* 487 B.R. 375, 389 (S.D.N.Y. 2013) (internal quotations omitted). "The question of whether the language of a contract is clear or ambiguous is a question of law to be decided by the court." *Compagnie Financiere de CIC et de L'Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 232 F.3d 153, 157 (2d Cir. 2000).

MFD Pontiac is listed as one of the 42 domestic facilities on Schedule 1 of the Collateral Agreement, and is a Material Facility for which JPMorgan filed a Fixture Filing. Accordingly, Defendants have a security interest in fixtures (to the extent that there are any) at that facility. Powertrain Engineering is not identified on Schedule 1 of the Collateral Agreement. Therefore, based on the definition of "U.S. Manufacturing Facility" in the Collateral Agreement, Defendants only have a security interest in the fixtures at Powertrain Engineering if it is determined to be a "related or appurtenant" building to one of the facilities listed in Schedule 1 to the Collateral Agreement.

"Appurtenant" has been defined as property "[a]nnexed to a more important thing." *In re Phillips*, 957 N.Y.S.2d 778, 781 (4th Dep't. 2012) (quoting Black's Law Dictionary 118 (9th ed. 2009)). "Moreover, courts have defined an appurtenance as 'something annexed to or belonging to a "more important" thing and not having an independent existence.'" *Id.* (citing *In re Crystal v. City of Syracuse Dep't of Assessment*, 364 N.Y.S.2d 618 (4th Dep't 1975), *aff'd*. 38 N.Y.2d 883 (1976)). "Related" generally means "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." *Morales v. Trans World Airlines*, 504 U.S. 374, 383 (1992) (quoting Black's Law Dictionary 1158 (5th ed. 1979)). Although "related" may be interpreted broadly, "the Supreme Court has cautioned that the term must be read in context." *United States v. Agrawal*, 726 F.3d 235, 247 (2d Cir. 2013).

Powertrain Engineering is not a "related or appurtenant" building to MFD Pontiac. The evidence will show that MFD Pontiac and Powertrain Engineering do not share any operational functions and are not physically connected. MFD Pontiac is a stamping facility where body panels and motor compartments are stamped for use in New GM assembly plants. By contrast, Powertrain Engineering is a research and development facility where New GM designs, engineers, develops, and tests engines and transmissions. There is no evidence that the two facilities share management, employees, or human resources personnel. They have different plant managers, testing facilities and storage areas.

MFD Pontiac and Powertrain Engineering are two of the many buildings and facilities located on the "Pontiac North Campus." However, MFD Pontiac and Powertrain Engineering have two different addresses and are located on opposite sides of the street. The street separating the two facilities is on a piece of land that Old GM deeded to the City of Pontiac, Michigan in 2008 to develop for public use. There is no evidence that MFD Pontiac and Powertrain Engineering share site entrances, parking lots, or security gates. Both facilities, and likely other buildings, get power, steam, and utilities by a utility trestle from the utility complex on the Pontiac North Campus. In all other respects, MFD Pontiac and Powertrain Engineering are not physically or operationally connected in any way.

Although JPMorgan filed a Fixture Filing with a metes and bounds description that covers the entire Pontiac North Campus, Fixture Filings, at most, can perfect a specific contractually defined security interest and nothing more. Regardless of their scope, the Fixture Filings cannot enhance or expand the security interest granted to Defendants under the Term Loan Agreement. *See generally* N.Y. U.C.C. § 9-502 & cmt. 2 (McKinney 2016). Had the parties intended for the Term Loan Agreement to cover the fixtures located at Powertrain Engineering, that facility would have been listed on Schedule 1 of the Collateral Agreement.

Powertrain Engineering was not listed; and because the two facilities are not related or appurtenant, Defendants do not have a perfected security interest in the fixtures at Powertrain Engineering.

III. The Surviving Collateral Only Includes Fixtures that Are Located at Facilities Within the Grant of Collateral and Are Covered by Fixture Filings

As discussed above, following the Second Circuit's decision on the 2008 Termination Statement, Defendants now only have a perfected security interest in the Surviving Collateral. In order for assets to constitute Surviving Collateral, among other requirements, such assets must be: (1) perfected by one of the Fixture Filings; and (2) classified as a fixture.

First, none of the assets located at the Lansing Delta Township Assembly or Lansing Regional Stamping facilities were perfected by any Fixture Filing. Second, only two of the Representative Assets and portions of two other Representative Assets are properly classified as fixtures.

A. Assets Contained in Lansing Delta Township Assembly and Lansing Regional Stamping Facilities Are Not Subject to a Fixture Filing

There are no assets located at either the Lansing Delta Township Assembly or Lansing Regional Stamping facilities that are subject to a Fixture Filing.[11]

Defendants claim that the fixture filing recorded by JPMorgan on April 26, 2007, in Eaton County, Michigan, listing Old GM as debtor (the "**Eaton County Fixture Filing**"), *see* Fisher Decl. Ex. M, covers the assets located at both the Lansing Delta Township Assembly and the Lansing Regional Stamping facilities in Lansing, Michigan. But the Eaton County Fixture Filing does not cover either facility.

[11] In order to facilitate resolution of this action, the parties have agreed that the Court will address whether the Excluded Assets and the Representative Assets located at the Lansing Delta Township Assembly facility or the Lansing Regional Stamping facility are fixtures and, if so, their value, regardless of whether the assets are covered by the Eaton County Fixture Filing or within the grant of collateral.

Neither the Lansing Delta Township Assembly plant nor the Lansing Regional Stamping plant lies within the scope of the property described in the Eaton County Fixture Filing. The legal description contained in Exhibit A to the Eaton County Fixture Filing—in terms of both street address and metes and bounds description—does not cover any part of either facility and instead corresponds exclusively to an empty parcel of land *across the street* from both facilities. The parcel described in Exhibit A of the Eaton County Fixture Filing is denoted in a red outline on Exhibit Q to the Fisher Declaration (Adv. Pro. Dkt. No. 827 Ex. 1), a sketch plan of the area jointly commissioned by the parties. Defendants admit, and there is no doubt from Exhibit Q that the metes and bounds description in the Eaton County Fixture Filing does not include the two facilities.

The address in the Eaton County Fixture Filing is also for the empty lot across the street from the Lansing Delta Township Assembly and the Lansing Regional Stamping facilities. Defendants admit that the Lansing Delta Township Assembly and the Lansing Regional Stamping facilities are located at 8175 Millett Highway, Lansing, MI, (a/k/a 8001 Davis Highway). The Eaton County Fixture Filing lists an address of 8400 Millet Highway, which the evidence will show is the address for the empty lot across the street.[12] Fisher Decl. Ex. M (Eaton County Fixture Filing Ex. A). Accordingly, the Eaton County Fixture Filing is a valid fixture filing for the vacant lot across the street from the two Lansing facilities where Defendants continue to contend without basis that there is Surviving Collateral.

[12] Defendants conceded this point at the February 14, 2017 hearing before the Court.

1. The Eaton County Fixture Filing Did Not Give a Bona Fide Purchaser Constructive Notice of Defendants' Interest in the Two Lansing Facilities

Defendants assert that even with the wrong metes-and-bounds description and the wrong address, the Eaton County Fixture Filing covers the fixtures located at the Lansing Delta Township Assembly and the Lansing Regional Stamping facilities. According to Defendants, notwithstanding its identification of a different parcel of land, the Eaton County Fixture Filing nonetheless provided sufficient notice under Michigan law to constitute a fixture filing against the parcels where the facilities are located. This is not correct.

Under Michigan U.C.C. law, the critical question is whether the fixture filing itself gave constructive notice to a bona fide purchaser of a lien against the parcels where the facilities are located. A 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 this state if the description were contained in a record of the mortgage of the real property." Mich. Comp. Laws Ann. § 440.9502(2) (West 2016). In Michigan, "a properly recorded mortgage provides a bona fide purchaser of real property with constructive notice of the prior interest in the property." *Moyer v. Edlund (In re Vandenbosch)*, 405 B.R. 253, 264 (Bankr. W.D. Mich. 2009).

Here, the description on the Eaton County Fixture Filing fails to give constructive notice to a bona fide purchaser that Defendants' have a secured interest in either the Lansing Delta Township Assembly plant or the Lansing Regional Stamping plant. There is no ambiguity in the Eaton County Fixture Filing. It provides the name of the debtor, the secured party or a representative of the secured party (in this case Old GM), and indicates the collateral covered. *See* Mich. Comp. Laws Ann. § 440.9502(1) (West 2016) (stating that a financing statement is sufficient if it provides the name of the debtor, provides the name of the secured party or a representative of the secured party, and indicates the collateral covered by the financing

statement). The Eaton County Fixture Filing unambiguously refers to the empty lot (which was also owned by Old GM) as the covered collateral: It describes the covered collateral as "all fixtures located on the real estate described in Exhibit A," and Exhibit A contains the address and the metes and bounds description that match the empty lot. Fisher Decl. Ex. M (Eaton County Fixture Filing Ex. A). Accordingly, if a bona fide purchaser of the Lansing Delta Township Assembly plant and the Lansing Regional Stamping facilities were to view the fixture filing (which is unlikely because it is recorded against the vacant lot, a separate parcel of land), the purchaser would have no reason to question that the Eaton County Fixture Filing secured the empty lot.

2. The Effort that Would Have Been Required to Uncover the Error Was Far Beyond Even the Inquiry Notice Standard

Defendants assert that a title insurance company's stamp on Exhibit A to the Eaton County Fixture Filing would have placed a bona fide purchaser on inquiry notice. The stamp in question appears to have been made by LandAmerica, the title insurance company that handled the Eaton County Fixture Filing, and it is located below the metes and bounds description to the vacant lot. The stamp reads: "GM Assembly Lansing Delta, 8400 Millett Hwy, Lansing, Eaton County, MI, LandAmerica File No. 100729." Fisher Decl. Ex. M (Eaton County Fixture Filing Ex. A). Defendants' argument is a non-starter.

First, the stamp is consistent with both the address and the metes and bounds description on the Eaton County Fixture Filing itself. The stamp contains the same address as the Eaton County Fixture Filing, the empty lot located at 8400 Millet Hwy, and it does not contain the correct name of one of the facilities in question, which is Lansing Delta Township Assembly not GM Assembly Lansing. Second, there is no authority for the proposition that a typed legal document should be treated as modified by a stamp with unknown origin, date, and purpose.

The stamp, located under the already legally sufficient address and metes and bounds description, appears to represent an internal filing system for LandAmerica. The stamp should be disregarded in this analysis.

Finally, Defendants' argument relies on a flawed legal standard for notice. Although Defendants admit that constructive notice based on review of the fixture filing itself is the standard, they fail to base their position on the language of the fixture filing. Instead, they argue that the stamp on the Eaton County Fixture Filing was sufficient to trigger a duty to inquire further. They argue that had a bona fide purchaser inquired, it is possible that additional inquiry could have turned up information indicating that the intended parcel was the Lansing Delta Township Assembly and the Lansing Regional Stamping facilities. Even if an inquiry standard is appropriate (which it is not), Defendants' standard would require a bona fide purchaser to go well beyond "ordinary diligence." *Tibble v. Wells Fargo Bank, N.A. (In re Hudson)*, 455 B.R. 648, 656 (Bankr. W.D. Mich. 2011) (finding no notice in part because investigation necessary to uncover mortgage failing was "far beyond . . . any reasonable conception of 'ordinary diligence'").

To accept Defendants' position, a hypothetical purchaser examining title to the two Lansing facilities would have had to go beyond the property records for the Lansing Delta Township Assembly and the Lansing Regional Stamping facilities, which would not have identified the fixture filing because it relates to a different parcel. *See, e.g.*, *In re Vandenbosch*, 405 B.R. at 264 (limiting notice to what could be found in the real estate records for the particular property at issue). The purchaser would have had to examine the grantor-grantee index for Old GM, seen the various interests recorded against Old GM for all the parcels of land it owned in Eaton County, examined any and all liens against Old GM property filed in Eaton County, and located the Eaton County Fixture Filing among the numerous filings. Further, this

hypothetical purchaser would have then contacted Old GM to inquire as to the particular security interest at issue; and had they done so, Defendants argue without support that this person *may* have discovered in a hypothetical conversation with an unknown Old GM employee that Defendants' claimed a security interest in the Lansing Delta Township Assembly and the Lansing Regional Stamping facilities.

Michigan courts have found that a bona fide purchaser did not have the requisite notice under very similar circumstances. In *In re Vandenbosch*, a bankruptcy court applying Michigan law found a mortgage to be avoidable by the debtor's trustee, filling the shoes of a bona fide purchaser, because it described a neighboring vacant lot adjacent to the property at issue. 405 B.R. at 264. Similar to the Eaton County Fixture Filing at issue here, it was undisputed that the mortgage mistakenly described the vacant lot adjacent to the property. *Id*. Also like the case here, the mortgagor in *In re Vandenbosch* argued that other irregularities in the filing (in this case it was the memorandum of land contract and the bank's mortgage were correctly recorded against the property) put a bona fide purchaser, in this case the trustee, on inquiry notice of the defective mortgage. *Id*. In categorically rejecting this argument, the bankruptcy court held that because the mortgage "had a different legal description" and thus was recorded against a different property, "no amount of inquiry into the Property's chain of title would have revealed the . . . mortgage." *Id*. at 264-65.

Similarly, the bankruptcy court in *In re Hudson* found that the debtor's trustee, taking the place of a bona fide purchaser, could avoid a recorded mortgage that contained the wrong legal description of the property. 455 B.R. at 654. There, the legal description on the mortgage to a lot of land erroneously described an adjacent lot, including its corresponding permanent parcel number. *Id*. at 651. The court found that the mortgage would not have been in the chain of title for the property owned by the debtor, and therefore would not have provided constructive notice

of the mortgage to a bona fide purchaser of debtor's property, even though there was ambiguities in the legal description of the property and references to both the mortgaged property and the adjacent lot. *Id.* at 654. Further, the court held that the title examination that would have had to occur in order to uncover the error was "far beyond any reasonable concept of 'obvious inquires' or 'ordinary diligence.'" *Id*. at 656. Moreover, the court noted that the mortgagor elicited no testimony of what would have been uncovered had the hypothetical phone calls in fact occurred. *Id*. Also critical to the court's decision was the fact that the person presenting the instrument for recording, in this case the mortgage holder, "must bear the burden of making sure that it is property recorded" and it was the Bank's responsibility to ascertain that a recording regarding [the correct property] actually occurred." *Id*. at 654-55.[13]

In re Vandenbosch and *In re Hudson* govern. Here, the Eaton County Fixture Filing was recorded in the real property records of the vacant lot and not the real property records of the Lansing Delta Township Assembly or the Lansing Regional Stamping facilities. Accordingly, had a bona fide purchaser searched in the real estate listings of either the Lansing Delta Township Assembly or the Lansing Regional Stamping facilities, the purchaser would not have uncovered the fixture filing. Similarly, here it is equally unclear, as in *In re Hudson*, what exact

[13] Courts in other jurisdictions, interpreting similar provisions of state U.C.C. law, have likewise found that a legal description of the wrong property does not provide constructive notice of an interest to a bona fide purchaser. *See, e.g., Hanrahan v. Univ. of Iowa Cmty. Credit Union (In re Thomas)*, 387 B.R. 4, 9-10 (Bankr. N.D. Iowa 2008) (in considering whether a properly recorded mortgage with a complete and accurate legal description of an adjoining parcel of property can constitute constructive notice to third parties, the court determined that the mortgage was voidable by trustee because the erroneous legal description did not provide constructive notice of the interest in the subject property); *Chase Manhattan Mortg. Corp. v. Bird (In re Hiseman)*, 330 B.R. 251, 256-57 (Bankr. D. Utah 2005) (creditor's deed of trust that contained erroneous legal description of property, including incorrect metes and bounds description, was not in the property's chain of title and did not give constructive notice of the interest under Utah law). *see also Perrino v. BAC Home Loan Servicing, LP (In re Trask)*, 462 B.R. 268, 276 (B.A.P. 1st Cir. 2011) (even where a mortgage contained the correct street address of the subject property, but the legal description of an adjacent parcel, the court found that the use of same street address to describe the two parcels of land was insufficient to constitute inquiry notice because it would not be apparent to a diligent title searcher that the inaccurate property description was suspicious).

evidence would be uncovered if the inquiry in fact occurred. Finally, there is no injustice in the outcome: It was incumbent on JPMorgan, based on the burden on filers under Michigan law and also its paid role as Administrative Agent under the Term Loan, to assure that the Eaton County Fixture Filing properly described the property and was properly recorded. The Defendants' failure to do so was a fatal flaw that precludes a finding that they have a perfected security interest in assets located at Lansing Delta Township Assembly and Lansing Regional Stamping.

Plaintiff contends that this issue may be decided as a matter of law. However, to the extent that the Court takes evidence on the issue, Plaintiff's expert will show that an independent title insurance company examining the chain of title and conducting a title search of mortgages and liens encumbering the Lansing Delta Township Assembly and Lansing Regional Stamping facilities would not have discovered the Eaton County Fixture Filing. Among other things, Plaintiff's expert asked a title insurance company to conduct precisely such an examination, and, not surprisingly, the Eaton County Fixture Filing did not turn up.

At bottom, the Eaton County Fixture Filing gives constructive notice of an interest only in the property described on the filing. Because the description does not in any way cover the Lansing Delta Township Assembly or the Lansing Regional Stamping facilities, the Eaton County Fixture Filing would not have provided a bona fide purchaser with constructive notice of Defendants' interest in the fixtures located at either of the two Lansing facilities.

3. The Trust Is Not Precluded from Asserting this Argument

The Trust is not precluded from showing that Defendants did not have a perfected security interest in the fixtures located at the two Lansing facilities.[14] The Final DIP Order provided that the Committee (and now the Trust) had automatic standing to bring actions challenging the perfection of first priority liens. Bankr. Dkt. No. 2529 ¶19(d). In the Amended Complaint, the Trust asserts a claim that due to the termination of the Delaware Financing Statement, Defendants did not perfect their first priority lien, and that they were entitled to be paid only to the extent of the value of any surviving collateral as to which they can demonstrate a perfected first priority security interest. Adv. Pro. Dkt. No. 91 ¶ 590-603. The argument with regard to the Eaton County Fixture Filing falls squarely within these borders: The Trust admits the validity of the Eaton County Fixture Filing but asserts that in fact no Collateral is covered by it, and thus Defendants do not have a perfected first-priority lien with regard to any collateral at the Lansing Delta Township Assembly or the Lansing Regional Stamping facilities.[15]

B. Objective Facts Govern the Court's Application of the Three-Part Fixture Test to the Representative Assets

The three-part fixture test followed in both Michigan and Ohio[16] is a fact-driven, context-specific test that requires a realistic look at all the circumstances surrounding the installation of a particular asset. *See, e.g.*, *West Shore Servs., Inc. v. Dep't of Treasury*, No. 321085, 2015 WL

[14] At a conference before this Court on February 14, 2017, Defendants argued that liens must be challenged within a two-year statute of limitations period. Defendants' argument is inapposite because the Trust does not challenge the Eaton County Fixture Filing as invalid, and does not challenge the perfection of the lien on the property described on that filing. Under these circumstances, Defendants' reliance on *Cen-Pen Corp. v. Hanson*, 58 F.3d 89 (4th Cir. 1995), is misplaced as the court in that case generally found that an adversary proceeding must be initiated to challenge a lien.

[15] Should the Court conclude that fixtures at the two Lansing facilities come within the scope of the Eaton County Fixture Filing, Plaintiff will be prepared to address the issue of whether the two facilities are appurtenant or related.

[16] As referenced in the initial fixture brief filed by the Trust, Adv. Pro. Dkt. No. 631, both Michigan and Ohio courts apply the three-factor test for determining whether a good should be treated as a fixture: (i) the article must be attached to the realty; (ii) the article must be adapted to the realty; and (iii) the annexing party must have intended to make the article a permanent part of the realty. *See Teaff v. Hewitt*, 1 Ohio St. 511 (1853).

4469666, at *2 (Mich. Ct. App. July 21, 2015) ("While there is no bright-line test for determining whether an item has become sufficiently attached to real property so as to constitute a fixture, our Courts have traditionally examined three factors on a case-by-case basis.");[17] *Masheter v. Boehm*, 307 N.E.2d 533, 539 (Ohio 1974) ("It is clear that the 'fixture' question in a given case must ultimately be resolved by weighing the criteria prescribed by *Teaff* . . . and its progeny, as the particular facts and circumstances, dictate. Although some varieties of property, such as furnaces or plumbing systems installed in a dwelling, are generally held to be part of the realty . . ., each case must stand on its own facts.").

The Defendants essentially argue that all fixed manufacturing assets that are necessary to an Old GM production line are fixtures. Such a broad definition of fixtures should be rejected. Ohio, following the majority of states that have addressed the issue, has expressly rejected a possible bright-line rule that "personal property placed in an industrial or economic establishment for permanent use as a necessary component of an integrated economic operation becomes a part of the real property regardless of other tests." *Masheter*, 307 N.E.2d at 539. Although Michigan courts have not specifically rejected treating necessary components of an industrial business with a bright-line rule, Michigan case law—similar to Ohio case law—precludes such an approach. Under both Michigan and Ohio law, there is no short cut for concluding whether manufacturing machinery and equipment are fixtures.

Such a fact-based approach makes sense in light of the nature of fixtures: personal property that has become so "related to particular real property" as to become part of it. *See*

[17] In light of the relatively small number of relevant Michigan cases addressing the classification of assets as fixtures, it is useful to consider unpublished decisions. *See* Mich. Ct. App. Rule 7.215(C)(1) (2016) (unpublished opinions are not "precedentially binding under the rule of stare decisis"). After 2002, courts in Ohio afford unpublished decisions precedential weight. *See* Ohio S. Ct. Reporting Op. Rule 3.4 (2012). Unpublished Ohio Court of Appeals decisions prior to 2002 provide persuasive guidance only. *See Cleveland v. Carpenter*, 126 Ohio Misc. 2d 77, 82 (Ohio Mun. Ct. 2003).

N.Y. U.C.C. § 9-102(a)(41).[18] For this same reason, goods remain as personal property unless specific, objective facts about the relationship between the good and the realty suggest otherwise. *See, e.g.*, *Gen. Elec. Co., Lighting Div. v. Am. Mech. Contrs, Corp.*, No. 2000-L-211, 2001 WL 1647158, at *3 (Ohio Ct. App. Dec. 21, 2001) ("Any doubt must be resolved in favor of finding the item personal property."); *Pine Creek Farms v. Hershey Equip. Co.*, No. 96CA2458, 1997 WL 392767, at *3 (Ohio Ct. App. July 7, 1997) ("[I]f it be a matter left in doubt or uncertainty, the legal qualities of the article are not changed, and the article must be deemed a chattel."); *see also Wheeler v. Bedell*, 40 Mich. 693, 695-96 (1879) ("No presumption therefore could arise from the mere annexation, and the machine must be assumed to be personalty unless made realty by other circumstances.").

1. Annexation

The attachment, or annexation, prong is in itself not dispositive of fixture classification under both Michigan and Ohio law. *See Cont'l Cablevision of Mich., Inc. v. City of Roseville*, 425 N.W.2d 53, 57 (Mich. 1988) (stating that significance of attachment depends on intention of attaching party, not the manner of attachment); *Jarvis v. Wells Fargo Fin. (In re Jarvis)*, 310 B.R. 330, 335 (Bankr. N.D. Ohio 2004). Because intent, and not means of attachment, governs, courts do not draw bright-line rules that assets above a certain size or attached in a certain way become part of the realty. *See Masheter*, 307 N.E.2d at 538 (stating that "a chattel may be considered a fixture even though only slightly attached to the realty . . . or though only constructively attached . . . but will not necessarily be considered a fixture because of a high degree of attachment to the realty unless the other criteria are met"). Courts recognize that based

[18] The Collateral Agreement defines "fixture" by reference to Section 9-102 of the New York U.C.C., and the Term Loan Agreement incorporates by reference this same definition. Fisher Decl. Ex. K (Collateral Agreement § 1.01) & Ex. J (Term Loan Agreement § 1.01).

on the circumstances, big and heavy items that are highly attached to the realty and integrated into a manufacturing process can nonetheless be personal property. *See, e.g.*, *Controls Grp., Inc. v. Hometown Commc'ns Network, Inc.*, No. 266347, 2006 WL 1691346 (Mich. Ct. App. June 20, 2006) (finding a printing press was personal property despite it being large and heavy, necessary for the newspaper business using it, and required a wall to be moved to install it); *Gen. Elec. Co.*, 2001 WL 1647158, at **1-3 (finding a manufacturing furnace was personal property even though the furnaces were large, required extensive retrofitting of the facility, removal would be lengthy, and the furnaces were actually entire furnace lines integrated to and necessary for the production process and without which the process could not operate). Similarly, courts find that when other indicators of intent to make permanent are present, constructive attachment alone can meet the annexation prong. *See, e.g.*, *Velmer v. Baraga Area Sch.*, 424 N.W.2d 770 (Mich. 1988) (allowing injured student to sue school under public building exception to government immunity based on finding that school intended milling machine to be permanent and then construing attachment of milling machine solely via gravity sufficient for constructive attachment).

Physical attributes and methods of attachment are only significant to the extent they reveal an intent to make permanent. For example, several courts have found that the degree of attachment in cementing an asset into the floor of a building indicates an intention to make permanent. *See, e.g.*, *Cincinnati Ins. Co. v. Fed. Ins. Co.* ("***Visioneering***"), 166 F. Supp. 2d 1172, 1179-80 (E.D. Mich. 2001) (finding, absent other indicators of intent, that the annexing party intended milling machine to be permanently affixed because it was cemented into the floor of the building); *Mich. Nat'l Bank v. City of Lansing*, 293 N.W.2d 626, 627-28 (Mich. Ct. App. 1980) (finding night depository equipment, drive-up window equipment, and vault doors were intended to be installed permanently because they were actually cemented into the walls such

that they became part of the walls themselves). Courts also recognized the flip-side: The use of less permanent methods of attachment that allow for easy removal indicates an intent to not make permanent. *See, e.g*., *Litton Sys., Inc. v. Tracy*, 728 N.E.2d 389, 392 (Ohio 2000) (finding that annexation by nuts and bolts "allows for easy detachment and removal," indicating an intent to make a temporary annexation.); *Scovill Mfg. Co., Nutone Div. v. Lindley*, No. C-810616, 1982 WL 8551, at *3 (Ohio Ct. App. June 2, 1982) (finding asset not to be a fixture because removal was easy and would not materially injure asset or building, despite holes left in the concrete floor from bolts). Similarly, courts consider whether there are reasons for attachment other than intent to make permanent—such as OSHA regulations or machine specification requirements—that explain the method of attachment used. *See Controls Grp.*, 2006 WL 1691346 ("Accession requires more than bolting a piece of equipment to the floor to serve a particular purpose, whether permanently or indefinitely.").[19]

Because of the fact-specific inquiry, the particular method of attachment and its significance as to intent as applied to the Representative Assets are discussed as part of the asset specific discussion below in Sections III.C-III.G.

2. Adaptation

In both Ohio and Michigan, a manufacturing asset is considered adapted to the real estate if it benefits a general manufacturing or industrial use of the realty. Under adaptation, courts analyze the nature of the building and determine whether the asset in question is adapted to that use. *In re Matter of Mahon Indus. Corp.*, 20 B.R. 836, 839-40 (Bankr. E.D. Mich. 1982). In keeping with the regular and expected movement of assets that occurs at manufacturing and

[19] Defendants agree in principle with this formulation. Defendants treat the attachment prong as a threshold issue, albeit a forgiving one, and discuss the extent of attachment in relation to intent.

industrial buildings, Ohio courts, and increasingly Michigan courts as well, define the nature of this type of building in broader terms than the particular manufacturing business.

The discussion of adaptation overlaps with intent: If an asset is required for the use of the realty, it suggests an owner intended to make annexation permanent. Accordingly, although this discussion is here outlined in relation to adaptation, it is equally valid in the context of intent and courts discuss the concept under both prongs of the fixture test.

Under Ohio law, adaptation is more outcome determinative than under Michigan law. If an asset in every other way resembles a fixture but is specific to the business and not the realty, Ohio courts will nonetheless find the asset to be personal property. For example, in *General Electric*, the Ohio court framed its fixture decision primarily in terms of adaptation: "The testimony of appellant's employees and witnesses demonstrates that the furnaces are personal property; i.e. the furnaces primarily benefit the business and not the realty." 2001 WL 1647158, at *3. In contrast, under Michigan law, courts put less emphasis on adaptation. *See Wayne Cnty. v. Britton*, 563 N.W.2d 674, 680 (Mich. 1997) (stating that "[n]o Michigan case has addressed the adaptation prong of the fixture test" and emphasizing instead the intent factor).

Because Ohio is stricter and more explicit with the application of the adaptation consideration, the Court should weigh this factor more narrowly and strictly with respect to Ohio assets and the jurisdictions are discussed separately below.

a. Ohio

Ohio law is explicit that the use of the realty is defined in relation to an industrial building's broadest use. It is settled law that an asset that "primarily benefits the business and not the realty" is considered personal property. *Gen. Elec. Co.*, 2001 WL 1647158 at *3. "Thus, if the article is particular to the business conducted on the realty rather than general to the realty itself, it retains its character as personal property." *Id*. (*quoting G & L Invs. v. Designer's Workshop, Inc.*, No. 97-L-072, 1998 WL 553213, at *4 (Ohio Ct. App. June 26, 1998)).

Accordingly, in *General Electric*, the Court found that furnaces specially designed to produce quartz tubing and rods used in the semiconductor and lamp industries as part of a General Electric quartz manufacturing facility remained personal property because they primarily benefited the business and not the realty. 2001 WL 1647158 at *3. The court found confirmation in the fact that the furnaces were specialized for General Electric's particular business. *Id*. Similarly, in *Pine Creek Farms*, 1997 WL 392767 at *3, the court found that a very large and complicated caging system that was necessary to an egg production business primarily benefited the particular business and not the realty. Critically, the Ohio Court of Appeals stated:

> The system was not designed as an accessory to the land itself; it was not intended to benefit any type of business which may be conducted on the premises. Rather, it was 'designed, purchased and integrated' for the peculiar benefit of Pine Creeks' present business only.

Id.; *see also In re Jarvis*, 310 B.R. at 338 (holding that farrowing and gestation structures benefited the swine business, not the realty, because not easily used by a future hypothetical purchaser); *Funtime, Inc. v. Wilikins*, 822 N.E.2d 781 (Ohio 2004) (finding amusement park ride was personal property because it benefited the business and not the realty); *Litton Sys.*, 728 N.E.2d at 392 (holding that conveyor system was not adapted to the realty because equipment

benefited particular business and "[a]nother business would not necessarily require conveyors and material-handling systems"); *Roseville Pottery, Inc. v. Cnty. Brd. of Revision. of Muskingum Cnty.*, 77 N.E.2d 608, 610 (Ohio 1948) (*superseded by statute*) (finding that very large and immovable kilns necessary for a pottery business benefited the business and not the realty); *Zangerle v. Standard Oil Co. of Ohio*, 60 N.E.2d 52, 58 (Ohio 1945) (*superseded by statute*) (stating that machinery installed on land for the benefit of the industry is personal property).

Conversely, when an asset does benefit the use of the land more generally, Ohio courts will often conclude that the asset is a fixture. *See, e.g.*, *Holland Furnace Co. v. Trumbull Sav. & Loan Co.*, 19 N.E.2d 273, 275 (Ohio 1939) (finding furnace used for heat was necessary to the enjoyment and use of the property as a residential dwelling); *G & L Invs.*, 1998 WL 553213, at *4 (finding heating system was a fixture because even though specially designed for the particular manufacturing use of woodworking, it could be used by all future users (even if not to its fullest capabilities)); *Cleveland Elec. Illuminating Co. v. Cont'l Express*, 733 N.E.2d 328 (Ohio Ct. Com. Pl. 1999) (finding for statute of limitation purposes that a light pole was a fixture because it improved the real property as well as the business on the real property).[20]

The Representative Assets located in Ohio include six assets located at GM Powertrain Defiance ("**Defiance**") and one press that was formerly located at Old GM's Metal Fabrication Division stamping facility in Mansfield, Ohio ("**Mansfield Stamping**"). The stamping press that was located at Mansfield Stamping clearly fails the adaptation prong under Ohio law because the

[20] Although some of these Ohio cases are applying the fixture test in the tax valuation context, Ohio courts uniformly apply the same fixture test for adaptation regardless of the context. *See, e.g.*, *In re Jarvis*, 310 B.R. at 336 (applying the standard from *Zangerle* to priority of competing claims context); *Gen. Elec. Co.*, 2001 WL 1647158, at *3 (applying the standard from *Zangerle*, a tax case, to statute of limitations context); *G & L Invs.*, 1998 WL 553213, at *3 (applying the standard from *Zangerle* and *Roseville Pottery* to contract context); *Pine Creek Farms*, 1997 WL 392767, at *3 (applying the standard from *Zangerle* to statute of limitations context). Although business fixtures have been codified under Ohio tax law as personal property, such a definition is consistent with Ohio courts' application of the three-factor test.

Mansfield Stamping was a large manufacturing building capable of being used for a variety of purposes and the stamping press benefitted GM's specific business operations, not the building more generally. *See Holland Furnace*, 19 N.E.2d at 275. Consistent with this application of Ohio law, the press from Mansfield Stamping was sold by Maynards Industrial in a private treaty sale separately from the realty, and the 2.5 million square foot Mansfield Stamping facility was later sold to a real estate development company to be turned into a modern multi-tenant facility.[21]

Defiance is no different than Mansfield Stamping, even though it is currently used by GM as a foundry. Under Ohio's broad test, the Representative Assets that are used in connection with the foundry operations primarily benefit GM's particular business, not the realty.

Although Defiance is described as a foundry generally, the evidence will show that the majority of equipment and machinery at Defiance is dedicated to GM-specific processes and could not be used by other foundry businesses.[22] Only the melt shop is specifically designed for use as part of a foundry, but because it constitutes less than 5% of the total Defiance facility, the melt shop does not change the character of the facility as a whole. Moreover, the melt shop only serves the iron casting process, one particular foundry technology; even if Defiance is treated as adapted to use as a foundry, it is not adapted to any one particular foundry technology. The assets must be analyzed in relation to a hypothetical company's use of a foundry, not Old GM's particular use and technology. *In re Jarvis*, 310 B.R. at 338 (defining the test in regard to a hypothetical purchaser).

[21] Although sold to a redeveloper, this stamping facility ended up being almost entirely demolished. Other stamping facilities, however, have in fact been sold and used by non-automotive industries.

[22] The Defendants also assert that the Representative Assets are highly customized to GM's processes. Regardless of whether the Defendants are right (and Plaintiff contests the extent of this customization), the Defendants' argument supports a finding of no adaptation under either Ohio or Michigan law.

The facts presented at trial will confirm that the Representative Assets at Defiance exclusively support iron foundry operations that are being phased out at Defiance, with one line already removed and replaced by an aluminum line. Unlike traditional factories and foundries that used one generic process that any hypothetical buyer of that facility could use, Defiance is a more flexible manufacturing facility that currently utilizes both iron and aluminum melting, with the former being phased out. *Cf. Whitaker-Glessner Co. v. Ohio Sav. Bank & Trust Co.*, 22 F.2d 773, 774 (6th Cir. 1927) (finding realty adapted to use of land as canning factory generally); *Brennan v. Whitaker*, 15 Ohio St. 446, 449 (1864) (finding, with little discussion, that realty adapted to use as saw mill generally).[23] Because the Representative Assets at Defiance benefit GM's specific business operating on the realty, not the realty itself even if the realty is defined in relation to a foundry, the Court should find that none of these assets meets the adaptation prong.

Because of Ohio's strict adaptation requirement, the lack of adaptation alone precludes a finding that the Representative Assets at Defiance and Mansfield Stamping are fixtures.

b. Michigan

Although adaptation is emphasized less under Michigan law, Michigan courts follow Ohio in defining adaptation in regard to the use of the realty, as opposed to the specific business located on it. In *McTevia v. Pullman (In re Mahon Indus. Corp.)*, 20 B.R. 836, 840 (Bankr. E.D. Mich. 1982), a federal court, applying the three-part fixture test under Michigan state law, held that overhead cranes were adapted to the realty because the cranes benefitted the building. Instead of defining the use of the building in relation to the particular industry of the current user

[23] In contrast, in *Smith v. Blake*, 55 N.W. 978, 979 (Mich. 1893), a Michigan not Ohio case, the Michigan Supreme Court found foundry equipment to be fixtures at a time when iron foundries were the only type of foundries that existed and no change in technology was anticipated.

(as urged by one of the parties), the court described the building generally as being "used and adapted for industrial and manufacturing purposes." *Id*. The court emphasized

> that the cranes were conveyed with the real estate each time the property was conveyed or leased. Specifically, each successive owner or tenant used the cranes and the building alike and as one integrated unit for manufacturing purposes. Without the cranes, the use of the building for those purposes would be considerably lessened.

Id. Critically, the court found that *any* user of the building would need the cranes to carry on a manufacturing process, regardless of the specifics of the process. *Id*. This determination that the asset was necessary to carry on any general manufacturing process led the court to conclude the asset was adapted to the realty, an important consideration in the court's fixture finding.

Similarly, in *Controls Group*, 2006 WL 1691346, the Michigan Court of Appeals defined the use of the building broadly when determining whether a printing press was a fixture. Although only the intent of the annexing party was at issue on appeal, one of the parties argued that intent to make permanent was shown because the printing press was uniquely adapted to printing, which was how the realty was currently being used. *Id*. In rejecting this argument, the court found that the building had "varied industrial or commercial uses" that were not necessarily related to printing. *Id*. The court specifically distinguished the printing presses at issue from the gas ranges in *Peninsular Stove Co. v. Young*, 226 N.W. 225, 226 (Mich. 1929), by finding that the gas ranges in *Peninsular Stove* were necessary for a building that could only be used as residential apartments. *Controls Grp.*, 2006 WL 1691346. Implicit in the holdings in *Mahon Industries* and *Controls Group* is the understanding that modern industrial and manufacturing buildings are not narrowly adapted to one use.

In other non-manufacturing contexts, which do not apply here, Michigan courts have more narrowly defined the use of the building in relation to a particular business. For example, in *Pal-O-Mar Bar, IV, Inc. v. Badger Mut. Ins. Co*., No. 310448, 2013 WL 6182640, at *2

(Mich. Ct. App. Nov. 26, 2013), the Michigan Court of Appeals found that a bar containing unique equipment for a bar was adapted for that purpose. In *Premonstratensian Fathers v. Badger Mut. Ins. Co.*, 175 N.W.2d 237, 241 (Wis. 1970), a retail grocery store with several large coolers for frozen food was found to be adapted for use as a grocery store. Similarly, in *Tuinier v. Charter Twp. of Bedford*, 599 N.W.2d 116, 120 (Mich. Ct. App. 1999), a commercial nursery with several large greenhouses was found to be adapted for use as a greenhouse.

These cases shed little light on how Michigan courts treat assets in the modern manufacturing context. In contrast to bars, grocery stores, or greenhouses, modern manufacturing facilities are typically very large structures that multiple industries can adapt for different manufacturing purposes. Often, the machinery and equipment in a large manufacturing facility is quite specific to the particular manufacturing business being carried on in the building at the time. Thus, upon the sale of such a manufacturing facility to a new owner, almost all of the process-specific machinery and equipment would be removed and new equipment installed to accommodate the new manufacturing process being located in the building.

Visioneering, a case emphasized by Defendants, highlights the error that occurs when Michigan courts have defined the use of realty too restrictively and in relation to a particular, narrow manufacturing purpose. In *Visioneering*, a case in which neither party contested the fixture designation, the court found that a milling machine was adapted to the use of the realty because it was used in the regular course of Visioneering's business as a manufacturer of parts for the automobile and aerospace industry. 166 F. Supp. 2d at 1180. Only a few years after the 2001 case, however, the evidence will show that Visioneering changed the focus of its business to more predominantly aerospace and required the removal and disposal of any machines not suited for this purpose. Accordingly, Visioneering removed and sold the milling machine at issue, despite the size of the asset and that it was cemented into the floor of the facility.

Moreover, the evidence will show that Visioneering moved its entire operations, along with the remaining machinery and equipment, to another larger facility. Despite the numerous holes left in the floor from removal of the large equipment, the evidence will show that Visioneering healed the floor of the building and is now looking to sell the empty building to another manufacturing company. These facts, which were not known to the *Visioneering* court because they happened after the decision, demonstrate that the realty in question was not limited to a specific manufacturing use in the automobile and aerospace industry. Consequently, the milling machine was not adapted to the use of the building as a manufacturing facility, but only to one particular manufacturing use of the realty. Had the *Visioneering* court defined the use of the building more generally, consistent with *Mahon Industries* and *Controls Group*, it would have found that the milling machine was not a fixture. Such a result better comports with what is now known about the removal of this milling machine and the realty's continued use as a manufacturing facility without it.

GM's Warren Transmission ("**Warren Transmission**"), Lansing Delta Township Assembly, and Lansing Regional Stamping plants are examples of how modern manufacturing buildings are not narrowly adapted to one particular business. For example, the evidence will show that Warren Transmission was originally built as a naval munitions plant for World War II, was later used by Ford Motor Company and then sold to Old GM to manufacture axles, and is currently being used by New GM as a transmission plant. The facts will make clear that other GM facilities were similarly repurposed from other manufacturing uses.

Similarly, the Court will hear evidence that the Lansing Regional Stamping facility is a regular high-bay manufacturing building that is common housing for heavy-duty manufacturing and industrial processes. The Stamping Plant was not customized to its content and was in fact built larger than required for the current presses being housed in it, as evidenced by the fact that

less than 30% of the high bay area is being used by the stamping presses. The evidence will further show that when Old GM has in the past closed similar stamping facilities, several of these facilities have been converted to non-automotive uses.

The Court will hear further evidence that the Lansing Delta Township Assembly plant consists of standard manufacturing buildings and that when Old GM closed similar assembly and powertrain facilities, they were often converted to use for other non-auto manufacturing purposes. Accordingly, all Representative Assets at Warren Transmission or Lansing Delta Township Assembly that do not benefit any general manufacturing and industrial use are not adapted to the realty.

The paint shop at the Lansing Delta Township Assembly plant should not be treated differently. As with the melt shop in Defiance discussed above, the paint shop makes up only a portion of the Lansing Delta Township Assembly plant as a whole. In *Tuinier*, the Michigan Court of Appeals found that the realty had been adapted to use as a commercial nursery in part because the business' greenhouses covered over 11.6 acres of the real estate. N.W.2d at 120. In contrast, here, where the paint shop constitutes only a fraction of the total Lansing Delta Township Assembly plant, the existence of the paint shop should not change the conclusion that the Lansing Delta Township Assembly plant was adapted for use as a general manufacturing and industrial building. For example, the evidence will show that the purchaser of GM's Assembly Plant in Moraine, Ohio, a glass manufacturing company, currently has plans to expand its operation into the paint shop as well. Consistent with this approach, when Old GM sold a manufacturing facility in Wilmington, Delaware to another auto manufacturer who was considering using the paint shop, the paint shop machinery and equipment was bargained for separately and listed on a bill of sale separate from the real estate. Accordingly, the

Representative Assets in the paint shop should not be considered adapted to the use of the realty unless they benefit manufacturing and industrial uses of the realty generally.[24]

3. Intent

An annexor's intent to attach an asset permanently is determined based on objective facts and manifestations of intent, not the subjective or "secret" intent of the annexor. *West Shore Servs.*, 2015 WL 4469666, at *2 ("The surrounding circumstances determine the intent of the party making the annexation, not the annexor's secret subjective intent."); *In re Joseph*, 450 B.R. 679, 694 (Bankr. E.D. Mich. 2011) (stating that as the annexing party conceded, "such statements by the [annexing party] of their subjective past intent are immaterial under Michigan law; they cannot be considered as evidence").

The Defendants plan to present testimony from former Old GM executives that Old GM intended for all fixed manufacturing assets to be installed permanently. But courts uniformly disregard or discount testimony from company executives that a company intended to keep certain equipment in place until the end of its useful life. For example, in *Controls Group*, 2006 WL 1691346, the party arguing that the printing press was a fixture claimed that the annexing company showed sufficient intent when a high-level executive of the annexing company stated in his deposition that the company intended for the printing presses to be permanent. The court disregarded this testimony as a subjective statement of intent and affirmed that "the intention which controls is that manifested by the objective, visible facts." *Id.* Instead, the Michigan Court of Appeals found contemporaneous agreements by the annexing company as actual

[24] *Mid-Ohio Mechanical, Inc. v. Carden Metal Fabricators, Inc.*, 862 N.E.2d 543 (Ohio Ct. App. 2006), is not at odds with this formulation. In *Mid-Ohio*, the court did not decide whether a paint line was a fixture, but rather in the mechanic's lien context, that certain work was performed in furtherance of "an improvement to a building or appurtenance thereto, a fixture, a bridge, or other structure, or to personal property." *Id*. at 546. In reaching its opinion, the court noted that it was interpreting the language broadly based on the legislative intent to liberally recognize mechanic's liens and a prior mechanic's lien case that also reached its conclusion without applying the three-part fixture test. *Id*. at 548-49.

objective indications that the annexing party did not intend to make the annexation permanent, regardless of this stated intent by a company executive. *Id.*; *see also Gen. Elec. Co.*, 2001 WL 1647158, at *3 (ignoring affidavit stating that it was General Electric's intent to use the contested assets until they wore out or became obsolete). Even in situations where courts appear to credit testimony of subjective intent, they do so only when objective intent factors prove the accuracy of the subjective testimony. *In re Johns-Manville Sales Corp.*, 88 F.2d 520, 521-22 (6th Cir. 1937) (crediting subjective testimony of company president because confirmed in mortgage agreement, insurance agreement, and physical attributes of assets).

The pivotal question in fixture analysis is whether the party intended the assets to become "accessions" to the realty thereby allowing the interest in the machinery to be merged with the interest in the realty, not whether the party intended to leave the asset physically in place. *Cont'l Cablevision*, 425 N.W.2d at 57 & n.13; *see also Controls Grp.*, 2006 WL 1691346 ("Accession requires more than bolting a piece of equipment to the floor to serve a particular purpose, whether permanently or indefinitely."). In other words, the key issue is whether objective facts indicate intent to make the items part of the realty, not whether removal would be cost-effective for the annexing party. Courts recognize that the test cannot be whether a company would like at the time of installation to keep the asset in service until the machine is obsolete or the plant ceases operation because "the same statement could be made about any piece of equipment." *Gen. Elec. Co.*, 2001 WL 1647158, at *3 (finding furnaces to be personal property even though without the furnaces the facility would be unable to fully function and its economic utility would be destroyed); *see also Michael Yundt Co. v. Nat'l Bank of Detroit (In re Voight-Pros't Brewing Co.)*, 115 F.2d 733, 735-36 (6th Cir. 1940) ("The contention that removal of the machinery would suspend operations of the brewery is immaterial in determining whether it has become a part of the freehold."); *Woodliff v. Citizens' Bldg. & Realty*, 215 N.W. 343, 344 (Mich. 1927) ("The fact

that the elevator was essential to the use of the apartment house would not give the defendants any right to appropriate it."). Ohio and Michigan courts not only reject expanding the fixture definition to all necessary manufacturing equipment in a manufacturing facility but also reject framing the intent question in relation to the particular business operations of the annexing party.

The following objective facts reveal Old GM's intent to treat most of the Representative Assets as personal property, not fixtures that are merged with the interest of the realty: (1) contemporaneous agreements, including leases, that show GM intended to keep assets as personal property; (2) GM's sale of similar assets as personal property on a bill of sale and separate from the realty; (3) GM's treatment of the Representative Assets as personal property for purposes of its tax filings; and (4) the movement of the Representative Assets, or similar assets.

a. Contemporaneous Agreements

In determining objective manifestations of intent, the most important consideration is the specific bargained-for relationship of the parties in regard to the assets and any contemporaneous agreements that address the intent of the parties. *See, e.g., In re Johns-Mansville Sales Corp.*, 88 F.2d at 521-22 (looking at the terms of the mortgage agreement and accounting entries in determining intent under Michigan law); *Whitaker-Glessner Co.*, 22 F.2d at 773-74 (looking at the terms of the mortgage in assessing intent under Ohio law); *In re Szerwinski*, 467 B.R. 893, 902 (B.A.P. 6th Cir. 2012) (stating "evidence of the parties' intent may be gleaned from agreements entered into by the parties"); *In re Joseph*, 450 B.R. at 695 (looking at the sales agreement to determine the parties intended to include the assets in the sale of the realty); *In re Jarvis*, 310 B.R. at 336 (stating how depending on the relationship between the parties there could be a different fixture determination); *Cont'l Cablevision of Mich., Inc.*, 425 N.W.2d at 58 (looking at service agreement and accounting and business practices to infer intent). Thus, it is

necessary to view the fixture classification question through the lens of the underlying Term Loan and Collateral Agreements between Old GM and JPMorgan.

The framework of the Term Loan, described by the parties thereto as an "M&E loan," shows the parties understood that fixtures made up only a small portion of this collateral. For example, the parties structured the Term Loan such that the filing of the Delaware Financing Statement was designed to perfect the Term Lenders' security interest. Although such a filing also perfected the Term Lenders' interest in the fixtures at the relevant plants, in order to ensure that the Term Lenders had a first-priority lien on the fixtures the Term Lenders also had to file a fixture filing in the county where the property was located. The Term Loan Agreement, however, only contemplated fixture filings for the 26 "Material Facilities," defined as facilities with collateral of at least $100 million—no fixture filings were required, or filed, with respect to the remaining facilities. Fisher Decl. Ex. J (Term Loan Agreement § 1.01 & Schedule 3.12).

Given that it would have been relatively easy and inexpensive for JPMorgan to arrange fixture filings with regard to all the other facilities containing assets securing the Term Loan, the absence of such a requirement suggests that the parties did not consider there to be much value in the fixtures, both on an absolute value basis and also relative to the value of the personal property securing the loan. In other words, if Defendants are correct as to their fixture definition, at least 75-80% of all machinery and equipment in a GM facility would be fixtures. Thus, a net book value of in excess of $100 Million is a high threshold for making a fixture filing because this could leave Defendants without a first-priority lien at plants with fixtures valued at $80 million. Second, despite the relative ease in arranging for a fixture filing, and despite the filing of the Delaware Financing Statement the day after the closing of the Term Loan, JPMorgan took almost four months to file all of the Fixture Filings, suggesting again that the parties did not consider the majority of value in the collateral to be in the fixtures. Although the fixture filings

protected the interest of the Term Lenders and not Old GM, the Term Loan and the Collateral Agreement reflect an understanding of both parties as to how Old GM's assets are appropriately categorized.

Moreover, accepting Defendants' own fixture classification theory that is premised in part on emphasizing lengthy and burdensome removal processes, in the event of a default on the $1.5 billion loan, the Term Lenders would have been unable to seize or sell almost all of the collateral securing the Term Loan. As such, the collateral value would be difficult to realize absent a forced sale of the real estate; it would be odd to have such collateral form the primary security for the loan. Relatedly, GM has demonstrated over time how it uses its assets in various financing arrangements and has an interest in keeping machinery and equipment separate from real estate to allow these transactions to continue. Under Defendants' broad approach to fixture classification, GM's efforts to obtain asset-based financing would be thwarted.

This expansive fixture position is also inconsistent with JPMorgan's decision to litigate for almost six years, including an appeal to the Second Circuit, the issue of whether the Delaware Financing Statement had been terminated. Having drafted the Term Loan and Collateral Agreements to reflect the actual understanding of the parties—that most of the collateral value was in personal property, not fixtures—the Court should not allow the Defendants to re-write GM's intent with regard to the classification of these assets after the fact. *See In re Joseph*, 450 B.R. at 694-95 (discounting assertions of intent made after asset classification in dispute); *see also Lord v. Detroit Sav. Bank*, 93 N.W. 1063, 1064 (Mich. 1903) ("A declaration on the part of its owner, not made at the time, but long afterwards, would clearly be inadmissible to prove the intent with which said annexation was made. Made, as it was in this case, after the foreclosure suit was commenced, it was a mere self-serving statement.").

The lease agreements entered into by Old GM in 2003, prior to the Term Loan Agreement, also demonstrate the parties' intent for the machinery and equipment to remain personal property. Old GM leased two of the very large presses that are Representative Assets (Asset IDs BUYR503469FA and BUYR503481FA) located in the Lansing Regional Stamping facility, along with the press feed, end-of-line ("**EOL**") systems (which include conveyor equipment), and, in the case of one of the presses, robots. Both leases had a provision, entitled "Equipment to Remain Personal Property," mandating that the leased assets "shall retain the character of personal property"; "shall be removable without causing material damage to the real property"; "shall not become part of any real property"; and shall not be affixed or installed "in such a manner as to cause or permit such Unit to become a fixture or subject to the rights of any Person having an interest in such real property." The court should find such explicit language dispositive as to intent for these Representative Assets. *See Booth v. Oliver*, 35 N.W. 793, 794 (Mich. 1888) (finding machinery remained personal property because the lease "expressly stipulated" that all machinery should remain as such); *cf. In re Joseph*, 450 B.R. at 690 (finding that when other parts of test are met, intent can be shown by an agreement to treat specific property as a fixture). Moreover, because the evidence will show that the leases further gave the lessor the right to remove the assets in the event of default, the lease precludes a finding that GM intended the asset to be a permanent part of the realty. *See In re Jarvis*, 310 B.R. at 336 (holding that leased hog farm buildings, set on sturdy concrete foundations and hooked-up to utilities, did not become part of the realty under Ohio law because, inter alia, the lease agreement specified that the buildings were personal property and provided for removal in the event of default); *In re Voight-Pros't Brewing Co.*, 115 F.2d at 735 (finding that language in agreement allowing for reclamation upon default prevents an asset from becoming a fixture); *see generally In re Hilling Lumber Co*, 355 B.R. 566, 571 (Bankr. N.D. W. Va. 2006) (citing cases from several states,

including Ohio, in which assets leased with a provision allowing for removal at end of term are treated as personal property).

Moreover, GM's leases indicate a broader intent on the part of GM that all press systems—and all machinery and equipment more generally—remain as personal property. First, the evidence will show that in addition to the two Leased Transfer Presses, the two leases covered nine additional presses and supporting equipment. These press systems, which include conveyors and robots, are comparable to other non-leased assets. Because there was no difference in how GM treated or attached leased assets as compared to non-leased assets, GM's agreement under the leases is equally indicative of intent as to comparable non-leased assets. Further, the evidence will show that of the fixed manufacturing line items from the Warren Transmission, Lansing Delta Township Assembly, Lansing Regional Stamping, and Defiance facilities, more than 4,500 line items are leased assets (excluding capital leases), encompassing many similar assets to those of the 40 Representative Assets. These additional agreements provide further support for a finding that GM considered and treated its machinery and equipment separate from the realty and valuable in its own right. *See Controls Grp.*, 2006 WL 1691346 (finding significant to intent determination that the value of the presses "is separate and apart from the building and they are sufficiently valuable to merit separate financing"). Finally, because the evidence will show that leased assets were expressly carved out of the Collateral Agreement and a memorandum of lease filed in the public real property records put JPMorgan on notice that the lease required GM to retain the presses as personal property, the Collateral Agreement was entered into against the backdrop of the lease agreements.

Ignoring these essential indicators of intent, the Defendants suggest the Court should instead view the case through the default presumption under Michigan law that attachment by an owner suggests an intent to make permanent. *See In re Mahon Indus. Corp.*, 20 B.R. at 839

(stating that it is the attachment of an owner that raises a presumption). For those assets that GM leases, not owns, the presumption on its face does not apply. The reasoning behind the presumption also does not apply because of the lease provision allowing for removal in the event of default, which precludes the finding of intent to make permanent and precludes a presumption of an intent to permanently annex. Because of the overlap between leased and non-leased assets, there would be different presumptions on otherwise identical assets. Regardless, because the facts show that GM did not intend to make these assets a permanent part of the realty, any presumption that might exist is overcome by more compelling objective facts about GM's intent with regard to the assets. *See, e.g.*, *Controls Grp.*, 2006 WL 1691346 (finding that printing presses were not fixtures even though installed by building owner's subsidiary company).

b. Bills of Sale

Contemporaneous evidence of how GM treated its machinery and equipment underscores the conclusion that GM intended for them to remain as personal property. For example, the evidence will show that for the two closed GM plants that were sold to auto-manufacturing companies, machinery and equipment were included on a separate bill of sale reserved for personal property. *Wireman v. Keneco Distrib., Inc.*, 661 N.E.2d 744, 747 (Ohio 1996) ("It is a long standing rule of law that when property is sold by bill of sale, the property is presumed to be personalty.") (*citing Fortman v. Geopper*, 14 Ohio St. 558 (1863)); *but see In re Szerwinski*, 467 B.R. at 904 (finding that transfer of asset by Bill of Sale did not "conclusively establish[]" that the asset was personal property). Moreover, the evidence will show that other than these two exceptions, GM has marketed its facilities as empty buildings having first sold the machinery and equipment, again indicating that GM treated its machinery and equipment as valuable assets apart from the realty.

c. Tax Treatment

The evidence will further show that GM treated the majority of its machinery and equipment as personal property in its tax filings. *See, e.g.*, *Pine Creek Farms*, 1997 WL 392767, at **3-4 (finding that annexing party's treatment of assets as personal property for tax purposes indicative of intent for the assets to remain as personal property); *Controls Grp.*, 2006 WL 1691346 (finding significant the treatment of asset as personal property on tax returns). Of the 40 Representative Assets, GM only treated the ELPO Process Waste Lines (Asset ID 100037892), Pits and Trenches (Asset ID 100017544), and the Central Utilities Complex (Asset ID 100045909) as real property.[25] These classifications by GM are of particular significance here because GM's accounting group functionally weighed key considerations of the three-part fixture test for purposes of its tax classifications, including GM's intent to make permanent. Finally, the evidence will show that GM had a tax incentive in Michigan and Ohio to keep its machines and equipment as personal property, which at least one court has found significant when determining objective factors of intent. *Pine Creek Farms*, 1997 WL 392767, at *3. GM's treatment of these assets as personal property in numerous financial and tax contexts indicates a consistent GM intent over time to keep the majority of its machinery and equipment as personal property.[26]

d. Movement of the Asset or Similar Assets

Both Ohio and Michigan recognize that movement of assets can indicate a lack of intent to make annexation permanent. *Controls Grp.*, 2006 WL 1691346 (finding "the fact that

[25] As of 2009, Ohio did not require separate personal property tax filings but the evidence will show that GM nonetheless classified all of its fixed assets.

[26] This demonstrated intent by GM is another way this case differs so widely from *Visioneering*, a case Defendants relied heavily on in their opening fixture brief. The federal *Visioneering* court was presented with no evidence of financing agreements, mortgage arrangements, leases, or tax treatment. 166 F. Supp. 2d at 1179-80. Without any other indications of intent, it makes sense that the court relied heavily on the physical attributes of the asset and its

[annexor] purchased these presses from a similarly situated user of the equipment, had them moved to Michigan and installed" contradicted the argument that annexor intended to permanently attach the presses); *Litton Sys.*, 728 N.E.2d 389, 392 (finding it relevant that the annexor had "removed some [of the contested] equipment from a New Jersey facility and installed it in the [building]"). For example, in the case of mobile homes, one court, confronted only with indications of the ways in which a mobile home was attached, found the mobile home was a fixture, *Ottaco, Inc. v. Gauze*, 574 N.W.2d 393, 396 (Mich. App. Ct. 1998), whereas a second court found a mobile home was not permanent in large part because the owner had removed the mobile home promptly after purchase, *Hurley v. Deutsche Bank Trust Co.*, No. 07-11924, 2008 WL 373426, at *7 (E.D. Mich. Feb. 12, 2008).

The evidence will show the multiple ways in which GM moved its equipment. First, the evidence will show that several of the Representative Assets themselves were moved, both between and within GM facilities, and that GM moved machinery and equipment similar to the Representative Assets.[27] For example, when engine or transmission technology changed, GM often removed the old production line, healed the floor, and installed all new machinery. The evidence will show that similar changes occurred dozens of times over the last 40 years. Such a wholesale removal and change is much different than replacing one obsolete piece of equipment. In determining fixture status, Michigan and Ohio courts rely on evidence of movement and find that actual movement indicates lack of intent to make permanent. *See e.g., Controls Grp.*, 2006 WL 1691346 (finding evidence that company purchased used press out of state and then moved it into Michigan suggests no intent to permanently annex); *cf. Tuinier*, 99 N.W.2d at 120 (finding

role in the annexor's business, the only evidence before the court. *Id*. Nothing in *Visioneering* suggests, however, that where such indicators are present, a court should ignore such strong evidence of intent.

[27] New GM provided the parties only 6 years of asset movement data. Had GM provided more data, there would presumably be even more evidence of GM's movement of assts.

possibility to disassemble and move greenhouses, without evidence of any actual movement, did not counteract other evidence of intent to make permanent).

Second, as referenced above, the evidence will show that when GM plants closed, machinery and equipment was often removed for use in a different GM operating facility or to be sold at auction. Additionally, even within GM plants that remained in continuous operation, there are numerous examples of specific manufacturing assets that were removed and entire manufacturing lines that were changed over to make new products. Such asset movement again indicates that movement is possible and GM considered the machinery and equipment as separate from the realty and not something to be left behind with the realty. *See Controls Grp., Inc.*, 2006 WL 1691346 (finding it significant that if the annexor moved, the annexor would not have left the press behind with the realty because there was too much money invested in the press). Although Defendants suggest that these plant closures and other instances of asset removal were extraordinary events reflecting the unprecedented economic climate in the late 2000s, the evidence will show numerous examples in which GM has moved assets and closed plants. Such consistent action, taken over a period of years and well before the litigation in this case, was not extraordinary. Rather, it is evidence of industry-wide shifts that required automotive manufacturers to ensure that their assets could be handled nimbly to meet the constant, rapid changes in the automotive marketplace.

Third, the evidence will show that apart from GM, a secondary market existed for many of the Representative Assets. Evidence of a secondary market again suggests that movement is possible and that the industry places a separate worth on the equipment apart from the realty. *Controls Grp.*, 2006 WL 1691346 (finding the physical size and weight of the presses less significant because they were nonetheless "movable, saleable equipment"); *see also All City Commc'n Co., Inc. v. State Dep't of Revenue*, 661 N.W.2d 845, 853 (Wis. Ct. App. 2003)

(finding that a 480-foot-tall broadcast tower was not a fixture because "a market existed for the sale and purchase of used towers, and that the tower could be disassembled and reassembled at another site"); *In re Whitlock Ave.*, 16 N.E.2d 281, 282 (N.Y. 1938) (finding that silk ribbon factory machinery was not a fixture in part because there was a secondary market for it). Although, like every factor in this case-by-case determination, an asset's ability to move is not determinative of fixture classification if other indications of intent are present, *see, e.g.*, *Williams v. Grand Ledge High Sch.*, No. 321261, 2015 WL 3980517, at *4 (Mich. Ct. App. June 30, 2015) (finding in the context of the public building-exception to government immunity that choir risers were fixtures even though they had been moved occasionally within the choir room based on other indicators of intent), this ability to move an asset confirms GM's intention to retain the majority of Representative Assets as personal property.

Ultimately, because the weighing of these objective facts is an asset specific inquiry, the following Sections III.C-III.G contains a summary of the most salient, asset-specific facts regarding each of the Representative Assets.

C. Asset-Specific Analysis of Objective Facts Relating to Intent

1. Representative Assets at the Lansing Regional Stamping Plant

There are a total of four Representative Assets located at the Lansing Regional Stamping facility: three presses and a robotic measuring system.

As an initial matter, Defendants have admitted that two of these Representative Assets are not collateral supporting their claim. As discussed below, two of the press Representative Assets are subject to lease agreements that specifically provide that a) the presses and related equipment are to remain personal property; b) the presses and related equipment will be removed in the event of default; and c) the granting of a lien on these assets by anyone other than the lessor constitutes a default. Although it is agreed that these Representative Assets are not

collateral supporting the Term Loan, the parties have agreed that the Court would nonetheless reach classification as to these assets. Adv. Pro. Dkt. No. 805 ¶ 2.C.

For the reasons discussed herein, the evidence will not support a finding that GM intended for these four assets to become a permanent part of the realty at Lansing Regional Stamping.

a. Leased Transfer Presses (Representative Asset Nos. 32 & 33)

The 2003-A Leased Schuler Transfer Press (Asset ID BUYR503469FA) (Representative Asset No. 32) and the 2003 C-1 Leased B3-5 Transfer Press (Asset ID BUYR503481FA) (Representative Asset No. 33) are both used as part of GM's manufacturing process to convert sheets of metal into various components of the car body using stamping dies. *See* Asset Appendix, Tabs 32 and 33.[28] The presses are large and heavy: the 2003-A Leased Schuler Transfer Press is an "AA" size press, GM's largest press category, weighing more than six million pounds; and the 2003 C-1 Leased B3-5 Transfer Press is a "B" size press, which is GM's third largest press size, and likely the second heaviest piece of equipment at the Lansing Regional Stamping plant, weighing between 4 and 5 million pounds. Both presses are transfer presses, meaning that the presses utilize a transfer system to move the pieces of sheet metal through the five stations within the press systems. Each of the five stations is assembled from the following components: press bed and rolling bolsters (which hold the dies), four uprights, the slide, and the crown. In addition, the presses are housed in a noise reduction enclosure that has roll-up doors to allow the rolling bolsters to be moved in and out of the press when the dies are

[28] All references herein to the Asset Appendix are to Plaintiff's Representative Assets Appendix (the "**Asset Appendix**"), which has been submitted herewith as a separately bound document. The Appendix includes a separate tab for each of the 40 Representative Assets, which includes a description and photographs of the asset. The tab numbers for each asset correspond to the Representative Asset numbers, as set forth on the *Joint Notice of Selection of 40 Representative Assets* (Adv. Pro. Dkt. No. 644).

changed. There is additional equipment in the press basement, such as hydraulic power units and electrical distribution cabinets. In addition, each press uses a feed system to lift the steel sheet metal blanks that have been stacked on a pallet and position them, one at a time, into the first press station, and an EOL system to remove stamped parts from the press and load them into racks for transport to the Lansing Delta Township body shop or to other regional GM plants.[29]

The facts to be proven at trial, taken together, do not evidence GM's intention to make the Leased Transfer Presses a permanent part of the realty. Although not an exhaustive list, following are some of the salient facts that are indicative of GM's intent at the time the presses were installed: First, that each press, along with the press feed and EOL systems, is subject to a lease that contains the following language manifesting GM's intention to treat the Leased Transfer Presses as personal property:

> SECTION 24. Equipment to Remain Personal Property. The Lessee and the Lessor agree that the Equipment, each Unit and every Part thereof are severed from, and shall remain severed from, any real property and are readily moveable, and, even if physically attached to such property, it is the intention of the Lessee and the Lessor that the Equipment, each Unit and every Part thereof (i) shall retain the character of personal property, (ii) shall be removable without causing material damage to the real property, (iii) shall be treated as personal property with respect to the rights of all Persons whomsoever, (iv) shall not become part of any real property, and (v) by virtue of its nature as personal property, shall not be affected in any way by any instrument dealing with any real property. The Lessee shall not, without the prior written consent of the Lessor and, until the Lien of the Indenture shall have been discharged in accordance with its terms, the Indenture Trustee, and subject to such conditions as the Lessor and, until the Lien of the Indenture shall have been discharged in accordance with its terms, the Indenture Trustee may impose for their protection, affix or install any Unit to or in any real property in such a manner as to cause or permit such Unit to become a fixture or subject to the rights of any Person having an interest in such real property.

[29] For the 2003-A Leased Schuler Transfer Press, the feed and EOL systems were capitalized separately by New GM under separate Asset ID numbers (BUYR403470FA and BUYR503471FA, respectively), whereas such systems are included in the same Asset ID for the 2003 C-1 Leased B3-5 Transfer Press. Fisher Decl. Ex. C (2003-A Lease Agreement, Lease Supplement Schedule 1 (NEWGM000041297)) & Ex. B (2003 C-1 Lease Agreement, Lease Supplement Schedule 1 (NEWGM000041389)). The feed and EOL systems subject to the lease are similar to certain conveyance systems and robots that are Representative Assets.

Fisher Decl. Ex. C (2003-A Lease Agreement § 24) & Ex. B (2003 C-1 Lease Agreement § 24). Notably, the section of the leases requiring the Leased Transfer Presses to remain personal property survives the expiration or termination of the lease. Fisher Decl. Ex. C (2003-A Lease Agreement § 25(b)) & Ex. B (2003 C-1 Lease Agreement § 25(b)). Where, as here, there was an agreement from at or around the time of installation that legally obligated GM to treat the Leased Transfer Presses as personal property, such agreement is a critical factor in determining that GM did not intend to treat the asset as a fixture. *See, e.g.*, *In re Jarvis*, 310 B.R. at 336; *Schellenberg v. Detroit Heating & Lighting Co.*, 130 Mich. 439 (1902) (finding statements in title contract that heating boiler was intended to remain as personal property trumped the benefit the boiler gave to the building); *In re Mahon Industrial Corp.*, 20 B.R. 836, 837-38 (Bankr. E.D. Mich. 1982) (finding significant an agreement by annexor that the overhead crane was a fixture).[30]

Second, although the Leased Transfer Presses would both require significant work to remove, experienced millwrights could dismantle the presses, and the presses could be shipped elsewhere, reassembled, and used again. That presses of this size are in fact moved is evidenced by GM's movement of at least 14 similar press systems for re-use at other facilities, including GM's movement of two AA presses from its Doraville, Georgia assembly plant to its Lordstown, Ohio plant in 2008, and, following the closing of the Grand Rapids and Mansfield, Ohio stamping plants in 2009, the movement of other AA and B-3 transfer presses for reuse at other GM locations. Further evidence of movement is found in how presses such as the Leased Transfer Presses are assembled and tested before delivery, so even new presses have already

[30] It does not matter that the leases appear to have been signed slightly after installation of the presses. Although there are few facts about the lease negotiation process leading up to the signing, the lease was undoubtedly planned well before the actual signing of it. Moreover, the terms of the lease effectively eliminate any significance to the delay: GM could not sign an agreement agreeing to keep the asset as personal property and to not permanently affix the asset had it already done so.

been installed, disassembled, transported, and moved. Finally, there is a secondary market for presses of this size, notwithstanding the relative difficulty of removal and shipment. *Controls Grp.*, 2006 WL 1691346 ("The presses are moveable, saleable equipment, and their large size and significant weight do not necessarily categorize them as fixtures.").

Finally, as with all of the machinery and equipment installed in pits, the pits for the Leased Transfer Presses are themselves separate assets, and in fact eight of them make up one of the Representative Assets in this case (Asset ID 100017544). Because the Leased Transfer Presses sit in pits, they are not cemented into the building and are thus distinguishable from cases in which assets cemented into the building floor are considered fixtures. *See, e.g.*, *Visioneering*, 166 F. Supp. 2d 1172.

b. Danly Tryout Press (Representative Asset No. 31)

The third Representative Asset press located at the Lansing Regional Stamping facility is a Danly 4,000 ton straight side press (the "**Danly Tryout Press**"), which is used to tryout dies at the facility. Asset Appendix, Tab 31. The uniquely large press tonnage (4,000 tons) allows the Danly Tryout Press to test dies for the first press section of the AA presses used at the Lansing Regional Stamping facility. The Danly Tryout Press, similar to the 2003 C-1 Leased B3-5 Transfer Press, is a "B" size press and is installed in a pit (or basement), with the four corners of the press bed supported by, and attached to, concrete piers rising from the floor of the basement. As with the Leased Transfer Presses, the pit and foundation work are treated as a separate asset with a unique Asset ID; the Danly Tryout Press is not itself cemented into the building's floor. The Danly Tryout Press also has a floor-level deck that fills in the opening around the press and pit walls, which is supported by two press beams in the press basement that are mounted on the same piers and steel plates used to support the press bed. Similar to the Leased Transfer Presses,

there is additional equipment in the basement, including a transformer, die cushion tanks and electrical control cabinets, all of which are attached to the floor with lag bolts.

The facts to be proven at trial, taken together, do not evidence GM's intention to make the Danly Tryout Press a permanent part of the realty. This particular press was originally manufactured in 1979 and placed in service in GM's Metal Fabrication Division facility in Indianapolis in 1980. In order to maximize the press's return and use, GM moved the press to the Lansing Regional Stamping plant when it opened in 2003, despite the cost of removal from Indianapolis, the need to transport the press over 250 miles, and the effort involved in reinstalling the press at the Lansing Regional Stamping facility. *See, e.g.*, *Controls Grp.*, 2006 WL 1691346 (the fact that defendant purchased presses from a similarly situated user of the equipment, had them moved to Michigan and installed in defendant's building contradicts the argument that defendant intended to make a permanent attachment). In addition, although the tonnage of the Danly Tryout Press is somewhat unique, there is a secondary market for similar Danly presses with smaller tonnages illustrating the movement of similar presses.

Further evidencing GM's treatment of its presses, including the Danly Tryout Press, as personal property, is the language in the leases discussed above relating to the Leased Transfer Presses. The same two leases relate to a total of eleven presses, including two "tryout cells," consisting of two presses per cell, providing strong evidence that GM considered this category of assets to be personal property.

c. OptiCell Measuring System (Representative Asset No. 10)

Asset ID 100041920 is a robotic three-dimensional measuring system (the "**OptiCell Measuring System**") that uses white light scanning technology to check the accuracy of stamped metal panels for quality assurance purposes. Asset Appendix, Tab 10. The components of the OptiCell Measuring System include: a six-axis robot mounted on a slide system with a light scanner mounted on the end of the robot's arm, a control system, and a hydraulic/pneumatic lift to move the sample part into place.

The following objective facts to be proven at trial illustrate that GM did not intend to make the OptiCell Measuring System a permanent part of the realty. First, the evidence will show that this exact asset has already been relocated within the Lansing Regional Stamping facility and more generally, that GM has moved approximately 20 similar assets between its various facilities. The evidence of the movement of similar assets is consistent with an article published by Wards Auto in 2006 that describes how GM initially used die measuring systems such as the OptiCell exclusively in die shops but as dies moved to vehicle assembly plants, these measuring systems (like the OptiCell Measuring System) also moved. Fisher Decl. Ex. H ("GM Buying into Tesco Measurement Cell").

In addition, the various components of the OptiCell Measuring System are assembled or attached with nut and bolt fasteners, quick disconnect cable fittings, and flexible loose wiring in cable trays that allow for simple installation, removal, and relocation. Such moveability is reflected in a robust secondary market for the floor-mounted robot that is part of the OptiCell Measuring System. Indeed, the OptiCell Measuring System is an example of one of the smallest and most portable Representative Asset.

Finally, the EOL system for the 2003-A Leased Schuler Transfer Press (discussed above at Section III.C.1.a), which is the subject of the same lease as the 2003-A Leased Schuler

Transfer Press, contains two floor-mounted robots that are similar to the robot that is part of the OptiCell Measuring System. Accordingly, the language in the leases requiring the robots that are part of the EOL system to remain personal property, Fisher Decl. Ex. C (2003-A Lease Agreement § 6), is equally applicable to the robot in the OptiCell Measuring System.

2. Representative Assets at the Lansing Delta Township Assembly Plant

There are a total of 16 Representative Assets located at the Lansing Delta Township Assembly plant: six in the general assembly building; five in the body shop; and five in the paint shop. As discussed more fully below, Plaintiff agrees that two of the 16 assets at the Lansing Delta Township Assembly plant are fixtures. The evidence at trial will show that the remaining 14 assets at this plant are not fixtures because, *inter alia*, the objective facts do not support a finding that GM intended for these assets to become a permanent part of the realty.

a. General Assembly Building

(1) Pits and Trenches (Representative Asset No. 2)

Plaintiff and Defendants agree that the pits and trenches in the general assembly building (Asset ID 100017544) (the "**Pits and Trenches**") are fixtures. Asset Appendix, Tab 2. Based on documents and information provided by New GM, the particular pits and trenches capitalized in this asset include those constructed for three different conveyance systems, including the final assembly line skillet conveyor, a separate Representative Asset that will be discussed below. The Pits and Trenches, generally speaking, are voids in the floor that allow for equipment installation below floor level and/or facilitate fluid collection and drainage through a trench. The asset is constructed by excavating a particular area, building forms in the shape required for the pit, and then pouring a concrete structure. Because the Pits and Trenches are physically integrated into the building floor system in a way that does not allow them to operate or remain intact when separated from the building, when the Pits and Trenches are no longer necessary

they are left in the ground and either fenced-off or filled with rubble and paved over at the surrounding floor level. Any attempt to "remove" the pit would result in significant damage to the building floor. Cementing the asset directly into the building eliminates all ability to remove the asset and is the type of permanent method of attachment that courts find indicative of intent to permanently annex. *See, e.g., Mich. Nat'l Bank, Lansing*, 293 N.W.2d at 627-28 (bank equipment cemented directly into the wall are fixtures). Accordingly, the objective facts indicate that GM intended for the Pits and Trenches to become a permanent part of the general assembly building.

(2) Paint Mix Room (Representative Asset No. 8)

Asset ID 100038035 is a small, self-contained paint mixing room (the "**Paint Mix Room**") located in the general assembly building and used to mix small quantities of paint for minor paint repairs to vehicles at the end of the final assembly line. Asset Appendix, Tab 8. The Paint Mix Room is a freestanding structure constructed of galvanized steel panels fastened together with nuts and bolts and attached to the floor with lag bolts. There are various utilities connected to the Paint Mix Room (compressed air, sprinkler water for fire suppression, ventilation ducting, and electrical wiring), all of which are connected in a way that allows for easy detachment. The evidence will show that GM previously relocated one similar paint mix room (notably, the relocated paint room was significantly larger that the Representative Asset). The evidence will also show that the Paint Mix Room's small footprint, allowing for simple de-installation and relocation, indicates that GM installed this asset to retain portability (i.e., relocation within the assembly area due to production line reconfiguration)—not for permanent installation. Permanent paint mix rooms, in contrast to the "portable" Paint Mix Room, are designed with walls and ventilation systems integrated into the building structure. Accordingly, Plaintiff acknowledges that permanent paint mix rooms are not personal property.

(3) Wheel Assembly Machine (Representative Asset No. 15)

Asset ID 100060623 is a tire and wheel assembly machine (the "**Wheel Assembly Machine**"), including soaping stations, which lubricate the wheels and tires; two tire mounting stations; two inflation stations; a control panel; and a conveyor system, which moves the wheels between each station. Asset Appendix, Tab 15. The various stations that comprise this asset are attached to the floor with lag bolts, and many of the stations were designed with lift points on the top portion of each station to facilitate relocation. The utilities and data connections to the components of the Wheel Assembly Machine allow for quick disconnection and easy reconfiguration. The conveyor system has been assembled from two to four-foot-long sections that are connected to each other, and to the various stations, with Allen bolts. Similar to the stations, the conveyor system mounts are attached to the floor with lag bolts.

The Wheel Assembly Machine was patented in 2006, and the summary of invention describes the Wheel Assembly Machine as comprised of modules that are "removably connected to one another" and states that:

> One of the advantages of the present invention is that the length of the assembly line can be changed as desired by adding or removing modules. The modules are interconnected with bolts or any other removable fastener. The modules are interchangeable and can be moved from one position along the assembly line to another position along the assembly line.

Fisher Decl. Ex. I (United States Patent: 7,082,677 B2–Assembly line for mounted units).

Thus, GM's decision to purchase and install this particular Wheel Assembly Machine, specifically designed for ease of relocation, removal, and use of interchangeable modules, evidences GM's intention for this asset to be reconfigured to meet the evolving demands of GM's manufacturing process and layout—not to remain permanently in place. Corroborative of this fact, GM has previously relocated three similar assets for reuse at other GM facilities and there is a secondary market for similar assets.

(4) Vertical Adjusting Carriers (Representative Asset No. 18)

Asset ID 100062269 consists of vertical adjusting carriers used to transport automobile bodies through the assembly process (the "**Vertical Adjusting Carriers**"). Asset Appendix, Tab 18. Each of the 87 carriers is powered by a trolley with wheels that ride on top of a monorail track, but the track itself and the switches for the carriers are treated as separate assets by New GM. The track is connected to white steel that, in turn, is connected to the building. The actual Vertical Adjusting Carriers, however, have no physical points of attachment to the realty; they are moving pieces of equipment, regularly travelling hundreds of feet along monorail track. Electric power that drives the trolleys comes from an electric busbar system attached to the side of the monorail track (similar to how a bridge crane works)—thus, there is not even electric or other utility connections attached to the Vertical Adjusting Carriers.

Because the Vertical Adjusting Carriers are moveable pieces of equipment with no physical attachment to the realty, or connection to utilities, removal of the carriers could be accomplished relatively easily by removing a rail section and rolling the carrier off the rail. Installation onto another rail would be similarly straightforward. In addition, GM has previously relocated a conveyance system with some of the same characteristics as the Vertical Adjusting Carrier system.

Further, although each carrier is a substantial piece of equipment, weighing approximately 8,800 pounds and measuring more than 21 feet in length, the Vertical Adjusting Carriers are not constructively attached to the realty. Unlike the cranes that were the subject of *In re Mahon Indus. Corp.*, 20 B.R. 836 (Bankr. E.D. Mich. 1982), and rested on rails that were attached to the building and which the parties conceded were fixtures, the rails on which the Vertical Adjusting Carriers travel are also not attached to the realty. Instead, the Vertical

Adjusting Carriers travel on rails that are attached to white steel that is, in turn, attached to the building's structural steel; there is no support for finding an object with two-degrees of removal to be nonetheless annexed to the building.

Further, in finding the overhead to be a fixture, the court in *In re Mahon Industries* emphasized the necessity of the crane to the use of a building as a manufacturing facility and emphasized that the crane "has no peculiar adaptation" to a particular business. *Id.* at 839-40. In contrast, the Vertical Adjusting Carriers are specifically designed to transport automobile bodies of a certain specified size and on a certain specified path through various substations within the general assembly building. The Carriers are so specific that if GM itself changed the body size of the automobile it produced at Lansing, GM would have to remove the Vertical Adjusting Carriers and install other carriers with a larger body size; even if the conveyance system and rails remained during such a change, the Vertical Adjusting Carriers, a separate asset, would nonetheless be fully removed and replaced with different carriers.

(5) The General Assembly Conveyance Systems (Representative Asset Nos. 20 & 21)

There are a total of eight conveyance systems included in the Representative Assets, four of which are in the general assembly building.[31] The other four conveyors are located at Defiance and Warren Transmission and are discussed in relation to those facilities. To illustrate the differences between all eight systems, however, attached as Exhibit S to the Fisher Declaration is a chart comparing the conveyance systems to each other and placing the conveyance systems on a spectrum from easiest to remove to most difficult. Regardless of the

[31] There are other assets that either include part of a conveyance system (e.g., the Leak Test System, Asset ID 100053677)) or are related to a conveyance system (the Vertical Adjusting Carriers, Asset ID 100062269). These assets are discussed separately and are not included in the conveyor system chart.

difficulty of removal, however, the evidence at trial will show that GM did not intend to make any of the conveyance systems a permanent part of the realty.

Two of the conveyance systems are in the general assembly area of the Lansing Delta Township Assembly plant. One system is the wheel and tire delivery conveyor (Asset ID 100065640) (Representative Asset No. 20) (the "**Wheel and Tire Delivery Conveyor**"), used to transport the tire and wheel assemblies to the final assembly line, and the other is a skillet conveyor system (Asset ID 100066809) (Representative Asset No. 21) (the "**Skillet Conveyor System**"), used to transport vehicles through the final assembly process.

The Wheel and Tire Delivery Conveyor consists of several types of conveyors, a mezzanine "catwalk" system, and a control cabinet. Asset Appendix, Tab 20. The conveyance system, which is approximately 400 liner feet in length, is made up of an inclined belt section that rises from the floor level to a mezzanine 12.5 feet overhead, a powered roller conveyor at the mezzanine level, and two spiral conveyors/silos, which bring the wheels back down to floor level.

Although long, the Wheel and Tire Delivery Conveyor is comprised of shorter sections (most of which are 20 feet in length) and is attached together and to the building primarily with bolts. The conveyance system is attached to the floor in various places with lag bolts, and certain sections of the conveyance system are attached to the mezzanine structure with small tack welds that are relatively easy to remove. The mezzanine structure, which has been fabricated in sections, is supported from the roof trusses in the same manner as other GM overhead conveyors—using vertical members attached to the trusses by clips. Utilities are connected to the Wheel and Tire Delivery Conveyor at several locations using quick disconnect fittings. GM has moved similar assets in the past, confirming that removal is in fact possible.

In addition, the inclined belt section of the Wheel and Tire Delivery Conveyor is similar to the EOL systems for the Leased Transfer Presses (discussed above in Section III.C.1.a) that are the subject of the same leases as the Transfer Presses and require that the EOL remain as personal property. Accordingly, the leases are instructive in that GM intended equipment similar to certain components of the Wheel and Tire Delivery Conveyor to be treated as personal property, and not a fixture. Although one of the larger conveyor systems, the objective facts will show that GM did not intend to make the conveyor system part of the realty.

The Skillet Conveyor System is a conveyor that uses a specialized vehicle assembly platform called a "skillet," which is large enough to hold a vehicle body and have excess space for workers to stand on and perform work on the vehicle as it moves along the assembly line. Asset Appendix, Tab 21. The skillets have a built-in scissor lift (which looks like an accordion) that can raise or lower the vehicle, as needed, to perform a task at a given workstation (e.g., if a part needs to be added to the bottom of the vehicle, the lift is raised so the worker doesn't have to bend down to attach the part). The Skillet Conveyor System consists of approximately 500 linear feet of conveyor track, 18 freestanding drive rollers used to propel the skillets along the assembly line, and a control panel. The Skillet Conveyor System is installed in a pit that is part of a separate Representative Asset (the Pits and Trenches, Asset ID 100017544, discussed above in Section III.C.2.a.1), and which the parties agree is a fixture.

Other than being mounted inside of a shallow pit, the Skillet Conveyor System is the most lightly attached and easiest to remove of the eight conveyance systems. The track rails that make up the Skillet Conveyor System are assembled from 20 foot sections that are bolted together and supported by leveling feet, which are attached to the floor with lag bolts. The drive rollers and the control panel are also attached to the floor with lag bolts and the control panel has two top-mounted eye bolts designed as lift points to assist with moving the unit. Finally, the

connection to the utilities primarily uses quick disconnect fittings (essentially an industrial electric plug) for easy separation. GM has previously moved two skillet systems from its Spring Hill facility to its Orion Assembly facility, further evidencing that assets like the Skillet Conveyor System can be, and sometimes are, removed and reused. Defendants' effort to consider the pit that would remain after removal of the Skillet Conveyor System to be damage disregards GM's treatment of the pit as a separate asset (which Defendants value at $2,285,000) and ignores the fact that Defendants themselves consider the pit to be a separate asset that is part of their collateral (not building damage).

The objective facts to be proven at trial, including the sectional fabrication of the conveying equipment and the methods of attachment, which allow for removal of the asset without damage to the building or the equipment itself, do not support a finding that GM intended to permanently install the Wheel and Tire Delivery Conveyor or the Skillet Conveyor System. This is further supported by GM's classification of these assets as personal property on its tax returns, and its movement of similar assets.

b. Body Shop

(1) Body Shop Conveyance Systems (Representative Asset Nos. 16 & 17)

Two conveyance systems are located in the Body Shop: Asset ID 100061614 (Representative Asset No. 17) (the "**BS P&F Conveyor**"), and Asset ID 100061079 (Representative Asset No. 16) (the "**BS Skid Conveyor**"). Both of these conveyors are located above the body shop floor and include a mezzanine structure that, similar to almost all of GM's overhead equipment, is suspended by steel members that are attached to the building trusses by removable clips. Similar to other GM conveyors, the sections of conveyor track for both the BS

P&F Conveyor and the BS Skid Conveyor are connected to each other with nut and bolt fasteners.

The BS P& F Conveyor, used to transport left side inner body subassemblies to the body framer, has dual tracks in a stacked configuration, with the tracks suspended above the main floor of the body shop, and connected with bolts to steel members that are suspended from the roof trusses. Asset Appendix, Tab 17. The BS P&F Conveyor consists of over 2,000 linear feet of overhead conveyor track, a positioner unit, two chain drive units, two chain take-ups, trolley/load bar units, control cabinets, and access platforms and mezzanines. The mezzanine structure for the BS P&F Conveyor is suspended below the conveyor track to provide access for maintenance and to hold some of the equipment (control panels, chain drives, etc.). The majority of the mezzanine for the BS P&F Conveyor has a heavy welded wire grating floor, but the areas surrounding the equipment have a solid steel floor over heavier framing to which the equipment is attached with bolts.

The BS Skid Conveyor, designed to transport skids carrying body-in-white structures from the re-spot welding zone to the main body shop assembly line, consists of over 1,000 linear feet of powered roller-bed conveyor track. Asset Appendix, Tab 16. The BS Skid Conveyor is mounted on the mezzanine structure and is made up of modular roller bed sections, the majority of which have legs that are bolted directly to the mezzanine. The skids that are transported by the BS Skid Conveyor have been separately capitalized by GM under Asset ID 100061605, and the Defendants agree that the skids are not fixtures. The skids rest on the rolls, and as the rolls turn, the skid moves forward. Each modular section has its own roller drive motor and, with the exception of ground wiring and cable ducts, the modules are not connected to adjacent modules. This design allows for relatively easy disassembly and replacement or reconfiguration of the conveyor sections if required. The power distribution panel and the control panel are attached to

the mezzanine floor with bolts. Electrical power is supplied to the power distribution panel by loose cabling, and the power distribution panel then feeds power and data to the conveyor by loose cabling contained in reconfigurable metal cable trays running underneath the conveyor. The modular nature and removeability of the asset is highlighted in the fact that GM has moved conveyors similar to the BS Skid Conveyor.

Similar to the conveyance systems in the general assembly area discussed above, the BS P&F Conveyor and the Skid Conveying System are also of a modular nature, with sectional fabrication of various components, and are attached in a way that permits the assets to be removed without damage to the building or the equipment itself. The objective facts, taken together, do not support a finding that GM intended to permanently install the BS P&F Conveyor and the Skid Conveying System. Similarly, in *Litton Systems*, the court held that conveyors that were bolted to hangers and headers, which were, in turn, attached to the building support beams (similar to the attachment method of the BS P& F Conveyor) were attached in a way that "allows for easy detachment and removal" with "no damage to the building" and were not intended to be permanently annexed. 728 N.E.2d at 392. GM's classification of these assets as personal property on its tax returns, and its movement of similar assets, further supports the conclusion that the BS P&F Conveyor and the Skid Conveying System were not intended to be permanently annexed to the realty.

(2) BS Framing Robot (Representative Asset No. 12)

Asset ID 100048169 is a robot mounted on an overhead platform straddling the outer body framing cell (the "**BS Framing Robot**"), and consists of a single Fanuc model R-2000iA/200R six-axis robot, a six-inch high riser, a mounting plate, and a remote control cabinet. Asset Appendix, Tab 12. The BS Framing Robot is one of a dozen robots used to apply spot welds to join together the various body panels from the framing station on the body assembly

line below. The robot is bolted to the riser plate, and the riser plate is attached to the overhead platform with eight bolts. The overhead platform on which the robot sits is open in the center and the robot reaches down through the center to perform the welding operations. The robot controller is mounted on casters (wheels) and the bottom frame of the controller was designed with forklift carrying tubes to aid in transporting the asset. The electrical and data wiring utilizes quick disconnect fittings for easy separation. The BS Framing Robot is one of hundreds of robots in the body shop and, as with most robots, is designed to be an interchangeable component within a larger process.

The evidence at trial will show that GM has relocated over 1,000 similar assets for reuse, including 75 Fanuc R2000i robots that were transferred to Lansing Delta Township Assembly between 2009 and 2015 from Orion, Fairfax, Lansing Grand River, Saturn Spring Hill and Grand Blanc Stamping. In addition, GM relocated over 150 of the Fanuc R-2000iA model robots to GM's Hamtramck Assembly facility between 2009 and 2015. There is also an active secondary market for similar robots. In addition, the EOL systems for the 2003-A Leased Schuler Transfer Press (discussed above in Section III.C.1.a), which is the subject of the same lease as the press, contains two robots that are floor-mounted robots similar to the BS Framing Robot. Accordingly, the language of the lease mandating the assets be treated as personal property and allowing for removal in the event of default is evidence that GM intended equipment similar to the BS Framing Robot to be treated as personal property, and not a fixture. Accordingly, the evidence at trial will show that robots such as the BS Framing Robot are not intended by GM to become a permanent part of the realty.

(3) BS Weld Bus Duct (Representative Asset No. 13)

Asset ID 100050513 is the electric power distribution bus ducts installed throughout the welding operations (the "**BS Weld Bus Duct**"). Asset Appendix, Tab 13. Bus ducts are used to

efficiently distribute electrical power to process equipment. Bus ducts, first introduced in 1932, "filled the automotive industry's need for a flexible power distribution system to serve its linear layouts." Fisher Decl. Ex. A ("Is Busway The Best Way?"). Bus ducts provide an alternative to the wire-in-conduit distribution method, which is more permanent and difficult to reconfigure.

The BS Weld Bus Duct is a modular system that is constructed using standard two to ten-foot long linear sections and various elbows, with the sections connected to each other with a single bolt. The majority of the BS Weld Bus Duct is suspended from the building trusses with threaded rod and I-beam clamps and tracts the location of the machinery and equipment on the plant floor. The intent of weld busway design is to be easily reconfigurable with minimal installation and removal effort. GM's documented re-use of busways illustrates GM's intent to treat the BS Weld Bus Duct as separate from the realty. There is also an active secondary market for weld bus ducts.

Although GM categorized the BS Weld Bus Duct as real property for tax classification purposes, the one categorization by GM that differs with Plaintiff's fixture classification position, a finding of personal property is nonetheless warranted here. Unlike the majority of assets for which GM is consistent, GM has inconsistently classified bus ducts for tax purposes. In many instances, GM has in fact classified bus ducts as personal property, and there is no evidentiary basis for the difference in treatment of the BS Bus Weld Duct. Unlike assets that benefit the building generally, bus weld ducts are configured and customized to GM's particular assembly line process. Although another manufacturing user could very well need bus weld ducts, because of GM's special configuration, the new user would most likely have to remove the Bus Weld Duct and could not simply use them as is, in place. When GM sells closed facilities, it first removes the bus weld ducts.

(4) Full Body Coordinate Measuring Machine (Representative Asset No. 19)

Asset ID 100064667 was a coordinate measuring machine (the "**BS CMM**"), placed in service in November 2006, and used for offline inspection of vehicle bodies at the manufacturing stage for quality control purposes. Asset Appendix, Tab 19. The BS CMM was removed from service in 2014, and was removed from the plant prior to the site inspection. The evidence will show that the BS CMM was assigned a 13-year depreciable life by GM and was removed half way through its assigned useful life because the technology had become obsolete. Offline inspection equipment is being replaced by robots similar to the OptiCell Measuring System (discussed above in Section III.C.1.c), that are capable of performing quality control without taking the vehicle bodies off the assembly line.

During the plant visit, the area where the BS CMM had been located was inspected, and except for the new concrete floor, there was no evident damage to the realty due to removal of the BS CMM. Based on photographs provided by New GM, it appears that the BS CMM was mounted in a concrete-lined pit (which was a separately-capitalized asset) with the surface plate flush with the building floor. According to New GM personnel, the pit was filled in after the asset was removed.

The evidence will show that almost 30 similar assets (some smaller than the subject asset) have been relocated by GM, and that there is a secondary market for similar assets. Finally, GM classified the BS CMM as personal property for purposes of its tax filings in Michigan. Accordingly, the objective facts will show that GM did not intend to install the BS CMM as a permanent part of the realty.

c. Paint Shop

(1) ELPO Process Waste Lines (Representative Asset No. 4)

Asset ID 100037892 includes two process waste trenches, a sump pit, piping and two pumps from the electrophoretic deposition coating line (the "**ELPO Process Waste Lines**"). Asset Appendix, Tab 4. The ELPO process applies a coating of primer to the vehicle body by completely submerging the body in a tank of coating chemicals and then applying an electric charge that causes the coating to deposit on the body. The ELPO Process Waste Lines are used to transport liquid waste from the ELPO process to the waste treatment facility. Both parties agree that this asset is a fixture. The trenches of the ELPO Waste Lines are constructed of cast-in-place concrete with the top opening covered by steel grating. The trenches run underneath the floor for approximately 15 feet where they drain into a concrete sump pit. Pipe connects the sump pit to two pumps, which transport the waste from the sump pit to the waste treatment building. The process waste travels to the waste treatment facility through approximately 100 feet of reinforced pipe, which runs vertically from the pumps to the ceiling, then horizontally across the ceiling and outside the building to a pipe bridge.

A significant part of the ELPO Process Waste Lines (the trenches and sump pit) are physically integrated into the building floor, could not be removed intact, and would significantly impair the realty upon removal, leaving open, unlined holes in the floor of the building. Although the pumps could be removed and used elsewhere, they comprise less than 10% of the original cost of the asset. The categorization of the ELPO Process Waste Lines as a fixture comports with GM's tax classification of this asset.

(2) Paint Mix and Circulation Electrical System (Representative Asset No. 5)

Asset ID 100037940 consists of electrical distribution and control cabinets used to support the paint mixing and circulation equipment ("**Paint Mix and Circulation Electrical System**"). Asset Appendix, Tab 5. The Paint Mix and Circulation Electrical System provides electrical power for paint process equipment only and does not support assets that are related to the infrastructure of the building. Specifically, the Paint Mix and Circulation Electrical System includes two motor control center ("**MCC**") cabinets and two control cabinets. The MCC cabinets are approximately seven-feet-tall and were designed with angle iron lift points running along the top of the cabinet to assist in relocation. Incoming power is fed by overhead wire through conduit and conduit supports are bolted to the top of the cabinets to allow for possible reconfiguration of power distribution. Both cabinets are resting on a four-inch raised concrete pad without further methods of attachment. The two control cabinets are similar in construction to the MCC cabinets but are much smaller in size and minimally secured to the concrete pad by several lag bolts.

The evidence at trial will show that the modular design and limited attachment of the components of the Paint Mix and Circulation Electrical System allow for simple removal and relocation. This is further evidenced by GM's relocation and reuse of similar electrical distribution equipment—for example, in 2008, GM removed, transported, and re-installed substations and medium voltage cable from various facilities for re-use in the Powertrain Engineering Development Center in Pontiac, Michigan. Fisher Decl. Ex. N ("Road Ready"). In addition, the evidence will show that these types of asset are frequently bought and sold on the secondhand market, as this equipment can be used in virtually any industrial setting.

(3) ELPO IMC System (Representative Asset No. 6)

Asset ID 100037954 is a conveyor system that spans the entire length of the paint building across three levels and is used to transport vehicle bodies through the ELPO coating and drying process (the "**ELPO IMC System**"). Asset Appendix, Tab 6. The ELPO IMC System is another of the eight Representative Asset conveyor systems and part of the comparison in Exhibit S to the Fisher Declaration.

The components of the ELPO IMC System include approximately 1,500 feet of conveyor track, load and unload stations, two main electric drives, and standalone control panels. The conveyor track is constructed in modular sections of three to twenty-feet in length, connected by eight nut and bolt fasteners. The track is supported by iron legs, approximately six feet apart, that either rest on the supporting incline/decline floor grating (with no attachment), or are secured to the floor by lag bolts. The load and unload stations are constructed and affixed in a similar manner. The two main electric drives are constructed as skid mounted, self-contained units and are attached to the building floor with lag bolts. The multiple control panels are attached to the floor with a few lag bolts, and the cabinets have top-mounted eye-bolts designed as lift points for relocation. All utility connections utilize loose cabling and quick disconnect fittings for easy separation.

The objective facts to be proven at trial, including the sectional fabrication of the conveying equipment, and the methods of attachment, which allow for removal of the asset without damage to the building or the equipment itself, do not support a finding that GM intended to permanently install the ELPO IMC System. Because the ELPO IMC System is mostly located at floor levels, removal is easier than some of the more suspended conveyors.

(4) TC Automation Software (Representative Asset No. 7)

Asset ID 100038004 is a software package for the automation of certain top coat paint process equipment (primarily robots and paint applicators) (the "**TC Automation Software**"). Asset Appendix, Tab 7. The TC Automation Software is an intangible asset that "exists" within a computer data storage device and could be transferred to any other compatible computer device without damage to the realty or software. The evidence will show that an asset with no physical presence—and certainly no physical attachment to anything—is not intended to be permanently attached to the realty.

(5) Paint TC2 CC Bell Zone (Representative Asset No. 9)

Asset ID 100038119 consists of paint coating application equipment, including ten side application machines (similar in function to robots) and one overhead application machine (the "**Paint TC2 CC Bell Zone**"). Asset Appendix, Tab 10. The Paint TC2 CC Bell Zone, manufactured by Behr Systems, Inc., is used to apply a clear coating to the automobile body as a final step in the paint process. The side application machines are installed through the paint booth walls so that the controls can be accessed without entering the spray booth while paint operations are in progress. A flexible gasket/seal covered with a metal panel fits in between the spray booth wall and the applicator to prevent leakage of air from the paint booth. The side application machines are secured to the building floor by four lag bolts. The overhead application machine has four spray head arms mounted on a beam that extends between two vertical towers on either side of the paint booth wall. The overhead machine is installed in the same way as the side application machines: The towers are lag bolted to the floor, and seals are used to prevent the leakage of air from the paint booth. Incoming power, data wiring, and compressed air are fed to the Paint TC2 CC Bell Zone from a mixture of overhead cable trays,

conduit, and pipe. The data and control wiring is equipped with quick disconnect fittings for easy separation.

The evidence will show that GM did not intend to permanently install the Paint TC2 CC Bell Zone. The components have been attached to the building in a manner that allows for the equipment to be easily upgraded as paint application technology advances. For example, GM has replaced, and is currently replacing, a significant number of Durr/Behr paint applicators similar to the Paint TC2 CC Bell Zone applicators with Fanuc robots that offer better process flexibility, quality, and technology. As noted in an article published in *Paint & Coatings Industry Magazine* in 2007 (less than one year after installation of the Paint TC2 CC Bell Zone applicators), that the manufacturer had developed a second generation paint robot, similar to the Paint TC2 CC Bell Zone applicators, to specifically facilitate the replacement of older paint robots in existing paint cells. Fisher Decl. Ex. L ("Next Generation Paint Robots"). In addition, GM has previously moved similar assets—including 160 aqua bell applicators that were moved from Moraine to Lordstown following the closing of the Moraine facility.

3. Central Utilities Complex (Representative Asset No. 11)

Asset ID 100045909, the Central Utilities Complex, is comprised of multiple assets that provide various process-specific utilities to the Lansing Delta Township facility. Asset Appendix, Tab 11. The CUC is a single story building containing utility assets that include boilers, electrical power distribution equipment, air handling units, air compressors, a chilled water system, a hot water system, a water treatment system, a waste water treatment system, and various pipes and pumps. The Central Utility Complex building has a steel frame and wall panels, a metal roof, and a concrete slab foundation; its interior area is approximately 64,000 square feet.

As discussed above in Section II.A.2, the CUC is excluded from the grant of collateral for the Term Loan. The components of the building portion of the CUC are made up of typical building materials, and both parties agree that the building is properly categorized as real estate, not a fixture. The remaining components of this asset consist of both fixtures and non-fixtures, depending on whether the particular assets benefit any productive use of the building for any hypothetical purpose, or are specific to GM's manufacturing processes. *See, e.g.*, *Perez Bar & Grill v. Schneider*, No. 11CA010076, 2012 WL 6105324, at *8 (Ohio Ct. App. Dec. 10, 2012) (finding that a large air conditioning unit on the roof that was attached to the HVAC system and benefited the entire building was a fixture); *See G&L Investments*, 1998 WL 553213 (finding that a heating system, although specifically selected for the needs of the business, was a fixture as any subsequent buyer would have been able to utilize the heating system); *Atlantic Die Casting Co. v. Whiting Tubular Products, Inc.*, 337 Mich. 414 (1953) (finding that even if portions of heating equipment was removable, one inspecting the property would assume that all of the heating equipment were equally necessary to heating the building and maintained for use of the building) (*citing Nadolski v. Peters*, 332 Mich. 182, 185 (1952)).

Should the Court find that the Central Utilities Complex is part of the collateral, Plaintiff will present evidence as to the different components of this asset, showing which components are fixtures and which are not.

4. Representative Assets at the GM Powertrain Warren Transmission Plant

There are a total of eleven Representative Assets located at the Warren Transmission facility. For the reasons discussed herein, the evidence will not support a finding that GM intended for these eleven assets to become a permanent part of the realty at Warren Transmission.

a. Courtyard Enclosure (Representative Asset No. 37)

Asset ID NITWOS11026A is an addition to a building at the GM Powertrain Warren Transmission facility (the "**Courtyard Enclosure**"). Asset Appendix, Tab 37. The original Warren plant, built in 1941 as a United States Navy facility, consisted of a complex of 16 separate structures encompassing more than 1 million square feet of floor space. Over the years, the original separate structures have been modified and combined into a single large building. An open area on the west edge of the combined building was enclosed by GM in the 1980s for use as a shipping facility—this is what is referred to as the Courtyard Enclosure. At the time of the site inspection, the area was being used for staging parts for the production of transmissions. Based on discussions with Warren personnel during the site inspection, the installation of the Courtyard Enclosure consisted of the removal of an exterior wall, construction of a concrete floor at the same level of the adjoining building areas, plus the addition of structural steel framing, a steel truss roof structure with metal panel decking, fluorescent lighting, heating and ventilation ductwork, and sprinkler piping.[32]

The Courtyard Enclosure was an expansion of the building's structural components and is therefore real estate, not a fixture or equipment. Because it is real estate, it never was part of the collateral securing the Term Loan.

b. Conveyance Systems (Representative Asset Nos. 3 & 35)

Two of the Representative Assets at the Warren Transmission facility are conveyance systems and are included on the conveyor chart at Exhibit S to the Fisher Declaration. Asset ID 100033438 (Representative Asset No. 3) is an automated roller conveyor placed into service in

[32] Plaintiff anticipates that Defendants will argue that components of the Courtyard Enclosure asset are fixtures (e.g., dock levelers, dock doors, etc.). These components were not described by New GM as being part of the asset. Plaintiff did not consider these additional components to be part of the asset and therefore has not formed a view as to whether or not they are fixtures that would be separate from the real estate.

February 2007 to convey torque converter housings to and from machining operations (the "**Torque Converter Housing Conveyor System**"), and Asset ID NITCO3340 (Representative Asset No. 35) is an automated pallet conveyor system (the "**Button Up and Test Conveyor**"), placed into service in June 2006 to transfer transmissions from beginning through final assembly and testing operations. Both conveyors are roller conveyors arranged in a rectangle shape, assembled from conveyor modules that are between two and three feet in length, and have an independent drive unit and leg supports. The conveyor sections are linked together with bolted connector plates or bolts, which permit simplified reconfiguration and relocation. The conveyors are attached to the building floor with lag bolts.

The Torque Converter Housing Conveyor System measures approximately 55 by 75 feet, with entrance and exit lanes extending out from two corners. Asset Appendix, Tab 3. The components of the Torque Converter Housing Conveyor System include a number of straight, 14-inch wide power roller conveyor sections, three overhead workpiece transfer bridges with light curtains, four rotary table conveyor sections for direction changes, and a control panel. The overhead transfer bridges move workpieces across gaps left in the conveyor to allow foot traffic to the machining centers, which are inside the conveyor lines. The bridges are supported by steel tube legs, which are attached to the floor slab with lag bolts. The control panel for the Torque Converter Housing Conveyor System rests on the floor, without any attachment, and has eye-bolts mounted on top of it to serve as lift points. Incoming electrical power is supplied from an overhead bus duct via loose cabling and also connected by quick disconnect fittings for easy separation.

The Button Up and Test Conveyor includes 18-inch wide powered friction roll conveyor modules, rotary tables, elevator and lowerator sections, a control panel, and a human machine interface. Asset Appendix, Tab 35. There is a total of approximately 340 linear feet of conveyor

that measures approximately 120 by 20 feet with two additional sections measuring approximately 20 and 40 feet, respectively. In addition to being attached to the building floor with lag bolts, the Button Up and Test Conveyor is also bolted to the legs of certain sections of overhead cable trays. The control panel is secured to the building floor with lag bolts and incoming electrical power to the controller is supplied from an overhead bus duct through metal conduit. The controller feeds power and data to the Button Up and Test Conveyor by loose cabling and, in certain places, quick disconnect fittings are used for easy separation.

The objective facts to be proven at trial, including the modular nature of the conveying equipment, the methods of attachment that allow for removal of the asset without damage to the building or the equipment itself, and the adaptation of both conveyor systems to GM's unique 6-speed transmission line do not support a finding that GM intended to permanently install the Torque Converter Housing Conveyor System and the Button Up and Test Conveyor.

c. 4-Speed Transmission Assembly Line (Representative Asset No. 34)

Asset ID NIT219381 is a complete assembly line used for the production of four-speed transmissions (the "**4 Speed Build Line**"). Asset Appendix, Tab 34. The 4 Speed Build Line ceased operation prior to June 30, 2009, and was disassembled and removed from the facility prior to the May 2016 plant inspection. When it was in operation, the 4 Speed Build Line was one of four similar assembly lines located in the same building at Warren Transmission and, although New GM was unable to provide specific information about the components of the asset, likely would have consisted of assembly equipment, conveyors, other related assets, and the utilities required for operation of the assembly line. It should be noted that, although the asset listing refers to this asset as "Build Line w[ith] foundation," there is a separately capitalized asset (Asset ID NIT219381A) with the description "Build Line Pit," with an in-service date a year

before the 4 Speed Build Line was placed in service, which indicates that the pit/foundation is not part of the Representative Asset.[33]

As evidenced from the site inspection, all components of the 4 Speed Build Line, along with all utilities connections, were removed and there was minimal evidence of their previous installation. All pits or raised pads that were associated with the 4 Speed Build Line were filled in or removed so that the floor space is currently level with the surrounding building floor and no damage to the building was visible. The area is ready for re-use by GM as needed.

GM commonly installs conveyor lines and other equipment in a manner that allows for deinstallation without damage to the assets or the realty. Since the pit is treated as a separate asset, it is likely that the 4 Speed Build Line was installed in a manner allowing for removal without damage to the assets or the realty. This was confirmed through observation of the area of the building where the asset was located prior to removal. Accordingly, all the facts that are known regarding the 4 Speed Build Line support the conclusion that GM did not intend for the asset to be a permanent part of the realty.

Finally, the removal of the 4 Speed Build Line highlights how an entire assembly line devoted to a particular GM process, in this case building the 4-speed transmission, is no longer needed when GM changes its transmission technology. Despite the size of the line and difficulty and cost of removal, GM was able to remove all of the equipment and repurpose the building to serve a different production technology.

[33] Defendants contend that the 4 Speed Transmission Line includes the pit based on the installation cost and the title given to the asset by GM. Without guidance from New GM, however, it is impossible to divine what GM intended to include in the Representative Asset. Here, despite the title, it makes sense to treat the pit as a separate assets as it has its own line item and was installed the previous year. Moreover, GM's reasoning for capitalizing pits separately from the machine itself is borne out in this case: the 4 Speed Transmission Line was removed and the pit was filled in and destroyed. To the extent the Court includes the pit in the 4 Speed Transmission Line asset, however, this portion of the asset would be a fixture, in-line with the analysis of the Pits and Trenches set forth in Section III.C.2.a.1 above.

d. Shim Select and Placement Machine (Representative Asset No. 1)

Asset ID 100006527 is an automated shim selecting and placement machine located within the six-speed transmission assembly line at Warren Transmission (the "**Shim Select and Placement Machine**"). Asset Appendix, Tab 1. The Shim Select and Placement Machine, used to pick and place clearance adjusting shims (spacers) within a transmission, consists of an automatic placement station, a shim dispenser with approximately 26 storage magazines, and a control panel with a human machine interface. A conveyor system (which is a separately capitalized asset), is used to carry the pallets with transmission cases through the Shim Select and Placement Machine. The components of the Shim Select and Placement Machine are mounted on height adjustable base plates, which are attached to the building floor with lag bolts. The machine is also attached to the pallet conveyor with Allen bolts. Incoming power is supplied to the control panel with metal conduit; loose wiring and quick disconnect fittings are used to supply power and data from the control panel to the Shim Select and Placement Machine, allowing for the easy separation of utilities connections.

Removal of the Shim Select and Placement Machine is relatively straightforward: the lag bolts would have to be removed, the utilities disconnected, and the components disassembled for loading and handling. The ease of removal is also evidenced by the fact that GM has previously relocated 42 similar assets for use at other facilities. The Shim Placement Machine is specially designed for the size of the transmissions being produced; thus any change in transmission size (similar to the change from the 4-speed to the 6-speed that previously took place at Warren Transmission) would require the removal and replacement of this asset. Finally, GM classified the Shim Select and Placement Machine as personal property for purposes of its tax filings in

Michigan. Based on all these observable facts, it is evident that GM did not intend for the Shim Placement Machine to become a permanent part of the realty.

e. Leak Test System (Representative Asset No. 14)

Asset ID 100053677 is a three-station leak test system (the "**Leak Test System**"), which is used to test transmission cases for leaks after they have been machined, deburred, and washed. Asset Appendix, Tab 14. The Leak Test System includes: (i) three individual test stands, each of which has a standalone fluid pump and delivery station; (ii) a pallet transfer conveyor, which runs through the three test stands; and (iii) three control cabinets (one for each test stand).

The Leak Test System has a modular design and is primarily connected to the realty in ways that allow for relatively easy removal. Each leak test stand measures approximately 4x4x7 feet and is fabricated in two sections that are bolted together, with the lower frame constructed with integral forklift carrying tubes allowing for easy assembly and removal. The supporting legs of the leak test stands and the standalone fluid pump and delivery stations are secured to the building floor with lag bolts to prevent movement during operation. The three test stands are surrounded by safety fencing, which is constructed of modular aluminum extrusions connected by bolts and brackets that are attached to the floor with lag bolts and allow for multiple configurations and various interchangeable parts. Utilities are fed to the Leak Test System through flexible conduit with a large, quick disconnect fitting that releases the main electric and data wiring with a single metal clasp. Most of the data connections use flexible cables connected with finger-tightened connectors, allowing for easy removal; the hydraulic fluid is transported in pipes that only require a wrench to disconnect. The three control cabinets, which have multiple top-mounted eye-bolts to facilitate movement, are connected to the floor with a few lag bolts, and are connected to utilities with quick disconnect fittings. Finally, the pallet conveyor is

affixed to the equipment with nut and bolt fasteners, and the conveyor's support legs are secured to the building floor by lag bolts.

The modular design and construction of the Leak Test System allows for the various components to be removed or relocated with minimal effort, and without damage to the equipment or the building. Unsurprisingly, GM has relocated assets that are similar and perform a similar function, and similar leak test systems are bought and sold on the secondhand market, demonstrating that such systems can be removed and reused. For all of these reasons, the evidence will show that GM did not intend to permanently install the Leak Test System.

f. Robot Gantry System (Representative Asset No. 22)

Asset ID 100069322 is a gantry-mounted robotic material handling system (the "**Robot Gantry System**"), and is used to pick and place components for a subcomponent assembly line within the transmission assembly process. Asset Appendix, Tab 22. The components of the Robot Gantry System are a Fanuc six-axis robot, a Gantry rail, and a Fanuc robot controller.

As with the majority of GM's robot systems, the Gantry System is not permanently attached. The Gantry is a modular metal structure supported by three freestanding steel tube columns estimated to be 10 feet tall, each with a floor-mounting plate that is attached to the floor with lag bolts. The three columns support the approximately 50-foot-long horizontal Gantry rail using right angle brackets and various Allen bolts. The Gantry installation does not require any bracing or support from the building structure; rather, the rectangular baseplate of the robot arm is attached to an underslung carriage with Allen bolts, and the carriage is moved along the rail with a drive system. The Robot Gantry System is designed for ease of robot replacement due to the limited life of the robot and its wearable components. Electrical wiring is fed to the robot through loose wiring contained in an open cable tray on top of the Gantry rail. The robot controller is mounted on casters (wheels), and has top-mounted eye-bolts, designed as lift points

in the event the controller needs to be hoisted in the air. The power and data feeds to and from the controller utilize loose cabling and quick disconnect fittings for easy separation.

The Gantry system is modularly designed, and primarily built with nut and bolt fasteners (instead of being permanently joined by welding), for ease of assembly and disassembly. Aside from the few lag bolts that attach the Gantry column baseplates to the floor, the asset is not physically affixed to the building structure. The Robot Gantry System is one of the most portable Representative Asset, as removal could be accomplished with minimal effort. There is an active secondary market for assets similar to the Robot Gantry System, further evidencing that such assets can be removed and redeployed. GM itself has moved similar robots and other Gantry systems. Based on the observable facts regarding the Robot Gantry System, the evidence does not support a finding that GM intended for the asset to become a permanent part of the realty.

g. Aluminum Machining System (Representative Asset No. 23)

Asset ID 100070012 is a centralized coolant/cutting fluid filtration system (the "**Coolant Filtration System**"), used to clean cutting fluid in various machining operations. Asset Appendix, Tab 23. The components of the Coolant Filtration System include two filtration units, a polish filter unit, a heat exchanger, a chip conveying system, piping and a control panel. The two main filtration units, made of welded steel and measuring approximately 15x60x12 feet, are essentially large steel tanks, with travelling filter belts and chip conveying equipment installed inside. Each main filtration unit has small I-beams welded across the bottom of the tank, which sit directly on the building floor. The filtration units are attached to the building floor with angle iron clips and lag bolts in several locations around the perimeter of the units. Drainage trenches have been installed in the floor surrounding the filtration units to collect water and coolant spillage. A catwalk that sits about ten feet off the ground is mounted to the filter tank, and a

stairway providing access to the catwalk is bolted to the catwalk frame and lag bolted to the building floor. There are six vertical pumps mounted on the catwalk deck. The polish filtration unit is essentially a smaller version of the two main filtration units, measuring approximately 6x30x10 feet. The chip conveyor system, which is located between the two main filtration units, removes large metal particles from the coolant before it enters the filtration units. Similar to the main filtration units, the chip conveyor is constructed out of welded steel and is attached to the building floor with lag bolts. The heat exchanger is mounted on a skid, which rests on the building floor and has two openings that allow the skid to be easily lifted with a forklift truck. Similarly, the control panel is resting on the building floor, and is not attached by bolts or any other method. Incoming electrical power is supplied to the control panel from an overhead bus duct through metal conduit; the controller then feeds power and data to the components of the Coolant Filtration System by loose cabling in enclosed cable trays and, in certain places, utilizes quick disconnect fittings.

Many of the components of the Coolant Filtration System could be removed without damage to the assets or the realty; however, other components of the asset, such as the piping, would be destroyed during removal since handling long runs of large diameter pipe would be impractical. In addition, the trenches in the floor could not be removed absent significant damage to the building. Although a small percentage of the asset is permanently cemented into the ground and could not be removed, the evidence will show that the majority of the asset could be removed without damage to the asset or the building, that GM has moved similar assets, and that GM classified the Coolant Filtration System as personal property for purposes of tax filings in Michigan. Accordingly, although this asset is a more difficult determination than other assets, the objective facts, on balance, do not indicate GM's intent to make the Coolant Filtration System, in its entirety, a permanent part of the realty.

h. CNC Gear Shaper (Representative Asset No. 24)

Asset ID 100071009 is a computer numerical control ("**CNC**") gear shaping machine (the "**CNC Gear Shaper**"), which machines transfer gears used in GM transmissions. Asset Appendix, Tab 24. The main components of the CNC Gear Shaper include the gear shaping machine, a control panel, a hydraulic power pack, and an entry/exit conveyor section. The CNC Gear Shaper is mounted on a number of vibration isolation pads, which rest in a drip pan that is sitting on the building floor without further attachment.

Saw cut lines in the floor slab surrounding the CNC Gear Shaper indicate that a thicker slab or foundation may have been poured for additional stability or isolation. The saw cut lines indicate this entire area of the plant has a thicker slab, instead of a specialty foundation poured for this one particular machine. By installing the thicker slab for a larger area, GM indicated that at the time the plant was built and the assets installed, GM was already planning for equipment and machinery to move.

The modular nature and impermanence of the methods of attachment do not evidence GM's intention to make the CNC Gear Shaper a permanent part of the realty. All utilities that are provided to the CNC Gear Shaper use connections that allow for significantly easier disconnection (such as bolted flange or threaded pipe), as compared to more permanent connection methods. The control panel rests directly on the floor slabs, with no evident fasteners, and has four top-mounted eye-bolts, which serve as lift points during installation and removal. Electrical power is supplied to the control cabinet from an overhead bus duct by wire in conduit; the control panel then feeds electrical power and data to the CNC Gear Shaper through loose wiring utilizing quick disconnect fittings for easy separation. Next to the control cabinet is a small transformer that is secured to the building floor by lag bolts. Part loading and unloading conveyors, consisting of two 90 degree curves approximately five linear feet in length,

are bolted to the CNC Gear Shaper and the conveyor legs either rest on the building floor, or in some cases are secured by single lag bolts. Unlike more traditional conveyors that are designed for a single use, the reconfigurable design and construction of these conveyors allows for unlimited reconfiguration. Finally, the hydraulic power pack, which pumps fluid to the CNC Gear Shaper, has four leg pads that rest on the building floor without further attachment and uses various quick disconnect data wiring for sensors and control.

Similar to the Gear Hobber (Asset ID 100071022), the CNC Gear Shaper and its associated components are assembled using reversible attachment methods, thereby allowing for simple assembly and disassembly. Many of the components of the CNC Gear Shaper are resting on the floor without further attachment, others are secured by lag bolts. The Gear Hobber (Asset ID 100071022), which was previously located by GM, is comparable to the subject asset in design, construction, method of attachment, and use within the overall manufacturing process. Based on such similarities and the movement of other similar assets, GM could have relatively easily removed the Gear Hobber. In addition, there is a secondary market for assets similar to the CNC Gear Shaper, and GM classified the asset as personal property for purposes of its Michigan tax filings. Accordingly, based on all of the relevant facts and considerations, it is evident that GM did not intend for the CNC Gear Shaper to become a permanent part of the realty.

i. Helical Broach (Representative Asset No. 36)

Asset ID NITC03507 is a helical broaching machine, used to machine helical teeth into the internal diameter of transmission rung gears (the "**Helical Broach**"). Asset Appendix, Tab 36. The main components include: a broaching machine, a standalone control and electrical cabinet, a chip conveyor and filtration system, a hydraulic powerpack, and a centralized lubrication system. The Helical Broach is a large machine tool, with a footprint of approximately 24x39x25 feet and weighing 86,500 pounds.

The Helical Broach is mounted on four heavy duty isolation pads, which are bolted to the machine base and rest in a drip pan that is sitting on the building floor without further attachment. Like the CNC Gear Shaper (Asset ID 100071009) above, saw cut lines in the floor slab surrounding the Helical Broach indicate that a thicker slab or foundation may have been poured for additional stability or isolation. The existence of the saw cut lines near the Helical Broach, located in the same part of the facility as the CNC Gear Shaper, provides further credence to the conclusion that GM poured the thicker foundation for an entire area of the facility, and not a separate foundation per asset. Again, as above, the less customized foundation suggests that at time of installation GM was already planning for the possibility that these machines would be moved or replaced.

The means of the Helical Broach's attachment to the realty do not evidence GM's intention to make it a permanent part of the realty. Three small six foot, self-supporting operator platforms are attached to the Helical Broach with bolts, and the platform legs simply rest on the building floor. A jib crane is bolted to the upper frame of the Helical Broach in order to change broach tools, which are extremely heavy. All utilities attached to the Helical Broach use connections (such as bolted flange), which allow for relatively easy disconnection or modification. The standalone control and electrical cabinet, which is approximately ten feet long

and seven feet high, is secured to the building floor by lag bolts and was designed and constructed with forklift carrying tubes and top-mounted eye-bolts to assist with movement of the machine. Electrical power is supplied to the control cabinet from an overhead bus duct by wire in conduit; the control panel then feeds electrical power and data to the Helical Broach through loose cabling in reconfigurable metal cable trays, utilizing quick disconnect fittings for easy separation. Next to the control cabinet is a small transformer that is secured to the building floor by lag bolts. The hydraulic powerpack, which sits next to the Helical Broach, is mounted on vibration pads that simply rest on the building floor. A lubrication machine is connected to the side of the hydraulic powerpack reservoir with flexible hose. Finally, a coolant filtration system with a chip conveyor is bolted to the side of the Helical Broach and rests on the building floor between the Helical Broach and the control cabinet. The coolant filtration system is designed as a modular unit that can be used in many machining operations.

With the exception of the control cabinets that are secured to the floor by lag bolts, the Helical Broach and its remaining components rest on the building floor without further attachment. Further the modular design of the components of the Helical Broach allow for simple assembly and disassembly. Although the Helical Broach appears to be constructively attached via gravity, the lack of any other methods of attachment would support a conclusion that GM did not intend to the asset to be permanently annexed.

Further, based on discussions with GM employees during the plant inspection, if the Helical Broach were purchased in the 1990s, it would have been installed in a pit so that the operator would not need a platform to service the machine; the design and installation of the Helical Broach reflect GM's switch to less permanent attachment method for similar assets. Similar helical broaches have been transferred from one GM facility to another, and are bought and sold on the secondhand market on a regular basis. For example, a Crankshaft Turn Broach

(Asset ID NSA203568) was moved from GM's Flint Engine North facility to GM's Spring Hill facility. In the 2006 auction sale of a Manual Transmission of Muncie (a GM-owned company), twelve broaches were offered for sale and some were sold. The 2010 auction of GM's Willow Run facility resulted in the sale of seven similar broaches, and three of seven were re-purchased by GM and relocated to GM plants in Mexico or the United States. Based on these observable facts, it is evident that GM did not intend for the Helical Broach to become a permanent part of the realty.

j. CNC Gear Hobbing Machine (Representative Asset No. 25)

Asset ID 100071022 is a CNC gear hobbing machine manufactured by Liebherr used to cut teeth (splines) for transmission gears (the "**CNC Gear Hobber**"). Asset Appendix, Tab 25. The CNC Gear Hobber consists of: (i) a standalone human-machine interface ("**HMI**") control cabinet; (ii) the gear hobbing machine; (iii) two hydraulic power packs; and (iv) an entry/exit conveyor section.

The objective facts, taken together, do not evidence GM's intention to make the CNC Gear Hobber a permanent part of the realty. First, this asset was originally installed and used in Old GM's St. Catharines, Ontario facility from 2005 to late 2007. Two years after installation, the asset was deinstalled, transported, and reinstalled for use at the Warren Transmission facility. Moreover, the evidence will show there is an active secondary market for gear hobbers and other similar assets.

Second, the CNC Gear Hobber is installed in a way that allows for easy removal. The gear hobbing machine, which is the largest component of the asset, is resting in a drip pan that lays on the building floor—the machine is not affixed to the building floor in any way. The remaining components of the CNC Gear Hobber are either resting on the building floor (the hydraulic powerpacks), or are attached to the building floor by methods that allow for easy

removal, such as lag bolts (the HMI control cabinet and certain sections of the conveyor). In addition, certain components of the CNC Gear Hobber (the HMI control cabinet and the hydraulic powerpacks) were designed with eye-bolts or lifting brackets to assist with relocation of the machinery. Finally, the connections to the machinery for electrical power, data wiring and piping utilize methods such as loose cabling or flanged joints that are bolted together, allowing for easy disconnection between the machine and the piping or wiring.

5. Representative Assets at Defiance

There are a total of six Representative Assets located at Defiance: one conveyor, one robot, one crane, one furnace, and two air cleaning systems. Because these assets are located in Ohio, the adaptation prong drives the fixture determination because none of the Representative Assets at Defiance are adapted to use of the realty. As mentioned in Section III.B.2.a above, the melt shop is the only portion of Defiance that is adapted to exclusive use as a foundry and it makes up a very small percentage of the total facility. Instead, the majority of the facility could be easily used for any heavy-duty manufacturing purpose. Moreover, even with regard to the melt shop, the melt shop is specific to the cast iron process and not other foundry processes, such as aluminum processes. Finally, for the reasons discussed herein, the objective facts confirm that GM did not intend for these assets to become a permanent part of the realty at Defiance.

a. Core Delivery Conveyor System (Representative Asset No. 26)

Asset ID 100095344 is a core delivery conveyor system (the "**Core Delivery Conveyor System**") that is included on the conveyor comparison chart in Exhibit S to the Fisher Declaration. The Core Delivery Conveyor System is used as part of the iron casting process to transport molded cores from a CB 116 robotic assembly cell located on the ground level, up an incline and overhead until the conveyor descends to bring the cores to a CB 122 robotic dip cell located on ground level. Asset Appendix, Tab 26. The conveyor system is comprised of six

distinct conveyor sections; a mezzanine under the three suspended sections of the conveyor, and an HMI control panel. The six conveyor sections correspond with requirements of the system (a chain-on-edge conveyor that removes cores from the CB 116 robotic assembly cell; an ascending inclined/flat belt unit section; three suspended sections comprised of a 45 degree turn, a straight section, and a 90 degree turn; and a descending portion that connects to the CB 122 robotic dip cell) and are bolted together to form a conveyor approximately 130-feet long and 30-inches wide. The conveyor system is primarily supported by floor posts bolted to the ground and the inclined and suspended sections are also bolted to the mezzanine, which in turn is suspended by angle iron members clipped to a steel framework attached to the building and bolted to a steel column. The main control panel rests directly on the floor and is only attached by utility connections. The control panel feeds electrical power to the belt conveyor by conduit running underneath the catwalk.

The Core Delivery Conveyor System is only necessary in the iron casting process and is thus not useful should GM or another user switch to a different process, such as aluminum. This factor alone should be dispositive under Ohio law.

Further, this conclusion as to adaptation is supported by the lack of evidence indicating any intent to make permanent: evidence will show that the sectional fabrication of the conveying equipment and the use of lag bolts as the primary method of attachment, allow for removal of the asset without damage to the building or the equipment itself. In addition, the control panel has four top-mounted eye-bolts designed as lift points to move the unit. Moreover, the good access to the equipment makes the Core Delivery Conveyor System one of the easier conveyors of the eight to remove.

The evidence will show that the 116 and 122 robotic cells were located to accommodate the current plant arrangement at Defiance and the Core Delivery Conveyor System was installed

in its current configuration to connect the two machines in their current locations; the evidence will show that the configuration of the conveyor was adapted to the particular use of GM's building and not the building itself. Further, the incline portion of the conveyor is similar to the EOL systems for the Leased Transfer Presses (discussed above in Section III.C.1.a) that are the subject of the same leases as the Transfer Presses and require that the EOL remain as personal property. Accordingly, the leases are instructive in that GM intended equipment similar to certain components of the Core Delivery Conveyor System to be treated as personal property, and not a fixture. The objective facts to be proven at trial, including the modularity, ease of removal, connection to specific technology and GM's particular process, shows that GM did not intend for the Core Delivery Conveyor System to be permanent.

b. Cupola No. 4 Emissions System (Representative Asset No. 27)

Asset ID 100098085 is an emissions and abatement system (the "**Cupola No. 4 Emissions System**") for the #4 Cupola furnace, an asset which is used in Defiance to melt iron as part of the metal casting process. Asset Appendix, Tab 27. The Cupola No. 4 Emissions System is made up of four primary parts: 1) the thermal oxidizer, which pulls and incinerates off-gas from the melting process, is a large vessel approximately 108 feet tall and 12 feet in diameter that extends through the roof of the melt shop building and also connects via a 45 feet long and 10 feet in diameter duct to the heat recuperator; 2) the heat recuperator, which receives and cools hot exhaust from the thermal oxidizer while heating outside air used in the cupola melting process, is another large vessel approximately 53 feet high and 7 and a half feet in diameter that extends through the roof; 3) the hot blast turbine blower, which pulls air from the outside to send to the heat recuperator, is a contained metal turbine blower that is bolted to a raised cement platform; and 4) the scrubber vessel, which removes fine particulate matter from the air received from the heat recuperator and releases the cleaned air through stacks, is a large vessel

approximately 57 feet tall and 18 feet in diameter that extends through multiple floors of the building.

The Cupola No. 4 Emissions System is not adapted to the use of the realty generally, but rather to support the #4 Cupola as part of the metal casting process. Because the Cupola No. 4 Emissions System is adapted to a particularly foundry process, iron casting, under Ohio law it is not adapted to the use of the realty generally as a foundry.

Objective facts with regards to intent support the finding of lack of adaptation to the realty. Although the Cupola No. 4 Emissions System is very large and heavy, other indications of attachment indicate it was installed to be as moveable as possible. For example, the thermal oxidizer and the recuperator vessels are installed in such a way that they are entirely suspended from the roof structure allowing for a large crane to remove them through their roof holes without damage to either the asset or the building. Further, this method of attachment is more modular and less permanent than the older emissions cleaning system that this system replaced (Asset ID NJL2924414P). Similarly, GM classified the Cupola No. 4 Emissions System as personal property for purposes of its tax filings in Ohio.

Although its large size would make removal difficult and the asset replaced a previous emissions system, the other indications of intent coupled with the lack of adaptation to the realty make the Cupola No. 4 Emissions System not a fixture under Ohio law.

c. Ajax 100 Ton Holding Furnace (Representative Asset No. 28)

Asset ID 100099125 was a 100-ton vertical channel holding furnace (the "**Ajax 100 Ton Holding Furnace**"), which was removed from Defiance in 2010, was comprised primarily of a vertical channel holding furnace, a pit with foundation and equipment mounting pedestals, a control panel, and associated utilities. Asset Appendix, Tab 28. The Ajax 100 Ton Holding Furnace was used for collection and short-term storage of molten nodular iron as part of a nodular malleable iron process.

As with all assets in Defiance, the Ajax 100 Ton Holding Furnace is not adapted to the realty because it was part of a particular process, in this case the nodular malleable iron process, and did not benefit the building more generally. As the removal of this asset proves, once the nodular casting process was discontinued, the Ajax 100 Ton Holding Furnace was idled and removed a short time later; it was not an asset that more generally benefited the use of the building.

Similarly, despite the Ajax 100 Ton Holding Furnace being large and relatively permanently attached, the circumstances surrounding its attachment and removal prove that GM did not intend to annex the Ajax 100 Ton Holding Furnace to the realty at the time of installation. The evidence will show that GM installed the Ajax 100 Ton Holding Furnace as part of the nodular iron process that was moved from the Saginaw Malleable metal facility in 2007 when the Saginaw facility closed. The nodular iron process made parts exclusively for the four-speed transmission, and GM knew at the time of installation of the Ajax 100 Ton Holding Furnace at Defiance that there was a finite life for 4-speed transmissions. Accordingly, GM knew that within five years after installation, the product that the equipment was installed to support would no longer be produced. Accordingly, GM assigned a three-year depreciable life to the Ajax 100 Ton Holding Furnace, much shorter than other depreciable lives and much earlier

than a new Ajax 100 Ton Holding Furnace would wear out. *See, e.g., Cont'l Cablevision of Mich.*, 430 Mich. at 743 (finding relevant a company's depreciation of assets). What occurred after installation proves GM's lack of intent to make permanent: three years after installation, GM stopped the nodular iron process at Defiance and the following year the Ajax 100 Ton Holding Furnace was removed.

Again, the treatment of the Ajax 100 Ton Holding Furnace confirms how the planning that goes into the installation of machinery and equipment in modern manufacturing facilities is intended to preserve optionality, including the possibility of removing or relocating the asset: Despite the significant cost of the Ajax 100 Ton Holding Furnace (approximately $4.2 million) and its large size and relatively permanent method of attachment, GM installed the Ajax 100 Ton Holding Furnace expecting to remove it after only a few years. Ultimately, the relationship of the Ajax 100 Ton Holding Furnace to a particular process underscores how an asset should not be considered adapted to the realty if it is only useful for a particular process or technology.

d. Gas Cleaning System (Representative Asset No. 38)

Asset ID NJL2924414P was the original off-gas cleaning system for the # 4 cupola (the "**Gas Cleaning System**"). Asset Appendix, Tab 38. The Gas Cleaning System was used to remove airborne contaminants created by the #4 cupola during the melting process until the Gas Cleaning System was replaced by the Cupola No. 4 Emissions System (Asset ID 100098085) in 2007. Although the Gas Cleaning System has partially been demolished and removed, portions remain abandoned in place. The portions of the assets remaining include the venturi scrubber and separator, a supporting metal superstructure, a gas compressor, and ductwork. The venturi scrubber and separator vessels are more than 50-feet tall and are supported by a steel structure that is secured to the building with lag bolts. An elaborate stair and railing system surrounds both units and is attached to the two vessels and steel structure with welds and bolts. The size of

the remaining portions makes removal very difficult and expensive and would cause serious damage to the building and destroy much of the remaining asset.

The Gas Cleaning System is not adapted to the realty under Ohio law and is thus not a fixture. Like all of the Representative Assets at Defiance, it is adapted to use in an iron casting process and not to a foundry more generally. Because it is not adapted to the realty, it cannot pass the Ohio fixture test.

e. CB91 Unload Robot (Representative Asset No. 39)

Asset ID NJL2983009 is a CB91 robot that unloads assembled cores from the number CB91 core-making machine (the "**CB91 Unload Robot**"). Asset Appendix, Tab 39.[34] The CB91 Unload Robot is made up of the six-axis robot and a standalone robot control cabinet. Other related assets are separately depreciated by GM, including the core machine, pallet conveyors inside and outside of the cell fencing, a two-position turntable; and a core definning stand, and thus are not part of the Representative Asset. The CB91 Unload Robot's arm is mounted on a steel plate that is attached with lag bolts to a concrete pad in the floor. The robot controller rests directly on the floor and is attached only via gravity.

The objective facts to be proven at trial, taken together, do not evidence GM's intention to make the CB91 Unload Robot a permanent part of the realty. The use of lag bolts to attach the CB91 Unload Robot t plate to the building floor confirms its ease of removal and the evidence will show that the unattached robot controller is easily moveable by forklift as the bottom frame has been specifically designed with forklift carrying tubes and the cabinet top has four side-

[34] With respect to the CB91 Unload Robot, due to a discrepancy with respect to the eFast entry, the parties have agreed to present evidence regarding the classification of the CB91 Unload Robot, but not to value that particular asset.

mounted eye hooks. The evidence will further show a discrepancy between the data plate information on the control panel and the information in GM's asset ledger, suggesting that the robot controller was originally associated with a different robot.

Finally, the CB91 Unload Robot is a standard heavy duty robot for which there is a robust secondary market. The evidence will show multiple sales of similar robots and that GM itself at times moved robots within its facilities. Although the CB91 Unload Robot is slightly heavier duty, it is nonetheless similar to the framing robots included in the lease and similar to assets listed on the bill of particulars as personal property in GM sales of realty and equipment to auto manufactures. It is difficult to imagine an asset that more resembles personal property.

f. P&H Charger Crane (Representative Asset No. 40)

Asset ID NJL6084400 is a seven-and-a-half ton capacity charger bridge crane (the "**P&H Charger Crane**") that travels along a track within the material bay of the melt shop at Defiance, moving metal from railcars to the melting operation via magnet. Asset Appendix, Tab 40. The asset consists of only the P&H Charger Crane —the rails on which the crane travels and the attached magnet are separate assets. The P&H Charger Crane is primarily a double girder bridge that spans approximately 100 feet between the rails; a top-riding trolley with wire rope hoist, and a control cab. The P&H Charger Crane itself is bolted together and is not attached to the realty other than attached by gravity through its wheels onto rails that are bolted to crane ways that are more permanently affixed to the building.

Because the P&H Charger Crane supports the iron foundry process at Defiance in Ohio, and not general foundry activities, it does not meet the Ohio adaptation test. The holding in *Mahon Industries* that an overhead crane was a fixture does not require a different result here and in fact supports the different treatment of the P&H Charger Crane. In contrast to the P&H Charger Crane, the adaptation of the overhead crane in *Mahon Industries* was analyzed under

Michigan law, not the stricter Ohio standard. Further, the overhead crane was found to be a fixture precisely because it benefited the use of the manufacturing building generally, and not just the particular business operated on it as is the case with the P&H Charger Crane. 20 B.R. 836. Finally, in *Mahon Industries* the charger crane was constructively attached to and necessary for the operation of the crane rails, which the parties conceded were fixtures. *Id*. at 839. In contrast, here, neither the P&H Charger Crane nor the rails are fixtures; both are easily moveable, detachable assets that could be removed and installed in another plant with minimal difficulty. No Michigan case has expanded constructive attachment to include a piece of equipment that is attached to another piece of equipment that is attached to a fixture that is attached to the building.

Finally, the objective facts surrounding the installation of the P&H Charger Crane, including how it is relatively easy to disassemble for removal, how it is specifically designed to be portable in that it operates on wheels, and how GM has in fact moved similar assets in the past, prove that GM did not intend for the P&H Charger Crane to be permanent.

6. MLC/RACER Assets

Two of the Representative Assets in this case were not part of the 363 sale and remained with Old GM. Both of the Representative Assets were subsequently sold by RACER and are no longer in the possession of GM.

a. TP-14 Danly Transfer Press (Representative Asset No. 30)

The single-stand Danly transfer press (Asset ID BGI20163301) (the "**TP-14 Danly Transfer Press**") was not available for inspection but the evidence will show that the assets capitalized with the TP-14 Danly Transfer Press was a single press stand containing all drive components, electronic transfer system, and rolling bolsters and that the coil feed system, servo transfer system, turntables, press foundation, and an associated scrap metal conveyor were

capitalized separately. Asset Appendix, Tab 30. The TP-14 Danly Transfer Press works similarly to the Leased Transfer Presses described above in Section III.C.1.a.

The TP-14 Danly Transfer Press was installed in 1987 at Mansfield Stamping in Mansfield, Ohio and was in place in 2010 when the plant was closed as part of GM's restructuring. The TP-14 Danly Transfer Press was scheduled to be part of the equipment sale at Mansfield Stamping held in October 2011 but was ultimately sold privately prior to auction for $1.15 million (including a 15% buyer's premium). Under Ohio fixture law, Mansfield Stamping was adapted to use as a general manufacturing and industrial building, not a stamping facility. Because only GM's particular business required the TP-14 Danly Transfer Press, not any use of the realty more generally, the TP-14 Danly Transfer Press should not be considered adapted to the use of the realty.

Further, the objective facts to be proven at trial, taken together, do not evidence GM's intention to make the TP-14 Danly Transfer Press a permanent part of the realty. In particular, the TP-14 Danly Transfer Press was removed from Mansfield Stamping and sold separately before the facility was sold, demonstrating that GM did not consider the TP-14 Danly Transfer Press to be part of the realty and recognized a separate value in the TP-14 Danly Transfer Press apart from the realty. Because the Representative Asset itself was sold, there is no question that there is a market for it and that this asset is considered a saleable piece of equipment. Moreover, the high price received at private sale, which the evidence will show was slightly higher than the price expected to receive at auction, underscores the value in the TP-14 Danly Transfer Press as a piece of equipment apart from the realty and that this particular asset was sufficiently valuable to justify the cost of removal. Further evidencing GM's treatment of its presses, including the TP-14 Danly Transfer Press, as personal property, is the language in the leases discussed above

relating to the Leased Transfer Presses and GM's classification of the TP-14 Danly Transfer Press as personal property for purposes of Ohio tax filings.

b. GG-1 Clearing Transfer Press (Representative Asset No. 29)

Asset BF2016822 01 is a two-station transfer-type stamping press (the "**GG1 Clearing Transfer Press**") that was made up of two press stations, a press sound enclosure, main topside drive, dual rolling bolsters for each station, and electrical and control cabinets whereas the pit, piers, scrap metal conveyor rail system, and end of line system were capitalized separately. Asset Appendix, Tab 29. The GG1 was used at Old GM's Grand Rapids, Michigan Metal Fabrication Division beginning in 1989 and was in the plant when it closed in June 2009 as part of GM's restructuring plan. It was sold at the equipment auction of the Grand Rapids plant in November 2010 for $275,000 (excluding a buyer's premium). The evidence will show that the low sale value of the press indicates it was sold for scrap.

The objective facts to be proven at trial, taken together, do not evidence GM's intention to make the GG1 a permanent part of the realty. In particular, the GG1 was removed from Grand Rapids and sold separately before the Grand Rapids realty was sold, demonstrating that GM did not consider the GG1 to be part of the realty and recognized a separate value in the GG1 apart from the realty. Further evidencing GM's treatment of its presses, including the GG1, as personal property, is the language in the leases discussed above relating to the Leased Transfer Presses. The same two leases relate to a total of eleven presses, including two "tryout cells," consisting of two presses per cell. Further, GM classified the GG1 as personal property for purposes of Michigan tax filings. Finally, although Maynards sold this particular press for scrap, there is a secondary market for similar transfer presses illustrating the movement of similar presses. The evidence will show that the lack of a sale to a new user here was most likely due to

the old vintage and technology of the press coupled with the bad economic conditions in 2010, not because of a lack of a market for these types of presses.

IV. Valuation of the Surviving Collateral

As of June 30, 2009, Old GM had no going concern value. Old GM had attempted to secure private financing so that it could continue operations, and it failed to do so. It had made extensive efforts to sell its operations and to merge with another automotive manufacturer, but again it failed. It would most certainly have had to liquidate absent an extraordinary, non-market intervention. As the Court has concluded, there was "certainty or near certainty that in the absence of [the 363] sale, the patient will indeed die on the operating table." *See In re General Motors*, 407 B.R. at 492 n.54.

In late 2008 and early 2009, only the Government, in partnership with Export Development Canada, concerned about the impact that Old GM's failure would have on the U.S. economy at large, would agree to extend substantial financing to Old GM, and, ultimately, to sponsor an entity that would purchase at an extraordinary cost most of Old GM's assets.

The Government bailout, however, provides no basis for valuing the Representative Assets or the Surviving Collateral. Old GM was kept alive only by virtue of an enormous Government subsidy; that subsidy, included in the price paid by New GM in the 363 Sale, provided Old GM with a benefit far in excess of the value of the assets purchased. Because there was no market for Old GM's assets in the aggregate, or as part of a going concern, the only value attributable to these assets is what they could have sold for on the market as of the Valuation Date, which was their value in liquidation. Put differently, because Old GM itself had no value as a going concern, no rational market participant would have paid more for Old GM's assets than the price those assets would have sold for in an orderly liquidation. The evidence will show that this approach is in line with market realities as of the Valuation Date.

Defendants ask the Court to award them an improper windfall. They urge the Court to value their security interest in the Surviving Collateral, a subset of the tangible assets of New GM, assuming there was a market demand for Old GM and its assets as a going concern apart from the massive Government bailout. However, unlike in a business reorganization scenario or a commercial going-concern sale, New GM was not an entity that continued to use assets that had value as part of an existing going concern business; New GM was a newly created, Government-owned entity that included a massive bailout with a non-market cash infusion to enable the new entity to operate as a going concern. To apply the value of the assets to New GM as a going concern would ignore the market realities of the transaction and read section 506(a) of the Bankruptcy Code ("**Section 506(a)**") in a manner that would lead to an irrational result that does not comport with basic economic theory or the law. Defendants seek payment for more than the Representative Assets were worth as of June 30, 2009, and thus more than they are entitled to receive.

A. Section 506(a) Governs Valuation of the Representative Assets

Section 506(a) provides that a secured creditor's interest in a debtor's property should be valued "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) (2016); *see Official Comm. Of Unsecured Creditors v. UMB Bank, N.A. (In re Residential Capital, LLC)* ("***ResCap***"), 501 B.R. 549, 594 (Bankr. S.D.N.Y. 2013) (the "proper valuation methodology must account for the proposed disposition of the collateral"). No particular valuation method is specified. The Second Circuit has emphasized the need for flexibility in applying Section 506(a), stating that no fixed methodology should be "imposed on every bankruptcy court conducting a § 506(a) valuation." *In re Valenti*, 105 F.3d 55, 62 (2d Cir. 1997), *abrogated by Assoc. Commercial Corp. v. Rash*,

520 U.S. 953 (1997); *see also In re Adam Aircraft Indus., Inc.*, No. 08-11751MER, 2012 WL 993477, at *2 (Bankr. D. Colo. Mar. 23, 2012) ("Valuation under § 506(a) . . . depends on the purpose and circumstances of each case.").

As a general matter, as the Supreme Court instructed in *Rash*, value is assessed from the perspective of the debtor, not the creditor. *Assoc. Commercial Corp. v. Rash*, 520 U.S. 953, 963 (1997); *see also Till v. SCS Credit Corp.*, 541 U.S. 465, 476 n.13 (2004) (a "creditor's secured interest should be valued from the debtor's, rather than the creditor's, perspective"); *In re Menorah Congregation & Religious Ctr.*, 554 B.R. 675, 691 (Bankr. S.D.N.Y. 2016) ("[F]ocus should be on the collateral's value in the debtor's possession, namely, the replacement value to the debtor of property of the same type and condition . . . ."). Here, the proposed disposition or use by Old GM was to sell the assets to New GM, an entity sponsored by the Government. *See In re Motors Liquidation Co.* ("***TPC***"), 482 B.R. 485, 491 (Bankr. S.D.N.Y. 2012).

B. Fair Market Value Is the Appropriate Methodology to Value the Representative Assets under Section 506(a)

The fair market value in the hands of the debtor is the proper valuation standard to employ in assessing a secured creditor's interest in collateral. *See ResCap*, 501 B.R. at 591-92, 595 (concluding that "in determining the value of the [collateral] on the Petition Date, the Court must apply that value based on the proposed disposition of the collateral—*fair market value in the hands of the Debtors*") (emphasis added)); Collier's on Bankruptcy ¶ 506.03 (16th ed. 2011) ("Once the court has identified the creditor's interest in the estate's interest in the collateral, the court must then determine the valuation standard to be applied in valuing the creditor's interest. In general, the courts agree that the standard is one of fair market value.").

The fair market value of an asset is the price that the asset would command in an open and competitive market. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537-38 (1994). Said

another way, it is the market price that "would be fixed by negotiation and mutual agreement, after ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled to take the particular . . . piece of property." *Id*. at 537-38 (quoting Black's Law Dictionary 971 (6th ed. 1990)).

Similarly, expert testimony will show that in economics a standard definition of "market value" is the estimated amount for which an asset or liability would exchange between a willing buyer and a willing seller, on the valuation date, in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion. This definition requires that the exchange is not inflated or deflated by special terms or circumstances such as atypical financing, sale and leaseback arrangements, special considerations or concessions granted by anyone associated with the sale, or any element of value available only to a specific owner or purchaser.

As explained below, there was no market for the Representative Assets of Old GM except through their piecemeal sale. There was no market for the collection of assets, as was evidenced by Old GM's failure to sell them as such, notwithstanding their intensive efforts to do so. Therefore, Old GM had no going concern value at all. In cases, quite unlike this one, where a debtor's assets have value as a going concern and there is a third-party buyer that pays a market price based on the going concern value, the sale price may very well be indicative of the fair market value of the debtor's assets and may be an appropriate basis on which to value the assets. Here, it was only the Government's willingness to invest tens of billions of dollars for the purpose of a rescue, as part of a broader plan to prevent what they were concerned would be an economic catastrophe, that permitted a Government-owned New GM to use the assets at all. The Representative Assets' value, however, remains only what they would have sold for in the market, and that value is their liquidation value.

C. The Representative Assets' Fair Market Value Is their Liquidation Value

Where the value of the collective assets of a firm working together—their going concern value—is greater than their value individually, a going concern methodology may be appropriate for determining fair market value. The cash-flow-based value generated by the firm's assets operating together may, in some circumstances, result in a going concern value that is greater than liquidation value.

However, where there is no market for the collective assets of a firm, piecemeal liquidation value may yield the highest value. Courts have held that the assets of a business enterprise that is "on its deathbed" should be assessed at liquidation value, and not as a going concern. *Lawrence v. B & M Plastics, Inc. (In re Luster-Coate Metallizing Corp.)*, No. 01-22764, 2004 WL 432038, at *4 (Bankr. W.D.N.Y. Feb. 3, 2004) (where a business is no longer viable as a going concern—as indicated by, among other things, "pre-petition losses and inability to find a buyer"—the assets of that business cannot be "reasonably valued at going concern" value); *see also Schwinn Plan Comm. v. AFS Cycle & Co. (In re Schwinn Bicycle Co.)*, 192 B.R. 477, 486 (Bankr. N.D. Ill. 1996) ("When a business is in a precarious financial condition or on its financial deathbed, a liquidation value should be used to value the assets."). For example, in *In re Diplomat Electronics Corp.*, the court held that a fair market going concern valuation was inappropriate for valuing the inventory of debtor electronics distributors so bereft of funding, and so beset by losses, that they were "not going concerns" at all and "would need a great infusion of cash to regain that status." 82 B.R. 688, 692 (Bankr. S.D.N.Y. 1988).

The evidence will show that from an economic perspective, the liquidation standard is also appropriate where an individual asset does not contribute to the profitability of the firm and where individual asset values cannot be calculated. This makes common sense given that valuation of individual assets in the hands of third-party buyers reflects the value of the firm in

the hands of those third parties as a function, among other things, of the skills of the third-party buyer's structure and management, rather than reflecting the value of the assets to the debtor.

1. The Representative Assets Had No Value Beyond Liquidation Value

Here, it was only by virtue of the enormous Government bailout—predicated on the willingness of the Government to inject enormous sums into a failing company in hope of keeping the U.S. economy intact (a motivation that no ordinary market participant would have)—that New GM was able to operate at all after the 363 Sale. New GM was able to realize value as a going concern *only* because of the Government's enormous subsidy, and not because the Surviving Collateral had any value beyond liquidation value in use by New GM. If the assets had any independent going concern value, they would have been purchased in the market on that basis.

The Trust's proposed approach is consistent with the approach already applied in the Old GM Bankruptcy to value the assets that were sold in the 363 Sale. In *TPC*, Judge Gerber considered a dispute between certain secured creditors of Old GM (the "**TPC Lenders**") and New GM regarding the value of the TPC Lenders' security interest in two of Old GM's assets, a plant and a warehouse. 482 B.R. at 491. The TPC Lenders sought a valuation of their collateral to determine the amount distributable from the 363 Sale proceeds for their secured claims. New GM argued the assets should be valued at fair market value, while the TPC Lenders argued they should be valued in use.

Applying Section 506(a), Judge Gerber rejected the TPC Lenders' position that the collateral be valued in use in the hands of New GM and instead adopted the fair market value standard advanced by New GM. *Id.* at 494-95. Judge Gerber's conclusion that fair market value

was the appropriate methodology for valuing the collateral comports with the decision in *Rash*.[35] The Supreme Court in *Rash* held that where the property on which the creditor had a lien continued in use, it would not be valued as if there were a foreclosure—*i.e.*, the value to the creditor if the collateral were surrendered to the creditor—but rather based on the assets "replacement-value,"—*i.e.*, the "price a willing buyer in the debtor's trade, business, or situation would pay to obtain like property from a willing seller." *Rash*, 520 U.S. at 960.

Here, no purchaser, including New GM, would have paid more than the liquidation value to obtain the Representative Assets (or any subset of Old GM's assets) because they were not worth anything more. Thus, the fair market value of the Representative Assets is the value of those assets in liquidation. *See In re Arden Props., Inc.*, 248 B.R. 164, 172 (Bankr. D. Ariz. 2000) (the *Rash* standard focuses on what a "hypothetical," "willing third party buyer would pay."). Any amount paid by the Government beyond the liquidation value of the tangible assets is attributable to either a different asset (e.g., goodwill, intangibles) or the Government subsidy.

2. Old GM Almost Certainly Would Have Failed Absent the Government Bailout

The evidence will show that in the months leading up to the Petition Date, Old GM was a failing company. In 2008 it had negative cash flow of over $12 billion, and in 2009 it had negative cash flow of over $18 billion. Contemporaneous market securities' prices indicated that Old GM was failing prior to the Petition Date, despite the Government's extension of TARP financing. Market prices of securities, including Old GM's bonds and stocks, as well as credit default swaps on its bonds, indicated that Old GM would almost certainly fail without the benefits of the Government-sponsored 363 Sale. Old GM's bond prices were trading at

[35] Although the *Rash* court considered Section 506(a) valuation in the context of a Chapter 13 "cram down," its analysis has been held broadly applicable in the Chapter 11 context. *See, e.g.*, *TPC*, 482 B.R. at 492; *ResCap*, 501 B.R. at 592-93.

distressed levels. In the weeks prior to Old GM's bankruptcy filing, its bond prices fell below $10. Immediately before the bankruptcy filing, bond prices still remained below $20. These prices are consistent with a market view that Old GM was likely to default and that bondholders would receive a substantial haircut.

The credit default swap ("**CDS**") market for Old GM's bonds also signaled a high probability of default and low expected recoveries in case of default. The CDS prices on Old GM debt rose from 731 basis points at the beginning of January 2008 to 61,117 basis points at the time of the bankruptcy filing in June 2009, indicating a much higher probability of default. From January 2, 2008 to May 29, 2009 (the last trading day before the bankruptcy filing) Old GM's stock price fell from $24.41 to $0.75 per share. This change indicates a market view that there was little or no residual value to Old GM and is consistent with the view that Old GM was almost certain to fail.

Old GM's failure to raise capital through the debt and equity markets reflected market participants' belief that Old GM had little or no likelihood of providing a return on such new debt or equity investment, providing further support for the conclusion that Old GM could not continue as a going concern. Contemporaneous commentary by industry analysts reflected their expectation that Old GM would almost certainly fail, as did contemporaneous credit ratings and commentary by the three major ratings agencies.

Finally, statements by Government officials and agencies, including those intimately involved in the negotiations regarding the Government's role in the bailout, demonstrated that Old GM was failing and almost certainly would have been liquidated absent Government intervention. Retrospective analyses by Government agencies regarding the Government's role in the automotive bailout also concluded that, absent this assistance, there would be no General Motors operating business, as the business would have failed and faced liquidation.

3. There Was No Market Value for Old GM as a Going Concern

Old GM's failed attempts to combine with other automakers indicated skepticism by other market participants about the ability of the company to continue as a going concern. The evidence will show that no market participant was willing to buy the assets of Old GM either before or after the Petition Date, demonstrating that the market did not view the assets, working together as a collection, to have value as a going concern because its assets could not support sufficient cash flows. It is undisputed that Old GM, with Evercore's assistance, attempted but was unable to sell the combined assets of the firm, or components of the firm, to any willing buyer in the months leading up to the Petition Date.[36]

Time was of the essence, given Old GM's immense liquidity shortfall; so a traditional Chapter 11 reorganization was not on the table. Both the Government and Old GM argued to the Court in support of the motion to approve the 363 Sale that the only alternative to the Government bailout was liquidation.

For these reasons, as will be demonstrated at trial, there was no market for the sale of Old GM's assets on a going-concern basis and its assets had a fair market value of only what could be realized in an orderly liquidation.

4. The Government Bailout Says Nothing About the Value of the Surviving Collateral

The terms of the 363 Sale of some of the Representative Assets from Old GM to New GM does not provide any basis for a market-based valuation of Old GM's tangible assets.[37] The terms of the Government's interventions, including the 363 Sale, were not market based. They

[36] Defendants' economics expert is expected to assert that there were private actors who would have bid on Old GM if the Government had not. This assertion is directly controverted by the evidence. Defendants' economics expert is also expected to assert that Old GM could have reorganized itself as a going concern in Chapter 11 proceedings (as opposed to selling its assets as part of the Government bailout). This is likewise not supported by the evidence.

[37] As discussed above in Section III.C.6, two of the Representative Assets were not purchased by New GM.

were motivated by factors that would not be relevant to a commercial market participant, such as the macroeconomic and political impacts of allowing Old GM to fail. Therefore, the Government was not a "willing buyer under no compulsion to purchase." Rather, the Government, unlike any commercial market participant, was compelled by economic and policy considerations to finance and purchase the assets of Old GM for a price far in excess of fair market value.

The Government was prompted to enter into this non-market deal based on deep concerns about the impact an Old GM liquidation would have on the U.S. economy and the country at large. The Government's concerns included the anticipated loss of millions of jobs and a worsening job market, the failure of Old GM's networks of suppliers and dealers, and exacerbation of the financial crisis, as well as the impact on the national psyche given the historic role Old GM played in American society. The evidence will show that profitability was not the motive for the purchase, as it would be for an ordinary commercial market participant. The Government officials directly involved in negotiating the Government's interventions, including the 363 Sale, were clear about this in contemporaneous and retrospective statements. Retrospective Government reports regarding the Government's interventions reach similar conclusions.

The Court acknowledged this reality in its decision on the 363 Sale motion, concluding:

> In accordance with standard section 363 practice, the 363 Transaction was subject to higher and better offers, but none were forthcoming. The Court finds this hardly surprising. Only the U.S. and Canadian Governmental authorities were prepared to invest in GM—and then not so much by reason of the economic merit of the purchase, but rather to address the underlying societal interests in preserving jobs and the North American auto industry, the thousands of suppliers to that industry, and the health of the communities, in the U.S. and Canada, in which GM operates.

In re General Motors, 407 B.R. at 480.

Consistent with the above, the 363 Sale contained several nonmonetary concessions that would not have been considered by a commercial market participant. For example, New GM was required to (1) make an offer of employment to all of Old GM's non-unionized employees and unionized employees represented by the UAW; (2) negotiate a new collective bargaining agreement, which would convert at least half of the obligation Old GM had to the UAW to equity; and (3) make future contributions to the New Employees' Beneficiary Association Trust to provide retiree health and welfare benefits to former UAW employees and their spouses.

The evidence will also show that the Government's massive subsidy, which included a cash infusion of tens of billions of dollars to New GM, was the primary driver of New GM's equity value and potential for profitability—not the firm's assets. Without this cash on New GM's balance sheet, New GM was not solvent and would not have existed as a going concern as of July 10, 2009, when the sale closed. Many of the improved aspects of the new going-concern of New GM would not have been realized but-for the unique nature and magnitude of the Government bailout.

Defendants are expected to argue that the Government bailout is irrelevant to valuing the assets. But the specific price the Government agreed to pay was not set by competitive market forces. Rather, the Government paid what it did based on the demands of the viability plan provided by Old GM. The price paid by the Government was the minimum required to keep the company's manufacturing operations going—GM was losing approximately a billion dollars a week in June 2009—rather than what a market participant would pay. It was only after the Government several times refused to fund Old GM because it considered the business unviable that the Government accepted the fifth viability plan ("**Viability Plan 4B**"). Yet, Viability Plan 4B was premised on the existence of the non-market cash infusion that was necessary to allow New GM to operate. It was only a new business that contained a substantial subsidy on its

balance sheet that could put the assets to use.

Plaintiff is not aware of any bankruptcy court directly addressing the impact of a Government bailout on valuing the tangible assets of a firm under Section 506(a). In any event, the scale of this particular automotive bailout has no precedent. However, the ruling in *De La Rama Steamship Co. v. United States*, 92 F. Supp. 243 (S.D.N.Y. 1950), is instructive. There, the district court upheld a commissioner's finding that the value of a steamship could not be gauged by government-subsidized sales of comparable vessels. *Id.* at 250-51. The court explained that the government-subsidized sales did not reflect true market value of the assets because the "Government was selling ships at a considerable loss in order to stimulate American commerce." *Id*. at 251. The Second Circuit affirmed, holding that the price obtained in a "controlled market" resulting from the "use of subsidies" was "far from being a fair equivalent of a market price established by ordinary business dealing at arm's length." *De La Rama S.S. Co.*, 206 F.2d 651, 654 (2d Cir. 1953). The same principles govern here.

5. No Going Concern Value Is Attributable to the Representative Assets

Even if the Court were to determine that going concern value was the correct methodology for determining fair market value of the Representative Assets notwithstanding the Government bailout, the use of the Representative Assets by New GM after the 363 Sale does not increase their value. The evidence will also show that the portion of any going concern value that could be attributable to the Representative Assets is not variable. Rather, the market value of an individual tangible asset in a profitable firm is no more than the value of that asset in a less profitable firm. The value of a tangible asset would be the same in either situation; it would be the cost to purchase a like asset in the market. While profits may increase at a firm for any number of reasons, including brand, servicing, or a strong dealer network, none of those factors affects the value of any particular tangible asset. The value associated with not having to incur

transaction costs related to purchasing and installing identical assets is the only potential difference in the assets' values under a going concern and liquidation methodology.

So even if the Court were to conclude that the Government bailout was a fair market going concern transaction, Defendants would still not be entitled to receive any additional value embedded in the purchase price paid by New GM that is not attributable to the assets. The evidence will show that the purchase price paid by the Government necessarily included payment for components of the business that cannot be fairly attributed to the Representative Assets, such as the benefit of a skilled workforce in place, an extensive dealer network, and brand recognition. And, the purchased price contained a subsidy. None of the value associated with the intangible assets or the subsidy is attributable to the Representative Assets.

In re Chateaugay Corp. is instructive. There, the court determined that going concern value was not precluded as a consideration in determining the value of certain bondholders' interest in mills that would continue to operate after the debtor reorganized. 154 B.R. 29, 34 (Bankr. S.D.N.Y. 1993). However, the court concluded that:

> Notwithstanding the foregoing . . . [t]o the extent that the going concern value of a particular facility is enhanced by or attributable to assets in which the [bondholders] do not have an interest, such value *will not* be credited towards 'the value of such creditor's interest.' Therefore, just as § 506(a) instructs a court to value the collateral in light of its proposed use, it also makes plain that a creditor shall not have a secured claim to the extent that *its claim exceeds the value of its interest in the collateral.* Put another way, going concern value under § 506(a) is not without constraints.

Id. (emphasis added).

D. The Orderly Liquidation Value in Exchange Standard Provides the Correct Calculation of the Fair Market Value for the Representative Assets

For the reasons discussed above, there was no fair market going concern value for Old GM. Because Old GM would have been unable to maintain operations and generate cash flows absent the non-market Government bailout, it almost certainly would have failed and been

liquidated. Therefore, the evidence will show that the appropriate standard for valuing the Representative Assets from both an economic and appraisal perspective is the value that would be obtained in a liquidation, as part of a sale in which the Representative Assets were sold in the appropriate secondary markets.

Specifically, the evidence will show that the correct premise of value here is the "orderly liquidation value in exchange" premise, which provides the highest actual market value for the Representative Assets. Orderly liquidation value is defined as an opinion of 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. *See, e.g.*, *DeBoer v. Am. Appraisal Assocs.*, 502 F. Supp. 2d 1160, 1161 (D. Kan. 2007) (orderly liquidation value "measures the value of the assets when they are taken out of the company and sold outside of the business to alternate users."), *aff'd*, 314 F. App'x 94 (10th Cir. 2008). The evidence will show that under the relevant appraisal rules, when it is anticipated that an asset to be valued will be removed from its current location and sold for a similar or alternate use, the valuation premise is "value in exchange." The evidence will show that orderly liquidation value in exchange is the appropriate premise of value here because, given the absence of a market for a sale of these assets as part of a going concern, the assets' market value can only be determined by considering their value if they had been removed and sold in market transactions.

Other valuation methodologies—including what appraisers refer to as "fair market value" (not to be confused with the "fair market value" standard referenced by courts, as discussed above)—would not provide market-based values as high as in an orderly liquidation in this case. While courts often use the term "fair market value" to refer to the market value of an asset, appraisers use this term in a more specific way to refer to the value, either in exchange or in

place, that would be realized by a sale without any time limitation. The evidence will show that here an unlimited time frame for sale would result in excessive holding costs that would be higher than the value of an asset sold in a more expedient manner, for example, in an orderly fashion. The evidence will show that, in any event, there is not a dramatic difference between the calculation of an appraiser's "fair market value" and orderly liquidation value with respect to the Representative Assets, given the depressed market at the time of the Valuation Date.

Orderly liquidation value in exchange also qualifies as the highest and best use of the Representative Assets under the appraisal rules. Determination of the highest and best use of the Representative Assets from an appraisal perspective requires an analysis of the current and alternative uses of the property, considering (1) what is legally permissible, (2) physically possible, (3) financially feasible, and (4) maximally profitable. Here, all four criteria are met under the orderly liquidation value in exchange approach. Specifically with reference to prongs (3) and (4), an in-exchange approach, as opposed to an in-use approach, is required because Old GM would have been unable to continue as a going concern absent a substantial Government subsidy. In other words, as will be shown at trial, from a market perspective, it was not financially feasible or maximally profitable for Old GM to continue as a going concern. Rather, all *market* indications are that liquidation of Old GM's assets was the financially feasible and maximally profitable outcome.

It is important to note that orderly liquidation value in exchange (as used by the Trust's expert in this case) is different from, and a higher value than, forced liquidation value or foreclosure value. The case law often uses these terms "liquidation" and "foreclosure" loosely and imprecisely, at times conflating them. *See In re Lucero*, No. 13-14-10406 TA, 2014 WL 2159553, at *4 (D.N.M. May 23, 2014) (equating "liquidation" value with "foreclosure" value); *Taffi v. United States (In re Taffi)*, 96 F.3d 1190, 1191-92 (9th Cir. 1996)

(characterizing the foreclosure value of an asset as "forced sale" value). In the appraisal literature, these concepts are not the same.

The "primary difference between orderly and forced liquidation is the assumed time period for selling the property." *See* Am. Soc'y of Appraisers, Valuing Machinery & Equipment 11 (2011). Forced liquidation value contemplates an urgent sale, while orderly liquidation value contemplates liquidation over a more extended period of time. *Id.* In a foreclosure or forced liquidation, a seller is forced to sell in a severely restricted timeframe, such as a quick sale auction occurring in 30 to 60 days.

In assessing value in this case the Trust's expert assumed 9 to 18 months for disposition of the Representative Assets. This is appropriate for a calculation of fair market value, as opposed to foreclosure value. *See Alberts v. HCA, Inc. (In re Greater Se. Cmty. Hosp. Corp.),* No. 04-10366, 2008 WL 2037592, at *22 (Bankr. D.D.C. May 12, 2008) (indicating that an appraiser's "orderly liquidation value," reflecting the "value the equipment would earn in a sale that would occur within six to twelve months from the valuation date," contemplated a "typical fair market value period"). Under a forced liquidation value in exchange standard or a foreclosure value standard, appraisal values would have been significantly lower.

To determine the orderly liquidation value in exchange of the Representative Assets, the Trust's valuation expert considered the three standard appraisal techniques: market, cost, and income. *See* Am. Soc'y of Appraisers, Valuing Machinery & Equipment 12-13 (2011); *see also In re Chait Properties, Inc.*, No. 8-11-78236-reg, 2013 WL 4858296, at *3 (Bankr. E.D.N.Y. Sept. 10, 2013) (identifying the "three most widely recognized valuation approaches"); *In re Greater Se. Cmty. Hosp. Corp.*, 2008 WL 2037592, at *8.

The market approach relies on the assumption that the value of the property to be appraised can be measured by the selling or asking prices of similar assets, either individually or

collectively, in the used market. The market approach estimates value by "identifying and analyzing recent sales of comparable assets." *In re Greater Se. Cmty. Hosp. Corp.*, 2008 WL 2037592, at *8. The market approach yields "reliable and accurate estimates of value" if adequate data on those comparable sales is available. *Id.*; *see also* Am. Soc'y of Appraisers, Valuing Machinery & Equipment 13 (2011) ("The appraiser adjusts the prices that have been paid for assets comparable to the asset being appraised, equating the comparables to the subject."). The United States Supreme Court has recognized that "peculiar circumstances may make it impossible to determine a 'market value,'" including, for example, where there have been "so few sales of similar property" that a market price cannot be reliably predicted. *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949). However, even where sales are few and far between, isolated comparable sales may still be relevant in gauging value. *Id.*

The Trust will show that the best evidence of value is market sales of the same type of asset to be valued; however, where there is insufficient sales data for a particular asset, the best evidence is the sales and asking prices of similar assets with adjustments made for any differences, including those for the age, condition, and capacity of the assets or the location, date, and type of sale. The evidence will show that the market approach is preferred over the cost and income approaches, all else being equal. *See* Am. Soc'y of Appraisers, Valuing Machinery & Equipment 93 (2011).

The cost approach "measures the value of an asset by the cost to construct or replace it with another of like utility, taking into account depreciation in the asset to be valued." *NextWave Personal Commc'ns, Inc. v. F.C.C. (In re Nextwave Personal Commc'ns, Inc.)*, 235 B.R. 277, 294 (Bankr. S.D.N.Y. 1999), *rev'd*, 200 F.3d 43 (1999). Cost is distinguishable from price, in that cost relates to "production, not exchange." *See* Am. Soc'y of Appraisers, Valuing

Machinery & Equipment 12 (2011). The evidence will show that under the cost approach, the cost to purchase a brand new similar asset, or the Replacement Cost New ("**RCN**") of an asset, normally sets the upper limit of its value. RCN is estimated using either an indirect or direct approach. The indirect approach applies specific indices to the historical cost of an asset to estimate current replacement cost. The direct approach involves using published sources, cost estimating techniques, and input from dealers and manufacturers to supply that information.

The income approach looks to the "present value of the future economic benefits of owning the property." *See* Am. Soc'y of Appraisers, Valuing Machinery & Equipment 13 (2011); *see also In re Melgar Enters., Inc.*, 151 B.R. 34, 40 (Bankr. E.D.N.Y. 1993) (income approach looks to "net future income that the property is capable of producing"). The evidence will show that the income approach is appropriate for valuing assets only when it is possible to reliably allocate earning capacity to valuing individual assets, such as the Representative Assets. The parties agree that the income approach is not appropriate for valuing the Representative Assets.[38]

The Trust's expert will testify that he estimated the orderly liquidation value in exchange of the Representative Assets sold to New GM using the market approach where there was sufficient market data, and, in all other instances, the cost approach with the proper accounting for economic obsolescence to ensure that the cost values were appropriately aligned with and reflective of the market for the assets. The evidence will show that there is sufficient market data to determine the market value for many of the Representative Assets as of the Valuation Date.

[38] The income approach requires that the earning capacity of the Representative Assets be determined and that the expected capacity be capitalized at a rate sufficient to satisfy the investment requirements associated with ownership. Even when the income or earnings for a business are known or can be forecast, it is highly unlikely that some small portion of earnings could be reasonably attributed to an individual piece of machinery. For that reason, the income approach is rarely used when valuing individual pieces of machinery or equipment and is inappropriate here.

Therefore, in applying the market approach the Trust's expert estimated value based on market prices in actual transactions and asking prices for similar assets available as of the Valuation Date. *See HSBC Bank USA v. UAL Corp. (In re UAL Corp.)*, 351 B.R. 916, 918-20 (N.D. Ill. 2006) ("When collateral is not fungible, there is no readily accessible market price, and the value of 'like property' can only be measured by comparison to transactions involving similar properties . . . ."). Adjustments were then made for differences in factors such as location, type, age, and condition of the equipment. Where appropriate, the Trust's expert considered the scrap value of the asset or portions thereof. The evidence will show the market for the Representative Assets—either piecemeal or together—was extremely depressed in June 2009, and a fair market value must reflect that reality.

The Trust's expert will testify that because the Representative Assets are not brand new, when applying the cost approach accrued depreciation, including for physical deterioration, functional obsolescence, and economic obsolescence, needs to be deducted to arrive at value. To determine physical deterioration, he will testify that he considered, among other factors, the age of the asset as of the Valuation Date, current physical condition, operating history, and maintenance history. He also evaluated possible functional obsolescence considering the technology used by the Representative Assets and made adjustments to cost where applicable.

Finally, the Trust's expert considered economic obsolescence in applying the cost approach, which is any economic or external factors that may have impacted the value of the assets. The evidence will show that signs of economic obsolescence can include reduced demand for a company's products, overcapacity in the industry, dislocation of raw material supplies, increasing costs of raw materials, labor, utilities, or transportation while the selling price of the product remains fixed or increases at a much lower rate, government regulations that require capital expenditures to be made but offer no return on investment, and environmental

considerations that require capital expenditures to be made but offer no return on investment. As of the Valuation Date, the market for manufacturing machinery was depressed, with little activity for many types of assets among the Representative Asset, and, therefore, additional depreciation was required to account for those market conditions. The evidence will also show that reference to the rate of use of an asset to a specific user is insufficient to calculate the complete economic obsolescence factor indicated by the market.[39]

The values calculated by the Trust's expert for each of the Representative Assets (irrespective of their classification as fixture or non-fixture) are contained in Exhibit T to the Fisher Declaration.

1. Defendants' In-Use, Cost Approach to Valuation Provides an Inaccurate Calculation of Value

Defendants offer two overlapping views on the proper standard for valuing the Representative Assets. Both approaches adopt an in-use valuation methodology that is not appropriate for the reasons discussed above.

However, even if the Court were to apply a going concern standard in valuing the Representative Assets sold to New GM, Defendants' application of the cost method is fundamentally flawed and should be disregarded. Both of Defendants' methods for calculating value, offered by two of Defendants' experts, present an inflated view of value that does not

[39] The Trust's expert will also testify that he considered the real-world circumstances under which the assets would be sold during an orderly liquidation in calculating the values of the Representative Assets. The evidence will show that a potential buyer of the Representative Assets would ignore the seller's original installation or other indirect costs incurred to procure the asset and make it operational at the seller's location. The evidence will also show that it is not appropriate to deduct any costs that a buyer would have to incur in removing the asset from the seller's premises in valuing them because the market would incorporate that cost into the price of the asset on the market. In other words, when a buyer purchases an asset, the buyer is already aware that it must pay removal costs on top of the price paid for the asset. Therefore, the Trust's expert will testify that in reaching his conclusions the cost of installation (but not the cost of removal) were deducted in arriving at an indication of value for each asset. Given the purpose of the valuation—assessing value that should be paid to the secured creditors—it is self-evident that installation cost need not be factored into a valuation under Section 506(a), which requires valuation from the debtor's perspective.

reflect the realities of the market and deviate from proper and accepted valuation and appraisal methods.

Under Defendants' primary valuation proposal, the Surviving Collateral would be valued at approximately $3.2 billion. This means that Defendants would be secured far in excess of the $1.5 billion they lent Old GM, notwithstanding the Second Circuit's ruling that Defendants' security interest in all of the equipment and many of the fixtures had become unperfected before the Petition Date. Defendants' position suggests that even though their security interest in the personal property at all Old GM facilities—and *all* fixtures at Old GM's facilities not perfected by the Fixture Filings—was terminated, they are *still* fully secured because of the immense value of what Defendants claim are fixtures. This assertion is not only unsupported, but makes no sense given the circumstances surrounding the Term Loan and the litigation in this matter to date.

2. The Cost Approach Should Not Be Used When Market Data Is Available

For both of their proposed valuations, Defendants rely on an analysis that employs the cost approach, and entirely disregards the market approach, to value the Representative Assets. Where sufficient market data is available, the market approach is preferable. *See* Am. Soc'y of Appraisers, Valuing Machinery & Equipment 94 (2011).[40] As the evidence will show, there is sufficient market data for many of the Representative Assets.

Moreover, courts, including the Supreme Court, have cast doubt on the propriety of the cost approach where, as here, there is a seriously depressed market for the asset to be valued. *Toronto*, 338 U.S. at 402-03 (rejecting "original cost" and "reproduction cost" as measures of

[40] GAAP also supports the market approach.

value where "present market value in no way reflect[ed] the cost"). The Supreme Court stressed that, even where it is impossible to determine a true market value, other means of measuring value have relevance only insofar as they "bear[] on what a prospective purchaser would have paid." *Id*. at 402.

For example, in the case of *Int'l Bank of Commerce v. Davis (In re Diamond Beach VP, LP)*, 506 B.R. 701 (Bankr. S.D. Tex. 2014), the bankruptcy court held that the cost approach to valuation—proffered by experts for both parties—was inappropriate for assessing the value of an asset for which there was a depressed market. The court explained that while "cost is a proxy for value" in a "normal" or "competitive" marketplace, equating cost with value in a noncompetitive environment "may produce irrational results." *Id.* at 724. The district court affirmed the bankruptcy court's rejection of the cost approach, noting that the methodology was inappropriate absent a "viable marketplace." *Davis v. Int'l Bank of Commerce (In re Diamond Beach VP, LP)*, 551 B.R. 590, 607-08 (S.D. Tex. 2016); *see also UAL Corp.*, 351 B.R. at 918-20 (where "there is no readily accessible market price," the "value of 'like property' can only be measured by comparison to transactions involving similar properties").[41]

Here, the evidence will show that the market was extremely depressed. This is precisely why the Trust's expert applied an external economic obsolescence factor that adequately reflected the market in all instances in which he applied the cost approach in determining the liquidation value of the Representative Assets. Defendants, on the other hand, advance cost-based values that are grossly out of line with market-based values and fail to adequately consider external obsolescence factors. For this reason, Defendants values should be rejected. The

[41] Although there is not a market for every Representative Asset, for those Representative Assets for which there is a market, that market—although depressed—nonetheless existed. The evidence will show, and as played out in the sale of thousands of machinery and equipment from closed Old GM facilities, there continued to be auctions and sales of assets.

Defendants resort to an irrational valuation method in an effort to arrive at an irrational result.

3. Defendants' Primary Valuation Approach

We anticipate that Defendants' primary approach to valuation will be to rely on a truncated portion of KPMG, LLP's ("**KPMG**") valuation of New GM's tangible assets in connection with KPMG's Valuation of Total Invested Capital and Certain Assets, Liabilities and Equity Interests of General Motors Company, as of July 10, 2009 (the "**KPMG Report**"). For reasons that will be set out in the Trust's motions *in limine*, the KPMG Report is both irrelevant and inadmissible. However, even if the KPMG Report were admissible, it is of no use in valuing the Representative Assets.

KPMG performed a cost-based assessment of the aggregated value of the Personal Property ("**Personal Property**") and Buildings & Improvements ("**B&I**") of New GM North America ("**GMNA**"), a regional operating segment of New GM. The Representative Assets are constituent assets within the aggregate Personal Property and B&I groupings that were valued by KPMG in its "mass appraisal." KPMG never determined final fair values for any of the Representative Assets. Rather, it determined concluded opinions of a fair value for the asset categories of "Property, Plant, and Equipment," which is comprised of multiple subcategories, including Personal Property and B&I. Nonetheless, Defendants assert that the best "proxy" values for the Representative Assets are achieved by identifying numerical calculations contained in "back-up" working papers that are not part of the KPMG Report and then abridging these calculations by eliminating external market considerations. The truncated portion of calculations found in supporting documentation to the KPMG Report do not provide meaningful "proxy" values for the Representative Assets.

Specifically, Defendants focus on and approve of an *interim* calculation in KPMG's calculation of the fair value of Personal Property and B&I. These interim figures, which KPMG

referred to as Replacement Cost New Less Depreciation ("**RCNLD**"), are found only in KPMG's backup working papers and not in the KPMG Report. The term "RCNLD," as this term appears in KPMG's calculations, begins with an initial value that reflects the cost to replace or reproduce certain assets and/or groups of assets. This initial value was either provided to KPMG by New GM's management or derived from historical values found on Old GM's books and records. KPMG did not independently arrive at these values by examining or testing these assets, and KPMG did not make any efforts to corroborate, on a sampled basis or otherwise, whether the amounts entered in the "RCNLD" column of its backup worksheet reflected market conditions or the economic utility generated by an asset.

Furthermore, the values in the "RCNLD" worksheet column reflected downward value adjustments for certain categories of depreciation, but not for all categories of depreciation that KPMG concluded were necessary to apply. Most notably, the final discount applied by KPMG, which KPMG referred to as the economic obsolescence attributable to the low earnings power of New GM's assets, was not captured in RCNLD. Application of this final economic obsolescence discount factor is significant, and Defendants' position is that KPMG violated GAAP in applying this economic obsolescence factor. To the contrary, KPMG's application of this economic obsolescence factor was required by GAAP and was incorporated into the final "Property, Plant, and Equipment" values presented in New GM's SEC Filings. If KPMG had severed this adjustment from its valuation process and used "RCNLD" numbers that did not reflect this economic obsolescence factor, as Defendants' contend it should have, New GM's presentation of truncated calculations in its SEC filings would have constituted a perilous violation of GAAP.

As an initial matter, the evidence will show that the KPMG Report was an accounting project performed for New GM. Defendants' selective reliance on this report is inappropriate because it is not, and does not purport to be, an effort to value the Representative Assets to the

Debtors. First, KPMG did not value the Representative Assets in the hands of Old GM. Rather, it valued whole categories of assets as a going concern to New GM, an entity that had the benefit of tens of billions of dollars of cash provided by the Government. The evidence will show that KPMG calculated an enterprise value for New GM, called "Total Invested Capital" (or "**TIC**"), a "Reorganization Value" that included this cash. Then, KPMG distributed TIC and applied this Reorganization Value across all categories of assets on New GM's balance sheet, including the asset category that was in part comprised of Personal Property and B&I. This made sense in the context of KPMG's accounting engagement, because KPMG's assignment was to determine certain asset values for New GM, with the understanding that New GM in turn would present New GM's overall financial position, which included the Government's cash infusion, and not to determine the value of individual assets. The evidence will further show that KPMG's concluded fair values were calculated for GMNA's total "Property, Plant, and Equipment," of which the Personal Property and B&I assets of GMNA collectively were constituents. KPMG did not render opinions concerning the final fair values for any individual Personal Property or B&I assets, including the Representative Assets, or, for that matter, even calculate final fair values for individual Personal Property or B&I assets. Second, the KPMG Report's analysis was intended to be used by New GM to present a balance sheet for SEC reporting purposes. Accordingly, KPMG was engaged in an accounting exercise that was the precursor to the presentation of a balance sheet that would include some items that would be measured, under GAAP mandates, at values that expressly were not fair values. Valuation of assets for accounting purposes provides no meaningful measure of value from an economic perspective, and is therefore not reliable.

Third, KPMG specified that the KPMG Report was only valid as of particular date—July 10, 2009—not the Valuation Date. A valuation done as of any date other than the Valuation

Date is not relevant. The timing of a valuation may be "crucial in determining an appropriate value." *In re Lucero*, 2014 WL 2159553, at *4. Under Section 506(a), a "debtor's assets must be valued at the time of the relevant valuation . . . and not at what the assets turned out to be worth at some time after the intervening bankruptcy." *Union Bank of Switz. v. Deutsche Fin. Servs. Corp.*, No. 98 Civ. 3251(HB), 2000 WL 178278, at *10 (S.D.N.Y. Feb. 16, 2000).

Moreover, the evidence will show that the RCNLD calculations are not reliable values for the Representative Assets. RCNLD values were not calculated with precision or consideration of individual factors related to the assets. Despite extensive discovery efforts by Defendants, little is known about the initial aggregated replacement cost estimates provided by company management that were crucial in the valuation of many of the Representative Assets. There is no evidence of how the starting replacement costs were calculated or developed by New GM and/or Old GM staff, who calculated them, what standard was employed, and what information was considered.

The evidence will also show that, in determining initial replacement costs, KPMG frequently relied on management-provided estimates that were developed and expressed on a facility-wide basis for entire groups of assets, with no consideration or isolation of the replacement costs associated with individual assets or subsets of assets that constitute fixtures. Further, KPMG never applied a single dollar of functional obsolescence, a key component of depreciation, to any of the individual assets or subcategories of assets of which the Representative Assets are constituents.

But most importantly, RCNLD values calculated by KPMG do not reflect fair market values because they exclude the comprehensive economic obsolescence adjustment that KPMG properly determined was necessary to arrive at GAAP-compliant values suitable for SEC reporting purposes. To ask the Court to consider RCNLD as the basis for valuing the

Representative Assets is to ask the Court consider an exercise that the developer of the exercise, KPMG, considered to be only partially complete and not in compliance with GAAP. The evidence will show that KPMG's conclusions regarding the importance of incorporating economic obsolescence that reflects economic considerations external to the company are correct, and that application of such external economic obsolescence is a necessary and required step in valuing New GM's assets.

Defendants are expected to argue that KPMG's calculation of RCNLD is reliable and accurate, on the one hand, but then argue on the other hand that multiple other aspects of KPMG's analysis that adjust RCNLD values downward are inaccurate and unsupported. Defendants will contend that the Court should adopt their proposed revisions to KPMG's methodology and calculations in a manner that results in higher values for the Representative Assets than would be determined pursuant to KPMG's own methodology. In short, Defendants ultimately seek to rewrite the KPMG Report by selectively changing it into an individual asset-by-asset valuation (which it is not), relying on a backup document as if it was KPMG's final conclusion (which it is not), and re-writing and abridging those portions of backup documents with which they disagree. This approach of picking and choosing from the KPMG Report is inconsistent, unsound, and result-driven.

For all of these reasons, Defendants' primary valuation approach should be rejected.

4. Defendants' Secondary Valuation Approach

Defendants are expected to offer a second valuation opinion. It is unclear why Defendants offer two conflicting valuation approaches and calculations. Pursuant to this alternative approach, Defendants are expected to advance a "fair market value in continued use"

approach,[42] which is "an opinion, expressed in terms of money, at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts, as of a specific date and assuming that the business earnings support the value reported, without verification." Am. Soc'y of Appraisers, Valuing Machinery & Equipment 10 (2011). Defendants' own definition requires that the business earnings support the value reported for the assets, and that the buyer be under no compulsion to buy the assets, both facts Defendants' expert was instructed to assume by counsel for Defendants. As discussed above, neither of these assumptions are supported by the evidence.

The evidence will show that for Defendants' secondary valuation approach they employed a cost approach—and ignored the market approach—in calculating the fair market value in continued use. Defendants' expert is expected to testify that the market approach is not appropriate because there was insufficient market data to value any of the Representative Assets. The evidence will show that this is not the case. Many of the Representative Assets had a robust secondary market. For example, Maynards Industries, an asset liquidator, has sold thousands of robots and hundreds of presses and cranes. Additional databases used by appraisers, such as DataRef and The Book, shows thousands of sales of similar equipment during this time period and the sales of Old GM machinery and equipment bears this out.

He is also expected to testify that, unlike under Defendants' primary valuation approach, his cost calculation was not based upon KPMG's RCNLD interim calculation. Rather, he relied entirely on the historical cost to purchase the Representative Assets. He is expected to further

[42] The "fair market value" Defendants reference is the "fair market value" standard used by appraisers, not that frequently referenced by courts. This approach "establishes value on the premise of the continued use of the assets in the business. It assumes that the buyer and seller would be contemplating retention of the assets at their present location as part of the current operations." *DeBoer*, 502 F. Supp. at 1161.

testify that he brought the historical costs forward using a trended inflation measure. He then deducted from those costs amounts attributable to physical depreciation, functional obsolescence and an inutility penalty to arrive as his final values for the Representative Assets.

Under this secondary proposed approach, the Representative Assets would be valued at $156.16 million (even more than Defendants' primary valuation approach).

The evidence will show that this method is not credible. To calculate functional obsolescence, Defendants' expert is expected to testify that he used Bureau of Labor statistics regarding annual productivity in the United States. The evidence will confirm that he did not base his analysis on any inspection of the Representative Assets, despite having the opportunity to evaluate each asset in person on the site visits in this case. The evidence will show that this approach is not an accepted method for calculating functional obsolescence, and Defendants can offer no reasonable explanation for his use of this method.

Defendants' expert is also expected to testify that rather than calculating economic obsolescence based on external factors, he instead applied only an inutility penalty taken from the KPMG Report. The evidence will show that this is an insufficient measure of economic obsolescence because it fails to account for any external economic factors, entirely disregarding the external market. This approach violates principles of economics and appraisal rules.[43]

[43] The evidence will show that because the market data does not support an in-use value premise, there is no reliable way to complete such analysis. However, in his rebuttal report, the Trust's valuation expert nonetheless performed a hypothetical calculation of the Representative Asset's liquidation value in place. While the Trust will show that orderly liquidation in exchange is the right method of valuation, it will also show, if necessary, that its expert's hypothetical valuation of liquidation value in place offers a more reliable measure of value than either of the in-use, cost methodologies employed by Defendants. The evidence will show that the liquidation value in place approach employed in the Trust's alternative, rebuttal valuation assumes that some market participant would be willing to buy the assets to keep using them, but also incorporates real world data regarding the poor state of the market for automotive equipment. This alternative valuation is purely hypothetical and yields values in excess of the market value for the assets because, as explained above, there was no commercial purchaser willing to purchase the assets in place. Although these in-place values are in excess of realistic market values for the Representative Assets, they are still a fraction of Defendants' inflated values.

Further, the evidence will show that he performed no independent check on KPMG's analysis of inutility and has no substantive information regarding KPMG's methodology. As such, he is unable to verify its reliability or accuracy.

Defendants' expert is also expected to testify that the two Representative Assets not sold to New GM should be valued at their orderly liquidation value. These assets were sold by Old GM in connection with the wind-down of its estate. Defendants' expert applied a 30% inutility penalty to these assets as his economic obsolescence factor. The evidence will show that he employed no substantive methodology for this calculation, and that his methodology fails to consider or reflect relevant market factors. The evidence will further show that he does not offer any explanation as to why he employs the cost approach rather than the market approach for these two assets, despite the availability of *actual* sale data for these exact assets.

For all of these reasons, Defendants' secondary valuation approach should be rejected.

CONCLUSION

At the Representative Assets Trial, Plaintiff will seek a ruling from the Court that: (i) the three Excluded Assets are not Surviving Collateral; (ii) there is no Surviving Collateral at the GM Powertrain Engineering facility; (iii) there is no Surviving Collateral at the Lansing Delta Township Assembly facility and the Lansing Regional Stamping facility; (iv) the Representative Assets be classified in accordance with Plaintiff's position; and (v) any Surviving Collateral should be valued in accordance with Plaintiff's expert valuation opinion based upon a liquidation value in exchange premise of value.

Dated: March 1, 2017
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Respectfully submitted,

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