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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 POST-TRIAL BRIEF

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Plaintiff Motors Liquidation Company Avoidance Action Trust (the "**Trust**" or "**Plaintiff**") respectfully submits this post-trial brief (the "**Post-Trial Brief**").

PRELIMINARY STATEMENT

In this bankruptcy case, Defendants were paid approximately $1.5 billion, as though the value of their collateral exceeded the value of the amount they were owed on the Term Loan on the date they were paid (June 30, 2009). But the scope of their surviving collateral has never been defined following the Second Circuit's decision ruling that Defendants' main Delaware UCC-1 financing statement had been terminated. And their collateral has never been valued. The purpose of the Representative Assets trial is to obtain a bellwether decision from the Court, determining which of the Representative Assets are included in the surviving collateral and how those assets ought to be valued.[1]

As summarized in the chart on pages 338 to 339 of this brief, 39 of the 40 Representative Assets are not included in the surviving collateral. There are three independent, and sometimes overlapping, reasons why assets among the Representative Assets are not surviving collateral. First, three of the Representative Assets are not within the grant of collateral because they were not owned by Old GM or because they are subject to a prior lien. Second, 21 of the Representative Assets are not covered by a fixture filing because they are located at the Lansing Regional Stamping and Lansing Delta Township Assembly facilities. Last, 36 of the Representative Assets are not part of the surviving collateral because they are not fixtures (and portions of two other Representative Assets also are not fixtures).

In considering whether an asset was a fixture or not, Plaintiff drew upon all available sources of objective facts, in order to assess whether the asset had become a permanent accession

[1] In addition to a ruling on the Representative Assets, the parties also seek a ruling as to whether assets located at the GM Powertrain Engineering facility in Pontiac, Michigan, are included in the surviving collateral.

to the realty under either Michigan or Ohio law, as applicable. In addition to presenting the expert opinion of David K. Goesling, who has substantial experience classifying automotive assets into real and personal property categories in a great variety of contexts, Plaintiff also elicited and analyzed substantial third-party evidence about the assets from sources such as New GM, Maynards, Hilco, KPMG and others. In addition to a detailed analysis of the physical characteristics of the Representative Assets, Plaintiff's evidence at trial included Mr. Goesling's analysis of asset movements between GM plants, his analysis of asset retirements before the end of their useful lives, his analysis of the secondary market for these types of assets and other analyses performed by Mr. Goesling. As discussed in detail below, Plaintiff's consideration of all available evidence allowed for nuanced distinctions among the different categories of assets, including, among others, robots, presses, conveyors and machining equipment.

Defendants approach to the classification issue ignored or dismissed most third-party evidence. Defendants dismissed as "extraordinary," and thus failed to credibly grapple with, the substantial evidence of asset movement that Mr. Goesling gleaned from eFAST, GM's data about asset retirement, and Maynards' and Hilco's data about sales of GM assets. Defendants were similarly dismissive of GM's tax classification of its assets and the related GM testimony, GM's accounting policies and other policies related to GM's relocation of assets, relevant documents (like asset leases and patents describing assets), and GM's treatment of manufacturing assets in connection with sales of GM realty and buildings.

Rather than work with facts learned from third parties, Defendants' approach to the fixture classification question is entirely dependent on a closed circle of paid consultants, many of whom offered testimony based on their general recollection of GM's product planning process. This testimony broadly asserted that when GM planned for new manufacturing assets, it

always intended for those assets to be installed permanently. According to Defendants, this broad claim is equally true of presses as it is of robots; it is equally true of all conveyors, no matter the type; it is equally true in an old foundry, as it is in a newer assembly plant. Because Defendants' experts were proceeding from the premise that GM always installed its manufacturing assets with the intent that they be permanent, they had little need for third-party facts about asset movement, asset retirement, asset sales, and the like, because these experts claimed to have access to knowledge about GM's true intent with respect to all of its installed manufacturing assets.

As explained in detail below, Defendants' experts' positions about fixture classification should be accorded very little weight. There are no fixture-classification cases that credit the sort of corporate planning testimony offered by Defendants, notwithstanding their attempt to characterize the testimony as based on "objective facts." Further, the planning testimony is not particularly closely tied to any of the Representative Assets or their installation. Indeed, Defendants' primary overview witness, Eric Stevens, who opines about GM's supposed intent for all manufacturing assets at Lansing Delta Township Assembly to be permanent was out of the country during the two years leading up to the opening of that plant.

Moreover, Defendants' assertions about GM's planning process are entirely uncorroborated. No third-party witness and no document in evidence supports the claims they made about GM always planning for permanence. Further, this general planning testimony is insufficiently attentive to the particulars of the Representative Assets or the very different plants where they are situated. Highlighting the generality of their approach to the issue, two of the consultants called to testify by Defendants are not even offering an opinion about any particular

asset. This kind of general, corporate intent testimony is at odds with the case law's focus on objective facts from which reasonable inferences may be drawn about intent.

In contrast to Defendants, Plaintiff's approach to fixture classification is more tedious and painstaking (and maybe more boring), but ultimately more faithful to the case law. Ultimately, Mr. Goesling's analysis of the objective facts, together with the third-party evidence introduced at trial, are more reliable guides for this Court in applying Ohio and Michigan law to the Representative Assets, in a manner that is tailored to careful consideration of each asset on its own terms.

With respect to the valuation of the Representative Assets, the evidence at trial supports the conclusion that the Representative Assets should be valued under the premise utilized by Mr. Goesling in his appraisal: orderly liquidation value in exchange.

First, the assets are required to be valued in light of their intended disposition from the perspective of the debtor. Here, the intended disposition is a the sale of the Representative Assets, which, in the hands of Old GM were worth only what Old GM could realize through a sale of the individual assets (or grouping of assets) in a liquidation. Section 506(a) of the Bankruptcy Code is to be assessed from the perspective of the debtor. Therefore, the 38 Representative Assets sold as part of the 363 sale to New GM must be valued on the basis of their fair market value, as of the valuation date, in the hands of Old GM as debtor, and not in the hands of New GM. [2]

The reason the Representative Assets were worth no more than could be realized in a liquidation is that Old GM had no value as a going concern. It was a failing firm facing imminent shut down of its operations and liquidation of its assets. Its extensive efforts to secure

[2] Of the 40 Representative Assets, two remained with Old GM and should be valued on the same basis.

private financing and to sell its operations or to merge with another automotive manufacturer all failed. The fair market value of an asset is the price that the asset would command in an open and competitive market, and as of the valuation date, no market participant was willing to purchase the assets of Old GM as a going concern. The highest value for each of the Representative Assets is what Old GM would have realized by selling them on the open market. No commercial actor would have paid more than the liquidation value to obtain any assemblage of Old GM's assets in the market because they were not worth anything more. Thus, liquidation value is the proper measure of value for Representative Assets.

It is, of course, the fact that the government, compelled to prevent the collapse of the U.S. economy that would result if Old GM failed, bailed out Old GM by extending billions in TARP and DIP financing and by sponsoring a new entity that would purchase substantially all of Old GM's assets to prevent the firm's shuttering. And that as part of the transaction to acquire the assets of Old GM, the government provided New GM with a massive subsidy. In providing this subsidy, the government acted in a manner that no party with ordinary commercial motivations would act. Old GM was unable to maintain its operations or to generate cash flows absent this extensive government support in the months leading up to and beyond the valuation date. Even the new entity, New GM, was critically dependent on government support after the 363 sale, and would not have been able to sustain operations without the subsidy. This bailout, however, does not form a valid basis for valuing the Representative Assets for more than their liquidation value. In other words, the amount properly attributed to the Representative Assets as part of the 363 sale is the amount that any market participant would have paid for those assets. To do otherwise would provide a group of secured lenders with a portion of the subsidy that was never intended

to benefit them and is entirely unrelated to the value of the Representative Assets in the hands of Old GM.

Furthermore, even were the Court to determine that going concern value was the correct methodology for determining fair market value of the Representative Assets, notwithstanding the government bailout, the fact that the Representative Assets were put to use by New GM after the 363 sale did not increase their market value. The government bailout was of value to New GM, but did nothing to increase the value of the Representative Assets, let alone increase their value in the hands of Old GM. Further, the government's massive subsidy was the primary driver of New GM's equity value and its potential for profitability—not the firm's assets. Without the government cash on New GM's balance sheet, New GM was not solvent, would not have existed as a going concern as of July 10, 2009, when the sale closed, and would not have been able to put Old GM's assets to use. Many of the improvements that enable New GM to be a going concern after the 363 sale could not have been realized but for the nature and enormity of the bailout.

Mr. Goesling applied an orderly liquidation value in exchange premise of value in his appraisal, which is the value that would be obtained in an orderly liquidation on the appropriate secondary markets. 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. Notably, Mr. Goesling's appraised values are the *only* values of the Representative Assets offered by the parties that account for the actual market for the assets, and is therefore the only valuation consistent with Section 506(a).

In contrast, Defendants have sought to value assets in the hands of Old GM as if they were assets of New GM, with all the benefits of the Government subsidy. And they have gone even further, seeking to value the assets in the hands of New GM at close to twice the value that New GM itself assigned to those assets. Defendants' attempt to achieve this extraordinary outcome would require, as an initial step, the introduction of the KPMG Report as the touchstone of valuation. Defendants' strategy is to have this Court (i) accept the KPMG Report as an appropriate reference point for valuing the Representative Assets and then (ii) completely dismantle the entire report on the ground that it was prepared on the basis of multiple GAAP violations amounting to multi-billion dollar errors. Although relentless in their reliance on the KPMG Report, mere repetition does not make the report any more relevant, either for the values Defendants urge or as the basis for a "compromise" position by using the Final Concluded Fair Value that KPMG determined for each asset. Because the values presented in the KPMG Report, on its own terms or Defendants' cherry-picked version, are those of New GM operating as a going concern with the benefit of the government subsidy, those values are irrelevant. For the same reason, the appraisal values of Defendants' expert, Carl Chrappa, are too.

For these reasons, more fully set out below, the proper measure of value of the Representative Assets in the hands of Old GM is orderly liquidation value.

PROPOSED FINDINGS OF FACT

I. OLD GM AND ITS SUPPLIERS

1. For over one hundred years, General Motors Corporation ("**Old GM**")[3] and its approximately 463 direct and indirect wholly-owned subsidiaries were a major component of the U.S. manufacturing and industrial base and the market leader in the U.S. automotive industry.

[3] Old GM changed its name to Motors Liquidation Company ("**MLC**") after the sale of substantially all of its assets pursuant to Section 363 of the Bankruptcy Code.

JX-0006-0004 (Affidavit of Frederick A. Henderson Pursuant to Local Bankruptcy Rule 1007-2 ¶ 7 ("**Henderson Aff.**")).

2. Old GM was the largest Original Equipment Manufacturer ("**OEM**") in the U.S. and the second largest OEM in the world. JX-0006-0010 (Henderson Aff. ¶ 20).

3. As of March 31, 2009, Old GM employed approximately 235,000 persons worldwide, with approximately 91,000 of those employed in the U.S. JPTO Stipulated Facts ¶ 2[4]; JX-0006-0011 (Henderson Aff. ¶ 23); *In re Gen. Motors*, 407 B.R. 463, 475 (Bankr. S.D.N.Y. 2009).

4. Old GM utilized the services of thousands of different suppliers. JPTO Stipulated Facts ¶ 3; JX-0006-0012 (Henderson Aff. ¶ 25).

5. Old GM's use of these suppliers resulted in approximately $50 billion in annual supplier payments from Old GM. *In re Gen. Motors*, 407 B.R. at 476.

6. Approximately 11,500 of those suppliers were in North America. *In re Gen. Motors*, 407 B.R. at 476; JX-0006-0012 (Henderson Aff. ¶ 25).

7. At least hundreds and possibly thousands of automotive parts suppliers depended on Old GM for their survival. JPTO Stipulated Facts ¶ 4; *In re Gen. Motors*, 407 B.R. at 476; *see also* JX-0006-0012 (Henderson Aff. ¶ 25).

8. Over 600 of Old GM's suppliers had sales to Old GM that represented over 30% of the suppliers' annual revenues. *In re Gen. Motors*, 407 B.R. at 476.

II. THE TERM LOAN TO OLD GM

[4] All references to "JPTO" are to the parties' Amended Joint Pretrial Order, submitted to the Court on April 23, 2017.

9. Old GM borrowed approximately $1.5 billion pursuant to a term loan agreement (the "**Term Loan Credit Agreement**"), dated as of November 29, 2006, and amended as of March 4, 2009, among Old GM, Saturn, JPMorgan Chase Bank, N.A. ("**JPMorgan**"), and a syndicate of bank lenders (together with JPMorgan, the "**Term Lenders**" or "**Defendants**"). JPTO Stipulated Facts ¶ 44; PX-0288 (Term Loan Credit Agreement).

10. JPMorgan was the administrative agent for the loan (the "**Term Loan**"). JPTO Stipulated Facts ¶ 46.

11. To secure Old GM's and Saturn's obligations under the Term Loan, pursuant to a November 29, 2006 collateral agreement (the "**Term Loan Collateral Agreement**," and collectively with the Term Loan Credit Agreement, the "**Term Loan Agreements**"), Old GM and Saturn granted to JPMorgan, as administrative agent for the Term Loan, a first-priority security interest in equipment, fixtures, documents, general intangibles, all books and records and their proceeds at 42 Old GM and Saturn facilities throughout the United States, plus certain related facilities (the "**Collateral**"). JPTO Stipulated Facts ¶ 47.

12. A UCC-1 financing statement was filed with the Secretary of State of Delaware, which perfected the Term Lenders' security interest in all of the Collateral "now owned or at any time hereafter acquired" by Old GM and its affiliates (the "**Delaware Umbrella Financing Statement**"). JPTO Stipulated Facts ¶ 48.

13. A separate UCC-1 financing statement was filed with the Secretary of State of Delaware, which perfected the Term Lenders' security interest in all of the Collateral "now owned or at any time hereafter acquired" by Saturn and its affiliates (the "**Delaware Saturn Financing Statement**"). JPTO Stipulated Facts ¶ 49.

14. The term "Material Facilities" is defined in the Term Loan Credit Agreement as manufacturing facilities listed on Schedule 1 to the Term Loan Collateral Agreement where Collateral with a net book value of at least $100,000,000 was installed or located.

JPTO Stipulated Facts ¶ 51.

15. The Term Loan Agreements contemplated that fixture filings for each of the "Material Facilities" would be filed in county real estate records in the corresponding office of the County Clerk for the counties where the Material Facilities were located. JPTO Stipulated Facts ¶ 50; JX-0001-0107 (Term Loan Credit Agreement Schedule 3.12).

16. JPMorgan 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; *accord* JPTO Stipulated Facts ¶ 52.

17. In connection with the Term Loan Agreements, Old GM provided JPMorgan with collateral value certificates ("**Collateral Value Certificates**"). *See*, *e.g.,* PX-0023 (Collateral Value Certificates); PX-0288-0036 (Term Loan Credit Agreement).

18. In the Collateral Value Certificates, Old GM valued the Collateral at net book value, not at fair market value or using any other standard of value. Duker Dep. 41:2-41:11[5], 61:17-62:4; *see* PX-0032 (email regarding Collateral Value Certificates; *see also* PX-0023 (Collateral Value Certificates).

19. The Collateral Value Certificate provided by Old GM dated March 31, 2009, the last one provided before Old GM filed its bankruptcy petition, indicates that the net book value

[5] All references to "Dep." are to the deposition testimony for the witness, as designated by the parties. These references are subject to the Court's ruling on the Parties' objections to designated deposition testimony.

of all machinery and equipment Collateral was $4.535 billion and all special tools Collateral was $1.070 billion, for a total of $5.605 billion. PX-0023-0024.

20. JPMorgan did not independently value the Collateral securing the Term Loan, nor did it have an understanding of the specific valuation methodology employed by Old GM when it valued the collateral. Duker Dep. 41:01-42:01, 111:4-111:10.

21. In October 2008, a representative of a Term Lender expressed concern to Richard Duker, his contact at JPMorgan, that there "may be a disconnect [between] the company's book value for the collateral and its fair market value." PX-0032-0003.

22. In response to the Term Lender investor's inquiry, Mr. Duker confirmed that net book value, as reflected in the collateral value certificates, was not intended to reflect fair market value. PX-0033-0002.

III. OLD GM WAS FAILING PRIOR TO ITS BANKRUPTCY

23. In the period leading up to June 1, 2009, when it filed its bankruptcy petition, and prior to its sale of substantially all of its assets to a government-sponsored entity in a transaction under section 363(b) of chapter 11 of title 11 of the United States Code (the "**363 Sale**") on July 10, 2009, Old GM was facing dramatic financial distress. JX-0006-0005 (Henderson Aff. ¶ 10); *see In re Gen. Motors Corp.*, 407 B.R. at 476.

24. By the fall of 2008, the Company was in the midst of a severe liquidity crisis, and its ability to continue operations grew more and more uncertain with each passing day. JX-0006-0006 (Henderson Aff. ¶ 12); *see In re Gen. Motors Corp.*, 407 B.R. at 476 ("[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.").

A. Various Factors Contributed to Old GM's Distress

25. Old GM was burdened with significant structural costs, union restrictions, pension and healthcare obligations, an inefficient dealership network, and several failed brands. JPTO Stipulated Facts ¶ 8.

26. Competition from foreign automakers and high costs put pressure on Old GM. JPTO Stipulated Facts ¶ 5.

27. The growth of these competitors, who had far lower cost structures and dramatically lower benefit obligations, contributed to the decline in Old GM's position in the U.S. *See In re Gen. Motors Corp.*, 407 B.R. at 476.

28. Old GM's financial performance and liquidity were adversely impacted by the economic recession. PX-0133-0009 to 0010 (Repko Decl. ¶ 20).

29. An increase in gas prices, contraction of the credit markets, lowering of consumer confidence, high unemployment, and a further drop in consumer discretionary spending increased the pressure on Old GM and contributed to a downturn in auto sales. JPTO Stipulated Facts ¶ 7.

30. With crude oil prices rapidly rising and reaching $148 per barrel in July 2008, sales of large SUV and pick-up trucks, two segments in which GM traditionally had significant market share, dramatically declined. PX-0133-0009 to 0010 (Repko Decl. ¶ 20).

31. The Seasonally Adjusted Annual Rate of Auto Industry Sales in the U.S. ("**SAAR**") fell to 13.6 million in June 2008, 13% below the same prior year period, and continued to decline reaching 10.3 million in December 2008. PX-0133-0009 to 0010 (Repko Decl. ¶ 20).

32. For the fourth quarter of 2008, Old GM's domestic automobile sales were down 36% compared to the corresponding period in 2007. JX-0006-0006 (Henderson Aff. ¶ 11).

B. Old GM Could No Longer Operate as a Going Concern by June 2009

33. The pressures and burdens discussed above resulted in Old GM facing a capital shortfall. JPTO Stipulated Facts ¶ 9.

34. In November 2008, Old GM was essentially out of cash and desperately needed liquidity. Feldman Dep. 39:3-39:13; 39:24-40:05.

35. For the year ended December 31, 2008, Old GM had negative operating cash flows of over $12 billion. JX-0009-0128; *see* Fischel Test. 2637:19-2640:5.[6]

36. On May 8, 2009, Old GM announced its first quarter 2009 results, which presented a "grim financial picture, and equally grim trends." *In re Gen. Motors*, 407 B.R. at 479.

37. In its Form 10-Q filed on May 8, 2009, Old GM reported consolidated global assets of approximately $82 billion and liabilities of approximately $172 billion, as of March 31, 2009. JPTO Stipulated Facts ¶ 15; *In re Gen. Motors*, 407 B.R. at 475.

38. In its Form 10-Q filed on May 8, 2009, Old GM also reported total net revenue had decreased by $20 billion (47.1%) in the first quarter of 2009, as compared to the same period in 2008. JPTO Stipulated Facts ¶ 16; JX-0006-0029 (Henderson Aff. ¶ 67).

39. During this same period, Old GM had negative cash usage of $9.4 billion and available liquidity deteriorated by $2.6 billion due, in large part, to lower sales volumes. JX-0006-0029 (Henderson Aff. ¶ 67).

40. For the first quarter of 2009, Old GM's domestic automobile sales dropped by 49% compared to the corresponding period in 2008. JX-0006-0006 (Henderson Aff. ¶ 11)*; In re Gen. Motors*, 407 B.R. at 479.

[6] All references to "Test." are to the trial transcript for the Representative Asset trial.

41. Between 1980 and 2009, Old GM's market share for new North American vehicle sales dropped from 45% to approximately 19.5%. JPTO Stipulated Facts ¶ 6; *see also* JX-0006-0006 (Henderson Aff. ¶ 10); *see In re Gen. Motors Corp.*, 407 B.R. at 476.

42. For the period January 1, 2009 through July 9, 2009, Old GM had negative operating cash flow of approximately $18.3 billion. JX-0009-0128; *see* Fischel Test. 2637:19-2640:5.

43. AlixPartners, LLP ("**AlixPartners**"), which served as Old GM's advisor from later 2008 until the filing of its bankruptcy petition, concluded that Old GM could no longer operate as a going concern. Koch Dep. 7:2-8:5, 62:6-62:8.

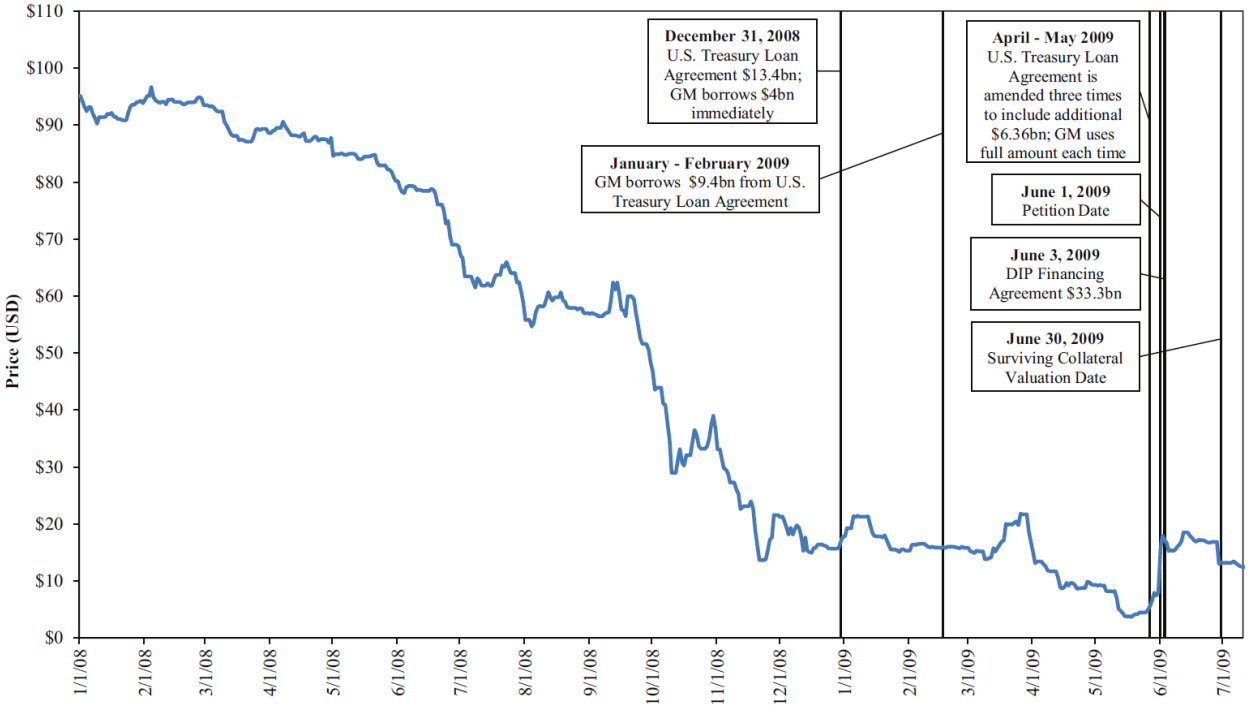
C. Contemporaneous Market Securities' Prices Are Consistent with the Conclusion that Old GM Was Failing

44. Market prices of securities, including Old GM's bonds and stocks, as well as credit default swaps ("**CDS**") on its bonds, indicate that Old GM was failing prior to interventions by the U.S. government (the "**Government**"). Fischel Decl. ¶ 25[7]; Fischel Test. 2634:25-2635:7.

45. As indicated in Exhibit A below, which provides the weighted average price of Old GM's bonds during the relevant period of 2008 and 2009, Old GM's bond prices were trading at distressed levels. Fischel Decl. ¶ 26; Fischel Test. 2634:20-25.

[7] All references to "Decl." are to the declaration providing the direct testimony of the witness.

Exhibit A: General Motors Weighted Average Corporate Bond Price
January 1, 2008 - July 10, 2009



Notes:
1. Only GM senior unsecured bonds issued by Old GM with offer dates prior to the Petition Date were used to determine the weighted average price of GM bonds. These bonds were found under the Bloomberg ticker for the Motors Liquidation Company (MTLQQ).
2. For bonds issued in foreign currencies, bond prices were converted into US denominated prices using spot exchange rates as a simplifying assumption.

Source: PX-0329 (Bloomberg, L.P.), PX-0328 (Capital IQ).

46. Absent concerns about default, these bonds would be expected to trade at or near $100, their par value. Fischel Decl. ¶ 26.

47. In the weeks prior to Old GM's bankruptcy filing, its bond prices fell below $10. Fischel Decl. ¶ 26.

48. Immediately before the bankruptcy filing, bond prices rose slightly but remained below $20. Fischel Decl. ¶ 26.

49. These low prices are consistent with a market view that Old GM was likely to default on its bonds and that bondholders would receive a substantial haircut. Fischel Decl. ¶ 26.

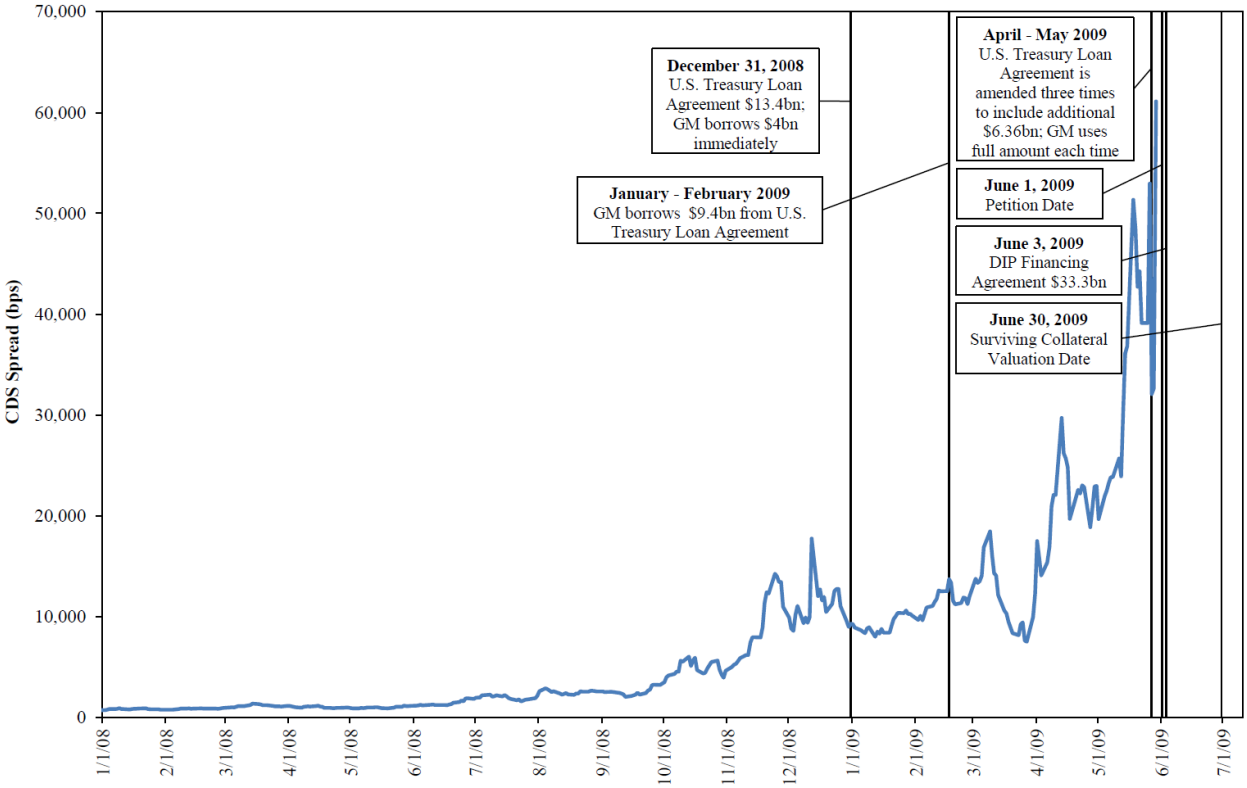
50. The CDS market for Old GM's bonds also signaled a high probability of default along with low expected recoveries in case of default. Fischel Decl. ¶ 27.

51. A CDS is a derivative contract that essentially provides a form of "insurance" to bondholders, paying off in case of default. Fischel Decl. ¶ 27; *see, e.g.*, PX-0313-0002 (John C. Hull, *Options, Futures, and Other Derivatives*, 8th Edition (Pearson Education, 2012), p. 548).

52. For this reason, the price that sellers of CDS demand for this insurance is commonly considered to be a market-based measure of the likelihood of default and the expected recovery in case of default. Fischel Decl. ¶ 27; *see, e.g.*, PX-0313-0003 to 0004 (John C. Hull, *Options, Futures, and Other Derivatives*, 8th Edition (Pearson Education, 2012), p. 554-55).

53. Exhibit B below provides the market prices of five-year CDS on Old GM's general obligation bonds. Fischel Decl. ¶ 27.

Exhibit B: General Motors Five-Year CDS Spreads
January 1, 2008 - July 10, 2009



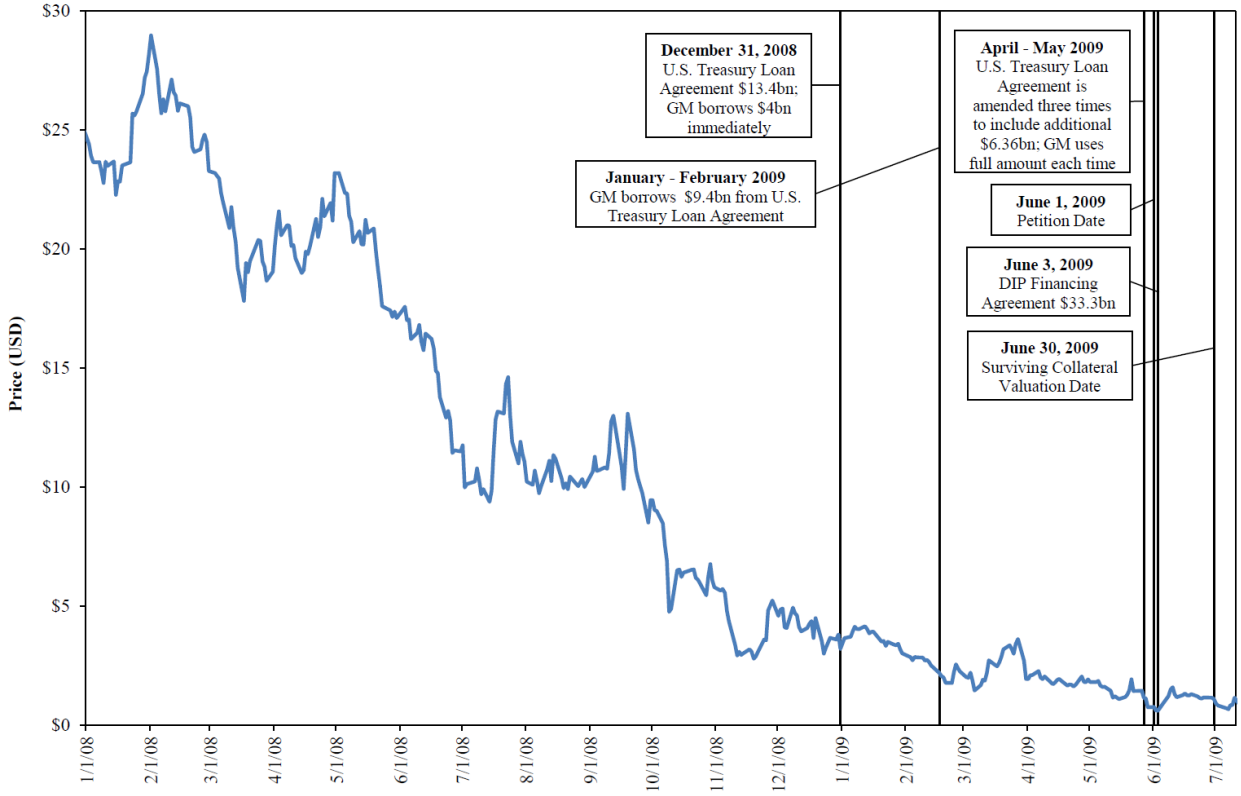
Note: The CDS spreads used are the mid annualized CDS spreads in CMA's standard data format.
Source: PX-0330 (Credit Market Analysis (CMA)).

54. As indicated in Exhibit B, the CDS prices on Old GM debt rose dramatically 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. Fischel Decl. ¶ 27.

55. Old GM's stock price further demonstrates the market's expectation of the company's failure prior to the 363 Sale. Fischel Decl. ¶ 28.

56. Exhibit C below summarizes Old GM's stock price during the relevant period and shows that from January 2, 2008 to May 29, 2009 (the last trading day before the bankruptcy filing) the stock fell from $24.41 to $0.75 per share, only slightly above zero. Fischel Decl. ¶ 28; Fischel Test. 2635:6-7; *see also* JPTO Stipulated Facts ¶ 14 (Old GM's common stock declined from $23.19 to $0.75 per share from May 1, 2008 to May 29, 2009).

Exhibit C: General Motors Equity Price
January 1, 2008 - July 10, 2009



Source: PX-0331 (Bloomberg, L.P.).

57. Because stockholders are the residual claimants to firm value, a stock price close to zero indicates a market view that there is little or no residual value to the firm. Fischel Decl. ¶ 28.

58. This is consistent with the distressed-bond-price-implied view that Old GM was almost certain to fail, providing stockholders with no returns. Fischel Decl. ¶ 28.

59. The fact that Old GM's stock price was still positive does not demonstrate any going concern value for the company, since equity can still have "option value" for the possibility that the firm's assets could (unexpectedly) increase in value back above the value of the firm's liabilities. Fischel Decl. ¶ 28; *see, e.g.*, PX-0325-0003 to 0005 (Zvi Bodie, Alex Kane and Alan Marcus, *Investments*, 8th Edition (McGraw-Hill Irwin, 2009), pp. 698-700) (discussion of equity valuation using an options framework in the academic literature); PX-0321-0003 to 0004 (Stephen A. Ross, Randolph W. Westerfield, and Jeffery Jaffe, *Corporate Finance*, 6th Edition (McGraw-Hill Irwin, 2002), pp. 652-653) (same).

D. Contemporaneous Analyses by Industry Analysts and Credit Ratings Agencies Are Consistent with the Conclusion that Old GM Was Failing

60. Contemporary commentary by industry analysts also indicates an expectation that Old GM would almost certainly fail absent assistance from the Government. Fischel Decl. ¶ 35; Fischel Test. 2635:8-16.

61. For example, in November 2008, a Barclays analyst wrote, "Having burned through $6.9 bil in the past quarter, GM now acknowledges that [it] is not likely to have sufficient cash to last through 1H09. While we had originally thought that GM could survive without government assistance through about May, we now believe GM is likely to exhaust its cash around February 2009, without government assistance." PX-0307-0002 (Barclays Capital, "Recapitalization vs re-leveraging," November 10, 2008, p. 2); Fischel Decl. ¶ 36.

62. In November 2008, a Wall Street Strategies analyst wrote, "We have been of the opinion that bankruptcy would be avoided as a result of positive cash flow from operations overseas that could do enough to offset the dismal state of the North American auto industry. However, with the precipitous decline in overseas markets, bankruptcy is quickly becoming a viable option." PX-0324-0001 (Wall Street Strategies, "Coverage Update and Earning Assessment Report General Motors (GM)," November 11, 2008, p. 1); Fischel Decl. ¶ 37.

63. In December 2008, a Plante & Moran LLC analyst was quoted saying, "If you take at face value what Chrysler and GM have said, I don't know how they avoid a near-term bankruptcy … They've said they're running out of money and can't access external capital markets. … I don't see any alternative if the bridge loan does not come through and the situation is as dire as GM and Chrysler have said." PX-0305-0002 (Alice Gomstyn and Charles Herman, "The Good, the Bad, and the Ugly: Auto Bailout Alternatives," *ABC News*, December 12, 2008); Fischel Decl. ¶ 38.

64. In May 2009, a JPMorgan analyst wrote, "We continue to see a 60-80% chance of a GM bankruptcy, and believe equity value is de minimus in- or out-of-court." PX-0315-0001 (JPMorgan, "Q1 Cash Burn In Line; NA Sees Major Structural Cost Progress; Emerging Mkt Profits Stabilize – ALERT," May 7, 2009, p. 1).

65. In May 2009, a UBS analyst wrote, "GM did not address any of the key issues [affecting their weak capital position] including the outlook for Opel, the status of UAW negotiations, its plan to consolidate its dealers, or its updated expectations for cash burn. We continue to believe that GM faces significant risk of bankruptcy. The significant increase in cash burn only increases this risk." PX-0323-0002 (UBS, "Cash Burn Accelerates," May 7, 2009, p. 2); Fischel Decl. ¶ 39.

66. Contemporaneous credit ratings for Old GM are consistent with the analyst commentary. Fischel Decl. ¶ 41; Fischel Test. 2635:8-16.

67. Exhibit D below reports the ratings of Old GM provided by Moody's, S&P, and Fitch, the three major ratings agencies in the U.S. Fischel Decl. ¶ 41.

Exhibit D: Corporate Credit Ratings for Old GM

	Moody's		Fitch		S&P	
Effective Date	Rating	Watch	Rating	Watch	Rating	Watch
01/26/06	B1	*-				
02/21/06	B2					
03/01/06			B	*-		
03/17/06	B2	*-				
03/29/06	B3				B	*-
12/13/06					B	
07/12/07			B			
09/24/07			B	*-		
09/26/07			B		B	*+
10/19/07					B	
03/17/08					B	*-
05/22/08					B	
06/20/08					B	*-
06/25/08			B-			
07/15/08	B3	*-				
07/31/08					B-	
08/13/08	Caa1					
09/22/08			CCC			
10/09/08					B-	*-
10/27/08	Caa2					
11/07/08			CCC	*-	CCC+	
12/03/08	Ca					
12/04/08					CC	
12/19/08			C			
06/01/09			D		D	

Source: PX-0332 (Bloomberg, L.P.).

68. By December 2008, Old GM was rated "Ca" by Moody's, a rating which Moody's described by stating that "[o]bligations rated Ca are highly speculative and are likely in, or very near, default, with some prospect of recovery of principal and interest." PX-0136-0007 (Moody's Investor Service, "Ratings Symbols and Definitions," October 2016, p. 5); Fischel Decl. ¶ 42.

69. By December 2008, Old GM was rated "C" by Fitch, indicating "[e]xceptionally high levels of credit risk. Default is imminent or inevitable, or the issuer is in standstill." PX-0140-0010 (Fitch Ratings, "Definitions of Ratings and Other Forms of Opinion," December 2014, p. 10); Fischel Decl. ¶ 43.

70. By December 2008, Old GM was rated "CC" by S&P, a rating which S&P described by stating that "[a]n obligor rated 'CC' is currently highly vulnerable. The 'CC' rating is used when a default has not yet occurred, but S&P Global Ratings expects default to be a virtual certainty, regardless of the anticipated time to default." PX-0148-0002 (S&P Global Ratings, "S&P Global Ratings Definitions," August 18, 2016); Fischel Decl. ¶ 44.

71. The ratings agencies' commentary during this period is also consistent with expectations of default. Fischel Decl. ¶ 45.

72. In April 2009, S&P stated that "additional post-petition lending in the form of [debtor-in-possession] financing would be more problematic for recoveries because GM has no available assets to secure a [debtor-in-possession] facility. In our view, this suggests that the existing lenders (including the government) could be primed in a bankruptcy proceeding, which would result in lower recovery values, either in a reorganization or in the event of a possible liquidation as the estate is wound down." PX-0146-0001 (S&P, "General Motors Corp.'s Recovery Rating Profile," April 10, 2009, p. 1); Fischel Decl. ¶ 46.

73. Fitch similarly noted that "[t]he federal government is likely to remain the lender of last resort over the near term as external capital markets potentially remain closed to GM." PX-0310-0002 (Fitch, "Fitch Downgrades General Motors to 'D'; Unsecured Recoveries Minimal," June 1, 2009, p. 2); Fischel Decl. ¶ 48.

74. These statements from the ratings agencies are all consistent with Old GM being unable to raise sufficient capital and being forced to liquidate absent Government intervention. Fischel Decl. ¶ 49.

E. Statements by Government Officials and Agencies Confirm that Old GM Was Failing

75. A wide range of contemporaneous statements by those who played a key role in authorizing Treasury's rescue of Old GM indicate that the company was failing and on the verge of liquidation prior to June 1, 2009. Fischel Decl. ¶ 50; Fischel Test. 2635:8-16.

76. Subsequent retrospective analyses by these individuals, as well as by various Government agencies, confirm these contemporaneous views. Fischel Decl. ¶ 50.

77. In announcing Treasury's initial assistance to Old GM in December 2008, when Old GM received its initial TARP loan in the amount of $13.4 billion, President Bush stated, "If we were to allow the free market to take its course now, it would almost certainly lead to disorderly bankruptcy and liquidation for the automakers." JX-0025-0001 (U.S. Treasury Department Office of Public Affairs, "GM Timeline," https://www.treasury.gov/press-center/press- releases/Documents/GM%20Timeline.pdf); PX-0138-0001 (The White House, "President Bush Discusses Administration's Plan to Assist Automakers," December 19, 2008); Fischel Decl. ¶ 51; *see* JPTO Stipulated Facts ¶ 21.

78. At the same time, Treasury Secretary Paulson stated, "Absent Congressional action, no other authorities existed to stave off a disorderly bankruptcy of one or more auto

companies." PX-0128-0001 (Department of the Treasury, "Secretary Paulson Statement on Stabilizing the Automotive Industry," December 19, 2008); Fischel Decl. ¶ 52.

79. Secretary Paulson later wrote, "We all understood that GM would file for bankruptcy by year-end if it didn't get financial assistance." PX-0311-0003 (Henry M. Paulson, Jr., *On the Brink: Inside the Race to Stop the Collapse of the Global Financial System*, (Business Plus, 2013), p. 418); Fischel Decl. ¶ 52.

80. Immediately following the 363 Sale, Ron Bloom, Senior Advisor at Treasury under President Obama, stated in testimony before the Congressional Oversight Panel that Old GM came to the federal Government "in a state of complete insolvency, facing almost certain liquidation." JX-0021-0020 (Congressional Oversight Panel, Ron Bloom Responses, Congressional Oversight Panel Hearing Transcript on July 27, 2009); Fischel Decl. ¶ 53.

81. Timothy Geithner, Treasury Secretary under President Obama stated that as a result of the Treasury's role in the bankruptcy proceedings, the "economy avoided the devastation that would have accompanied their liquidation." PX-0134-0001 ("Statement from Treasury Secretary Geithner on the Presidential Task Force on the Auto Industry," July 13, 2009); Fischel Decl. ¶ 53.

82. At the time of Old GM's bankruptcy, Treasury's submissions to the Bankruptcy Court described Old GM as being on the "precipice of liquidation." PX-0137-0002 (Bankr. Pro. Dkt. No. 37, Statement of the United States of America Upon the Commencement of General Motors Corporation's Chapter 11 Case ¶ 2); Fischel Decl. ¶ 55.

83. Steven Rattner, who served as lead adviser to the Presidential Task Force on the Auto Industry, stated, "With financial markets still frozen, both [Old GM and Chrysler] would have unquestionably run out of cash quickly, slid into bankruptcy, closed their doors and

liquidated." JX-0026-0002 (Steven Rattner, "Reflections on the Auto Restructurings," Federal Reserve Conference, May 10, 2010); Fischel Decl. ¶ 56.

84. Mr. Rattner also stated, "[B]ecause of the [Old GM's] enormous size, no merger or alliance could save it." PX-0322-0003 (Steven Rattner, *Overhaul: An Insider's Account of the Obama Administration's Emergency Rescue of the Auto Industry* First Edition (Houghton Mifflin Harcourt Publishing Company, 2010), p. 111); Fischel Decl. ¶ 56.

85. Austan Goolsbee, who served as Chairman of the Council of Economic Advisers, and Alan Kreuger, who served as Assistant Secretary of the Treasury for economic policy (both under President Obama), have written, "By December 2008, regardless of what one thought the sources of the Big Three's problems were or what should or should not have been done in the preceding years, General Motors and Chrysler faced an existential threat … Later, during the presidential election of 2012, critics of the rescue argued that private lenders should have been allowed to fund the General Motors and Chrysler restructurings in bankruptcy. In early 2009, however, such funding simply did not exist. At that moment, for better or for worse, it was government money or bust. Without government funds, GM and Chrysler were on a path to disorderly bankruptcy, which, by all accounts, would take years for resolving the myriad disputes among thousands of creditors, suppliers, and so on, and would likely mean liquidation." PX-0306-0005 to 0006 (Austan D. Goolsbee and Alan B. Krueger, "A Retrospective Look at Rescuing and Restructuring General Motors and Chrysler," *Journal of Economic Perspectives* 29, no. 2 (2015): 3-24, pp. 7-8); Fischel Decl. ¶ 57.

86. Harry Wilson, a senior member of the working group implementing the policies of the Presidential Task Force on the Auto Industry and an employee of the Treasury, had a similar understanding: "[W]hen Treasury first extended credit to GM in December 2008 under

the emergency secured loan, there was no other lender willing to loan to GM on such a condensed time frame and taking into account GM's available collateral." JX-0005-0003 (Declaration of Harry Wilson ¶ 8); Fischel Decl. ¶ 58.

87. Mr. Wilson noted that by the closing of the 363 Sale, Old GM was left with only one option—a Government bailout—and that as a consequence of Treasury's intervention, Old GM received much more than "the value attainable in a GM liquidation, the only other option available to the company." JX-0005-0009 (Declaration of Harry Wilson ¶ 18); Fischel Decl. ¶ 58.

88. Various retrospective analyses by Government agencies regarding Treasury's assistance to Old GM have also concluded that, absent Treasury's assistance, Old GM would have failed and almost certainly faced liquidation. Fischel Decl. ¶ 59.

89. For instance, the Executive Office of the President stated: "By the end of 2008, both GM and Chrysler were on the brink of disorderly liquidations. … Twelve months ago [in April 2009], GM and Chrysler were on the verge of liquidation." PX-0144-0003 (Executive Office of the President, "A Look Back at GM, Chrysler and the American Auto Industry," April 21, 2010, p. 2); Fischel Decl. ¶ 57.

90. The Government Accountability Office stated: "Without federal assistance from Treasury, the companies may not have been able to finance their restructuring and may have had to liquidate." PX-0142-0012 (U.S. Government Accountability Office, "Treasury's Exit from GM and Chrysler Highlights Competing Goals, and Results of Support to Auto Communities Are Unclear," May 10, 2011, p. 8); Fischel Decl. ¶ 61.

91. The Congressional Oversight Panel also stated: "By early December, Chrysler and General Motors (GM) could no longer secure the credit they needed to conduct their day-to-

day operations. Unless they could raise billions of dollars in new financing, they faced collapse..." JX-0022-0004 (Congressional Oversight Panel, "September Oversight Report," September 9, 2009); Fischel Decl. ¶ 62.

92. The Congressional Oversight Panel also stated: "[T]here is little doubt that in the absence of massive government assistance, GM, Chrysler, and GMAC/Ally Financial faced the prospect of bankruptcies and potential liquidation, given the apparent dearth of available financing from the private sector." JX-0023-0112 (Congressional Oversight Panel, "March Oversight Report," March 16, 2011, p. 102); Fischel Decl. ¶ 62.

93. The Congressional Oversight Panel further stated: "In particular, the investments that most dramatically stabilized the financial system were the CPP's investments in very large banks (which, at the peak of the financial crisis, received intense political and market pressure to participate in the TARP) and AIG, GM, and Chrysler (which would have suffered catastrophic, uncontrolled bankruptcies had they refused government support)." JX-0023-0168 to 0169 (Congressional Oversight Panel, "March Oversight Report," March 16, 2011, p. 158-159); Fischel Decl. ¶ 62.

IV. OLD GM TRIED, BUT FAILED, TO SOLVE ITS PROBLEMS THROUGH MARKET MEANS

94. Prior to the 363 Sale, Old GM tried, but failed, to solve its capital shortfall problems through various market means. Fischel Decl. ¶ 30; Fischel Test. 2635:17-2636:9

95. These various failures to identify a market solution indicate that market participants were unwilling to provide the amount of capital that Old GM needed at terms that Old GM could accept. Fischel Decl. ¶ 30.

96. Between 2008 and June 30, 2009, Old GM engaged in certain unsuccessful attempts to secure private financing. JPTO Stipulated Facts ¶ 13.

97. Evercore began working with Old GM in June of 2008 to advise it on capital-raising options and other strategic alternatives. PX-0133-0010 (Repko Decl. ¶ 23).

98. However, as of July 2008, the equity and debt markets showed a lack of investor confidence, which significantly hampered Old GM's ability to meaningfully enhance its liquidity through either a public equity offering or an unsecured debt financing. PX-0133-0010 to 0011 (Repko Decl. ¶ 24).

99. By July 1, 2008, the only capital-raising alternative available to Old GM appeared to be a potential issuance of secured debt financing using all of Old GM' s unpledged and available collateral, including the stock of certain of its foreign subsidiaries, certain intangible assets, including its brands, and intellectual property. PX-0133-0011 (Repko Decl. ¶ 25).

100. In July 2008, Old GM began discussions with several potential underwriters regarding such a transaction. PX-0133-0011 (Repko Decl. ¶ 25).

101. Significant effort was expended by Old GM, its team of financial and legal advisors, and its potential underwriters to develop a secured financing offering. PX-0133-0011 (Repko Decl. ¶ 26).

102. However, during the second half of 2008, the financial markets continued to deteriorate to an unprecedented state of distress. PX-0133-0011 (Repko Decl. ¶ 26).

103. Neither the leveraged-loan market nor the market for secured high yield bonds had sufficient liquidity, and sellers of leveraged loans and bonds vastly outweighed buyers, putting severe pressure on market trading levels. PX-0133-0011 (Repko Decl. ¶ 26).

104. Old GM's ability to raise additional secured borrowing was constrained by its existing secured facilities and restrictive provisions in its various bond indentures. JX-0006-0020 (Henderson Aff. ¶ 43).

105. In the summer of 2008, Old GM attempted to raise $3 billion of common and mandatory convertible preferred stock as well as a secured debt offering. JX-0006-0019 (Henderson Aff. ¶ 42).

106. Old GM attempted to pursue the proposed secured financing until early September 2008. JX-0006-0020 (Henderson Aff. ¶ 43).

107. In mid-September 2008, it became clear that there were no prospects for Old GM to launch any debt offering, even on a secured basis. JX-0006-0020 (Henderson Aff. ¶ 44).

108. Old GM and its advisors concluded that, not only would the proceeds that could be raised by the offering be insufficient to provide Old GM with sufficient liquidity, but also that the financing would be prohibitively costly and would impair Old GM's future capital-raising alternatives when considering, among other factors, the pricing that buyers would have demanded, the collateral that would have to have been pledged, and the covenants with which Old GM would have had to comply. PX-0133-0011 (Repko Decl. ¶ 26).

109. Old GM also attempted various strategic combinations with other automakers. JX-0006-0017 to 0018 (Henderson Aff. ¶¶ 36-39).

110. For example, Old GM explored a merger with Chrysler. JPTO Stipulated Facts ¶ 11; JX-0006-0018 (Henderson Aff. ¶ 38),

111. In early August 2008, Chrysler approached Old GM to begin discussions regarding a potential combination of the two companies. PX-0133-0011 to 0012 (Repko Decl. ¶ 27).

112. Evercore worked closely with Old GM to analyze the proposed merger with Chrysler. PX-0133-0011 to 0012 (Repko Decl. ¶ 27).

113. Evercore continued to work closely with Old GM as it pursued negotiations with Chrysler between September and early November of 2008. PX-0133-0012 (Repko Decl. ¶ 28).

114. In addition to strategic implications, a potential combination with Chrysler was initially viewed by Old GM as a potential catalyst for obtaining significant incremental financing from Old GM's and Chrysler's existing lenders, several of which were common to both companies, due to improved pro-forma credit statistics, a more positive long term outlook for the combined company and the likelihood that the trading value of the loans would improve post-transaction. PX-0133-0012 (Repko Decl. ¶ 27).

115. By early November 2008, however, two critical facts led Old GM to suspend its merger talks with Chrysler: (i) lenders were unwilling to provide sufficient incremental liquidity to the proposed merged company, and (ii) the business environment and GM's operating performance had continued to decline severely such that GM may have exhausted its liquidity prior to the consummation of the contemplated transaction. PX-0133-0012 (Repko Decl. ¶ 28).

116. Lenders' unwillingness to provide additional liquidity to a merged firm (even putting aside the other challenges in combining the two companies), indicated skepticism by these market participants about the ability of the company to continue as a going concern. Fischel Decl. ¶ 31; *see, e.g.*, PX-0131-0078 to 0079, 0092 (Committee on Banking, Housing, and Urban Affairs United States Senate, "Examining the State of the Domestic Automobile Industry—Part II," Senate Hearing 110-878, Dec. 4, 2008, pp. 74-75, 89).

117. Ultimately, no such merger with Chrysler took place. JPTO Stipulated Facts ¶ 11.

118. Old GM also attempted to raise capital by selling certain business units and brands, including Saturn, Saab, Hummer, Opel, and AC Delco. JPTO Stipulated Facts ¶ 10; *see,*

PX-0320-0001 to 0002 (Poornima Gupta and Soyoung Kim, "GM drops AC Delco sale plan, sees Hummer bids soon," *Reuters,* April 17, 2009, pp. 1-2).

119. However, due to market conditions, concerns about Old GM, and various deal-specific issues, Old GM was unable to complete sales of these units to improve its capital position. Fischel Decl. ¶ 32; PX-0317-0001 (Nick Bunkley and Bill Vlasic, "G.M. to Close Saturn After Deal Fails," *New York Times*, September 30, 2009, p. 1); PX-0318-0001 (Nick Bunkley, "G.M. to Close Hummer After Sale Fails," *New York Times*, February 24, 2010, p. 1).

120. In April 2009, Old GM attempted a public exchange offer to provide equity to its outstanding bondholders. JX-0006-0030 (Henderson Aff. ¶ 71); JPTO Stipulated Facts ¶ 12.

121. The exchange was announced on April 27, 2009, with Old GM stating that if the tender offer were to be unsuccessful, it would expect to enter into bankruptcy. JX-0006-0030 (Henderson Aff. ¶ 71).

122. The exchange offer expired on May 26, 2009, unfulfilled. JX-0006-0031 (Henderson Aff. ¶ 73); PX-0125-0009 (Bankr. Pro. Dkt. No. 92, Motion of Debtors for Entry of Order Pursuant to 11 U.S.C §§ 105, 363, and 364 Authorizing Debtors to (I) Pay Prepetition Claims of Certain Essential Suppliers, Vendors and Service Providers; (II) Continue Troubled Supplier Assistance Program; and (III) Continue Participation in the United States Treasury Auto Supplier Support Program ¶ 22)); JPTO Stipulated Facts ¶ 12; Koch Dep. 9:6-9:21.

V. THE GOVERNMENT BAILOUT

123. Ultimately, there were no alternatives in the marketplace for Old GM other than Government intervention and the massive Government subsidy that resulted. *E.g.,* Fischel Test. 2639:25-2640:5.

124. Old GM would have failed and liquidated absent that bailout. *See* Fischel Test. 2633:22-2634:2, 2682:6-9, 2666:20-2667:2.

125. The failures of these attempts by Old GM to solve its problems through market means indicate market participants' belief that Old GM had little or no likelihood of providing a return on such new debt or equity investment, and hence, are consistent with a conclusion that Old GM had no future as a going concern. Fischel Decl. ¶¶ 33, 34.

126. Consequently, in early November 2008, Old GM was compelled to seek financing from the "last resort" source of funds: The Government. PX-0133-0012 (Repko Decl. ¶ 29); *see* JPTO Stipulated Facts ¶ 17; JX-0006-00021 (Henderson Aff. ¶ 47); JX-0006-0006 (Henderson Aff. ¶ 13); Koch Dep. 11:15-11:25 ("[T]here was no private lender with the capability and the willingness to even remotely meet the needs that General Motors had, so in our view the government was the lender of last resort . . . .").

127. Without the immediate financial support of the Government, Old GM would need to confront the suspension of operations. JX-0006-0023 (Henderson Aff. ¶ 53); Koch Dep. 12:1-12:15; Koch Dep. 139:23-140:13 ("[I]t wasn't clear until President Bush stood up and said I'm not going to let them run out of money that we actually knew we were going to get money. So [going dark] was more than a remote possibility, it was – it was a real possibility.").

128. In late 2008 and early 2009, the Government agreed to extend substantial financing to Old GM. JPTO Stipulated Facts ¶ 18.

129. In response to its concerns about the state of the national automotive industry, the Government had implemented programs to assist the automotive industry through the U.S. Treasury and its Presidential Task Force on the Auto Industry. *In re Gen. Motors*, 407 B.R. at 477.

130. The Government—acting through the U.S. Treasury and Treasury's working group implementing the policies of the Presidential Task Force on the Auto Industry (the "**Auto**

Team")—implemented various programs to support and stabilize the domestic automotive industry. JX-0005-0003 (Wilson Decl. ¶ 7).

131. Those programs included, among other things, providing credit support for receivables issued by certain domestic automobile manufacturers, and support for consumer warranties. JX-0005-0003 (Wilson Decl. ¶ 7).

132. This included programs pursuant to the Troubled Asset Relief Program ("**TARP**"). JPTO Stipulated Facts ¶ 20.

133. In late 2008, Old GM requested financing. JX-0005-0003 (Wilson Decl. ¶ 8).

134. 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. *In re Gen. Motors*, 407 B.R. at 477.

135. The Government initially declined to extend financing of that magnitude. *In re Gen. Motors*, 407 B.R. at 477.

136. Then, on December 31, 2008, the Government agreed to provide Old GM with a bridge loan of up to $13.4 billion on a senior secured basis (the "**Treasury Prepetition Loan**") under TARP. JPTO Stipulated Facts ¶ 21; *In re Gen. Motors*, 407 B.R. at 477.

137. The Government decided to make available to Old GM these billions of dollars on an emergency basis to enable Old GM to avoid a chaotic "freefall" liquidation while it developed a new business plan. JX-0005-0003 (Wilson Decl. ¶ 8).

138. The funding was made available to prevent Old GM from commencing immediate bankruptcy proceedings. JX-0006-00023 (Henderson Aff. ¶ 54).

139. In December 2008, "there was absolutely no other source of financing available" to Old GM. *In re Gen. Motors*, 407 B.R. at 477.

140. "No party other than Treasury conveyed its willingness to loan funds to [Old] GM and thereby enable it to continue operating." *In re Gen. Motors*, 407 B.R. at 477.

141. "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." *In re Gen. Motors*, 407 B.R. at 477.

142. For example, there was no other lender willing to loan to Old GM on such a condensed time frame and taking into account Old GM's available collateral. JX-0005-0003 (Wilson Decl. ¶ 8).

143. Old GM drew $4 billion on that Treasury Prepetition Loan in December 2008. JPTO Stipulated Facts ¶ 22; *In re Gen. Motors*, 407 B.R. at 477.

144. Old GM then drew $5.4 billion more, and the remaining $4 billion on February 17, 2009. JPTO Stipulated Facts ¶ 22.

145. In connection with Old GM's loan requests from Treasury, Old GM submitted a "viability plan" on February 17, 2009, which outlined a number of steps it intended to take to make itself more competitive. JX-0005-0005 (Wilson Decl. ¶ 11).

146. The Auto Team reviewed and analyzed the plan and found that the plan was not adequate. JX-0005-0005 (Wilson Decl. ¶ 11).

147. 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. *In re Gen. Motors*, 407 B.R. at 478; JX-0006-0031 (Henderson Aff. ¶ 74).

148. On March 30, 2009, President Obama announced publicly that Old GM's efforts to develop a long-term viability plan had fallen short and that the advancement of any additional federal loans to Old GM beyond the subsequent sixty-day period would require a substantially

more aggressive effort to map out a clear path to long-term viability. JX-0005-0005 (Wilson Decl. ¶ 11)

149. On March 30, 2009, President Obama also 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. JPTO Stipulated Facts ¶ 23; *In re Gen. Motors*, 407 B.R. at 479.

150. The President made clear, however that Old GM was free to seek funding from any entity other than Treasury on any terms it could negotiate. JX-0005-0005 (Wilson Decl. ¶ 11).

151. The Auto Team did not restrict Old GM from seeking alternative funding; at no point did the Auto Team or Treasury require that Old GM accept funding from the Government or prohibit Old GM from seeking equity funding or loans from other sources. JX-0005-0005 (Wilson Decl. ¶ 11).

152. The Auto Team did nothing to prevent Old GM from seeking strategic relationships with other automobile manufacturers or other willing partners. JX-0005-0005 (Wilson Decl. ¶ 11).

153. On a number of occasions it was communicated to Old GM management that the Auto Team and Treasury would prefer to see Old GM develop a private sector financing solution, if at all possible. JX-0005-0005 (Wilson Decl. ¶ 11).

154. On April 22, 2009, the Government and Old GM entered into amended credit agreements for the Treasury Prepetition Loan. JPTO Stipulated Facts ¶ 24; *In re Gen. Motors*, 407 B.R. at 479.

155. On April 24 2009, Old GM received a second TARP loan of $2 billion. JPTO Stipulated Facts ¶ 25; *In re Gen. Motors*, 407 B.R. at 479.

156. On April 24, 2009, Old GM announced that as part of Old GM's efforts to rationalize its business, it would temporarily shut down certain production facilities starting in May 2009. JX-0006-00028 (Henderson Aff. ¶ 66).

157. The shutdown was not for the usual two-week mid-year period, and instead, for a period not to exceed eleven weeks. JX-0006-00028 (Henderson Aff. ¶ 66).

158. Frederick Henderson, President and CEO of Old GM, did not view the shutdown as a long-term solution, and concluded that it threatened Old GM's position in the market and the viability of its suppliers and dealers. JX-0006-00028 (Henderson Aff. ¶ 66).

159. On May 20, 2009, the Treasury Prepetition Loan agreement with the U.S. Treasury was amended to increase the facility, and Old GM received a third TARP loan of $4 billion. JX-0006-0029 (Henderson Aff. ¶ 68); *see also* JPTO Stipulated Facts ¶ 26; *In re Gen. Motors*, 407 B.R. at 479.

160. Old GM had borrowed a total of $19.4 billion from the Government by the end of May 2009. JPTO Stipulated Facts ¶ 27; *In re Gen. Motors*, 407 B.R. at 479.

161. The $19.4 billion in TARP funds advanced to Old GM were critical to Old GM's survival during the months leading up to its bankruptcy petition. JX-0005-0005 to 0006 (Wilson Decl. ¶ 11).

162. As discussed above, as a condition to the TARP loans, Old GM was required to submit viability plans. JPTO Stipulated Facts ¶ 28.

163. Old GM ultimately submitted five versions of its viability plan to the United States Government. JPTO Stipulated Facts ¶ 29.

164. The first four of Old GM's viability plans were rejected by the Government. JPTO Stipulated Facts ¶ 29.

165. Each of the four was deemed not to be "financially viable" even *after* the projected receipt of Government assistance. Fischel Decl. ¶ 101.

166. The Government accepted the fifth viability plan, Viability Plan 4B ("**VP4B**"), which contemplated additional Government funding in connection with a bankruptcy filing. JPTO Stipulated Facts ¶ 30.

167. Even subsequent to the submission of VP4B, Old GM worked with the Government to assess the ever-changing funding requirements of the company. Fischel Decl. ¶ 102.

168. Old GM and Treasury considered the possibility that Old GM would be unable to meet its needs other than through a chapter 11 filing. JX-0005-0006 (Wilson Decl. ¶ 12).

169. Treasury advised Old GM that if an out-of-court restructuring was not possible, Old GM should consider pursuing the bankruptcy process to implement a transaction under which substantially all the assets of the Company would be purchased by a Treasury-sponsored purchaser. JX-0006-00031 (Henderson Aff. ¶ 74).

170. Although it was not Treasury or Old GM's first choice, it ultimately became clear that the only viable course was for Old GM to pursue (with the support of Treasury, the Government of Canada, and other constituents) the 363 Sale. JX-0005-0006 (Wilson Decl. ¶ 12).

171. The proposed plan that the Government was willing to accept was that in connection with its proposed bankruptcy filing, substantially all of Old GM's assets would be

purchased by a Government-sponsored entity in the 363 Sale. *See* JX-0006-0031 (Henderson Aff. ¶ 74).

172. The Government-sponsored entity purchasing Old GM's assets was to be a new company, NGMCO, Inc. ("**New GM**"). JPTO Stipulated Facts ¶ 33.

173. The assets that New GM did not acquire from Old GM would remain with Old GM, which was to be renamed Motors Liquidation Company. JPTO Stipulated Facts ¶ 33.

174. The 363 Sale was necessary because, per Frederick Henderson, there simply was "*no* viable alternative" to the 363 sale. JX-0006-0003 (Henderson Aff. ¶ 5)

175. Also contemplated as part of Old GM's bankruptcy process was Treasury and the Export Development Canada (the "**EDC**") providing debtor in possession ("**DIP**") financing to Old GM. JX-0006-0008 (Henderson Aff. ¶ 15).

176. During the second quarter of 2009, Evercore contacted several institutions to assess their interest in providing DIP financing to assist Old GM's restructuring efforts in the event that it were to seek Chapter 11 protection. PX-0133-0013 (Repko Decl. ¶ 32).

177. The financial institutions contacted were involved with Old GM as potential underwriters during the capital-raising efforts in the fall of 2008 and were named Dealer Managers in the Exchange Offer and Consent Solicitation on Form S-4 dated April 27, 2009, as subsequently amended. PX-0133-0014 (Repko Decl. ¶ 33).

178. As such, these institutions were familiar with Old GM's financial condition, collateral values, and the operational changes evidenced by Old GM's revised business plans, and had the ability to adequately assess the prospects for the repayment of the prospective DIP Facility. PX-0133-0014 (Repko Decl. ¶ 33).

179. None of these financial institutions expressed any interest in providing a DIP financing facility for Old GM. PX-0133-0014 (Repko Decl. ¶ 34).

180. In fact, the institutions specifically communicated that they were not willing to consider such a financing. PX-0133-0014 (Repko Decl. ¶ 34); *see* Worth Test. 1870:08-1870:24.

181. Evercore concluded that, *inter alia*, in light of current market conditions and the unprecedented size of the proposed DIP financing, (i) Old GM was unable to obtain necessary credit other than the proposed DIP Financing from the Treasury and the EDC; and (ii) no alternative DIP financing (public or private) was available to finance the Chapter 11 proceedings or any other form of bankruptcy liquidation or reorganization of Old GM. PX-0133-0015 (Repko Decl. ¶ 37).

182. Ultimately, Treasury and the EDC's DIP financing was the only DIP financing available to Old GM. *See, e.g.*, Koch Dep. 24:2-24:7; PX-0133-0014 (Repko Decl. ¶ 35); *see In re Gen. Motors*, 407 B.R. at 480.

183. Evercore concluded that if the proposed DIP financing was not approved, or was modified on terms that were unacceptable to Treasury and the EDC, Old GM would "collapse and will, in all likelihood, liquidate in a distressed and, at least initially, a disorganized way. Manufacturing plants that are currently idle, but that are planned to reopen in July, may likely never re-open." PX-0133-0013 (Repko Decl. ¶ 30).

184. Without the Government's DIP financing, Old GM would quickly plunge into a liquidation, with the concomitant loss of value, employment, and systemic failure necessarily attendant thereto. JX-0006-0008 (Henderson Aff. ¶ 15); JX-0006-0031 (Henderson Aff. ¶ 74).

185. The amount of DIP financing to be provided by the Government was determined based on the company's financial needs. Feldman Dep. 93:22-94:3; Worth Test. 1843:22-1849:06.

186. The Government also agreed to provide New GM with adequate post-acquisition financing. JX-0006-0031 (Henderson Aff. ¶ 75).

187. Old GM's liquidation was the only option available to Old GM other than the 363 Sale. JX-0005-0008 to 0009 (Wilson Decl. ¶ 18); Worth Test. 1813:24-1814:07; Worth Test. 1856:02-1856:10; Fischel Test. 2581:21-2582:16, 2582:17-2583:6.

188. In the words of Mr. Henderson at the time of the bankruptcy: "*There is no other alternative*. No other DIP financing source. No other buyer for the business. . . . The 363 Transaction is the only remaining alternative to save the Company's operations and prevent the immediate liquidation of GM and the catastrophic impact on the economy that will result from the loss of hundreds of thousands of jobs if the GM assets and business are not sold and transferred as proposed. No other potential buyer of GM's business has come forward. No entity other than the U.S. Government has the wherewithal to provide the billions of dollars needed for DIP financing and the financing of New GM. The only alternative to the 363 Transaction is a liquidation of the Debtors' assets – a process that will severely reduce the value of the Company's assets to the prejudice of its employees and all economic stakeholders. A liquidation will cause not only hundreds of thousands of jobs to be lost, but also a worldwide shutdown of GM's suppliers and dealers." JX-0006-0035, 0041-0042 (Henderson Aff. ¶ 82, 97-98).

189. AlixPartners conducted an analysis of the liquidation value versus the value of Old GM' s credit bid in the proposed 363 Sale, and concluded that the credit bid's value far

exceeded the liquidation value of all of the assets of Old GM. JX-0005-0008 to 0009 (Wilson Decl. ¶ 18).

190. If Old GM liquidated its assets, they would have been sold at depressed prices, given that suppliers would have been forced into bankruptcy as well and there would have been a glut of assets on the market with no essential buyers, with supply and demand driving prices through the floor. Koch Dep. 24:8-25:5.

VI. THE GOVERNMENT'S ACTIONS WERE MOTIVATED BY NON-MARKET FACTORS

191. In late 2008 and through June 30, 2009, the U.S. and Canadian Governments were concerned that if Old GM had to cease operations, it would cause significant harm to the economy and exacerbate the financial crisis. JPTO Stipulated Facts ¶ 19; *see In re Gen. Motors*, 407 B.R. at 477.

192. In particular, the Government recognized the likelihood of systemic failure throughout the domestic automotive industry and the significant harm to the overall U.S. economy from the loss of hundreds of thousands of jobs and the sequential shutdown of hundreds of ancillary businesses if Old GM had to cease operations. JX-0006-0006 to 0007 (Henderson Aff. ¶ 13); *In re Gen. Motors*, 407 B.R. at 477.

193. Even a 50 percent reduction in employment and production was projected to cause a loss of nearly 2.5 million jobs in 2009, a decrease in personal income of $125.1 billion in 2009, and ultimately a total loss in personal income of $275.7 billion through 2011. DX-0309-0005 to 0006 (Center for Automotive Research, "The Impact on the U.S. Economy of a Major Contraction of the Detroit Three Automakers," November 4, 2008).

194. At the time of its bankruptcy, Old GM was one of the largest private providers of healthcare in this country. JX-0006-0021 (Henderson Aff. ¶ 48).

195. The survival and future success of Old GM was, therefore, essential not only for the immediate stakeholders and constituents of Old GM, but also for the well-being of the economy and the public interest. JX-0006-0021 to 0022 (Henderson Aff. ¶ 48).

196. There would also be profound potential damaging effects of an Old GM collapse that were not easily anticipated, but which had the potential to multiply and adversely impact the United States' and the global economies. PX-0133-0013 (Repko Decl. ¶ 30).

197. The Government also 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 Gen. Motors*, 407 B.R. at 477.

198. In determining the whether to extend financing to and sponsor New GM in its purchase of substantially all of the asset of Old GM, the Government specifically considered the fact that if Old GM were to shut down and been forced to liquidate there would have been a substantial portion of employees of Old GM and other businesses dependent Old GM that would have been unemployed. Feldman Dep. 154:05-155:21.

199. Indeed, the Government viewed the survival of Old GM as necessary to avoid a far broader systemic failure that would severely disadvantage the nation and the millions of people who are employed in or dependent on the automotive sector. JX-0006-0022 (Henderson Aff. ¶ 48).

200. The Government viewed the 363 Sale as a critical element of the Government's plan to revitalize the U.S. automotive industry. JX-0006-00051 (Henderson Aff. ¶ 132).

201. The most important reason why it was necessary for the 363 Sale to proceed on the time-frame proposed to the Court was that a rapid emergence from bankruptcy would create the highest probability of avoiding the catastrophic and expensive meltdown in Old GM auto

sales that virtually all industry observers predicted would happen in the event of an Old GM bankruptcy filing. JX-0005-0006 to 0007 (Wilson Decl. ¶ 13).

202. It was Treasury's belief that only a rapid and certain emergence from bankruptcy via the 363 Sale could provide consumers the confidence necessary to make a major purchase like an automobile. JX-0005-0006 to 0007 (Wilson Decl. ¶ 13).

203. Available evidence indicates that the terms of Treasury's interventions, including the 363 Sale, were motivated by factors that would not be relevant to a typical market participant, such as the macroeconomic and political impacts of allowing Old GM to fail. Fischel Decl. ¶ 69.

204. Government officials directly involved in negotiating Treasury's interventions, including the 363 Sale, were clear about this fact, both in contemporaneous and retrospective statements. Fischel Decl. ¶ 70.

205. For example, President Bush stated: "My economic advisors believe that such a collapse [of Old GM and Chrysler] would deal an unacceptably painful blow to hardworking Americans far beyond the auto industry. It would worsen a weak job market and exacerbate the financial crisis. It could send our suffering economy into a deeper and longer recession." PX-0138-0001 (The White House, "President Bush Discusses Administration's Plan to Assist Automakers," December 19, 2008); Fischel Decl. ¶ 71.

206. President Bush further stated: "In the midst of a financial crisis and a recession, allowing the U.S. auto industry to collapse is not a responsible course of action." PX-0138-0001 (The White House, "President Bush Discusses Administration's Plan to Assist Automakers," December 19, 2008); Fischel Decl. ¶ 71.

207. Steven Rattner stated: "While protecting the taxpayers was an important part of our work [on the Presidential Task Force on the Auto Industry], the President did not approach this decision solely as if he were a private investor. . . . [H]e recognized that there were broad equities to be considered." JX-0026-0012 (Steven Rattner, "Reflections on the Auto Restructurings," Federal Reserve Conference, May 10, 2010); Fischel Decl. ¶ 73.

208. Mr. Rattner further stated: "It was frustrating to us that many commentators were suggesting that the government stay on the sidelines and let [GM and Chrysler] fend for themselves. With financial markets still frozen, both would have unquestionably run out of cash quickly, slid into bankruptcy, closed their doors and liquidated. That would have meant the elimination of more than two-thirds of American owned auto manufacturing capability, cost more than a million jobs in the short run, dramatically deepened and prolonged the nationwide recession and pushed unemployment rates in several states – particularly Michigan – above 20%." JX-0026-0002 (Steven Rattner, "Reflections on the Auto Restructurings," Federal Reserve Conference, May 10, 2010).

209. Austan Goolsbee and Alan Kreuger stated: "As the academic legal debate over bankruptcy law has observed, bankruptcy is largely a micro solution, aimed at reorganizing the assets and liabilities of a single firm (Warren 1987; Baird 1987). It is not a macro solution. It does not take cross-industry spillovers or broader government or social costs into account. The auto taskforce attempted to quantify and weigh many of these factors, though there was much disagreement on the details and magnitudes." PX-0306-0009 to 0010 (Austan D. Goolsbee and Alan B. Krueger, "A Retrospective Look at Rescuing and Restructuring General Motors and Chrysler," *Journal of Economic Perspectives* 29, no. 2 (2015): 3-24, pp. 11-12); Fischel Decl. ¶ 75.

210. They further stated: "For the most part, the Obama administration adhered to its goals and avoided political meddling. There were some notable exceptions, however. For example, when GM's Chief Executive wanted to move the company's headquarters from the Renaissance Center in Detroit to its Tech Center in Warren, Michigan, to be closer to the workforce—which made some business sense—the administration blocked the move. Congress and the administration both set restrictions on executive compensation for companies that had received Troubled Asset Relief Program funds (for example, the annual compensation for chief executive officers was capped at $9.5 million). The administration included a 'vitality commitment' as a condition of receiving funding, which prevented the companies from moving work at US plants to other countries. Members of Congress frequently attempted to intervene to prevent unnecessary and inefficient dealerships from being closed, to the administration's consternation." PX-0306-0019 (Austan D. Goolsbee and Alan B. Krueger, "A Retrospective Look at Rescuing and Restructuring General Motors and Chrysler," *Journal of Economic Perspectives* 29, no. 2 (2015): 3-24, p. 21); Fischel Decl. ¶ 75.

211. They further stated: "We heard numerous experts opine that a failure of General Motors, in particular, would level a major blow to supply chains and to consumer confidence that would have an outsized negative impact on spending as well as the argument that this was the equivalent of negative stimulus precisely when the fiscal and monetary policy authorities were attempting to provide positive stimulus. The negative aggregate impact of a disorderly failure of GM would be too great at exactly the wrong moment for the economy." PX-0306-0007 (Austan D. Goolsbee and Alan B. Krueger, "A Retrospective Look at Rescuing and Restructuring General Motors and Chrysler," *Journal of Economic Perspectives* 29, no. 2 (2015): 3-24, p. 9); Fischel Decl. ¶ 75.

212. Matt Feldman (Member of the Auto Task Force) stated: "I'll give you one example of something that was of consideration at that time. If General Motors had shut down and been forced to liquidate, there would have been a substantial population of both direct employees of General Motors, but also other smaller businesses that were very dependent on General Motors, and it would have made a meaningful change in what was already a historically high unemployment rate in this country. That was a consideration. It would have [also] had a significant negative impact on the economies of a number of Midwestern states that were already in financial trouble, Michigan in particular. That was a consideration . . . [t]o make the loan and to be willing to acquire the assets of General Motors . . . ." Feldman Dep. 154:23-155:21.

213. Retrospective Government reports regarding Treasury's interventions come to similar conclusions. Fischel Decl. ¶ 76.

214. For example, the U.S. Treasury reported: "TARP prevented a collapse of the American automotive industry, saving an estimated one million jobs. . . . The Automotive Industry Financing Program (AIFP) was launched under TARP to prevent a collapse of the American automotive industry. The severe condition of the industry at that time posed a significant risk to financial market stability and threatened the overall economy." PX-0132-0019 (Department of the Treasury Office of Financial Stability, "Troubled Asset Relief Program: Four Year Retrospective Report," March 2013, p. 15); Fischel Decl. ¶ 77.

215. The Congressional Oversight Panel stated: "With respect to the broader economy, the Treasury auto team has aimed to avoid the devastating impact that the collapse of these companies would have had on countless Americans and the greater economy beyond the automotive industry in times of severe recession and financial crisis. As part of this approach, the President and the Treasury auto team have acted to avoid the prospect of both Chrysler and

General Motors entering liquidation, which, they argue, would have caused 'substantial job loss with a ripple effect throughout our entire economy.'" JX-0022-0040 (Congressional Oversight Panel, "September Oversight Report," September 9, 2009); Fischel Decl. ¶ 78.

216. Government Accountability Office stated: "According to Treasury officials, Treasury provided assistance not simply because of the industry's importance, but because of the severity of the crisis and the desire to prevent significant disruption to the economy that would have resulted from uncontrolled liquidations of Chrysler and GM." PX-0127-0007 (Government Accountability Office, "Trouble Asset Relief Program: Status of Treasury's Investments in General Motors and Ally Financial," October 2013, p. 3); Fischel Decl. ¶ 79.

217. These statements are consistent with the fact that the value of the assets Treasury received as a consequence of the 363 Sale was far less than the value of the financing provided. Fischel Decl. ¶ 80.

218. However, despite the importance of the company to the U.S. economy, the Government at some point would stop funding General Motors. Feldman Dep. 153:6-154:4.

219. The Government did not provide "an open-ended check" to the company. Feldman Dep. 153:6-154:4.

220. Rather, the Government had a line that it would not cross. Feldman Dep. 156:15-157:22.

221. Further, the Government contemplated the possibility that the Court would not approve the 363 Sale. Feldman Dep. 158:11-158:25.

222. The Government's view was that Old GM would liquidate if the 363 Sale was not approved by the Bankruptcy Court. Feldman Dep. 159:20-160:22.

223. Statements by Government officials close to Treasury's interventions indicate that they never expected to see a full return of their investments. Fischel Decl. ¶ 84.

224. As Steven Rattner stated: "[W]hen we made the capital infusions into GM, we never anticipated a full recovery of them." JX-0026-0012 (Steven Rattner, "Reflections on the Auto Restructurings," Federal Reserve Conference, May 10, 2010); Fischel Decl. ¶ 85.

225. Similarly, Austan Goolsbee and Alan Krueger stated: "The gap in time between the granting of the loans in December 2008 and agreement on a workable plan for restructuring the companies and making them financial viable meant that the interim $20 billion in loans made to keep the companies afloat while they prepared the original viability plans was unlikely ever to be repaid." PX-0306-0005 (Austan D. Goolsbee and Alan B. Krueger, "A Retrospective Look at Rescuing and Restructuring General Motors and Chrysler," *Journal of Economic Perspectives* 29, no. 2 (2015): 3-24, p. 7); Fischel Decl. ¶ 86.

226. As Matt Feldman explained: "[I]t was my hope and expectation that [repayment to the Government] would occur. But I did understand it was subject to a lot of variables that were all going to take place after I left the government, including, most importantly, how the government chose to sell the stock and ultimately yield the proceeds from that sale." Feldman Dep. 136:10-15, 136:18-25.

227. According to Mr. Feldman, the Government was not a private equity firm or "a JPMorgan"; its decision making process went beyond those issues considered by ordinary market participants and if the Government's investment was in fact based entirely on expected recovery of investment, then somebody else would have extended financing. Feldman Dep. 144:19-145:19.

VII. OLD GM'S BANKRUPTCY PROCEEDINGS AND REPAYMENT OF THE TERM LOAN

228. Ultimately, Old GM could not restructure outside of bankruptcy. *See, e.g.*, Koch Dep. 8:20-9:5.

229. On June 1, 2009 (the "**Petition Date**"), Old GM and certain of its subsidiaries filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court. JPTO Stipulated Facts ¶ 31.

230. On the Petition Date, as planned, Old GM also filed a motion in the Bankruptcy Court seeking approval to sell substantially all of its assets to a Government-sponsored entity in an expedited sale under Section 363 of the Bankruptcy Code. JPTO Stipulated Facts ¶ 32.

231. Mr. Henderson stated at the time: "The Debtors have filed the 363 Motion because there simply is no viable alternative to the 363 Transaction to preserve the going concern value of the GM business and the employment opportunities and related benefits of that business. There is no other sale, or even other potential purchasers, present or on the horizon. There is no other source for debtor in possession ('DIP') financing even under the expedited process that is a condition to the instant proposal, let alone under a traditional chapter 11 process. In the face of the global meltdown of the financial markets, and a liquidity crisis unprecedented in GM's 100 year history, there is only one way to maximize the value and permit the survival of GM's business and save hundreds of thousands of jobs associated with not only GM, but also its vast supplier and dealer networks: These chapter 11 cases and the prompt approval of the 363 Transaction. The only other alternative is the liquidation of the Debtors' assets[.]" JX-0006-0003 (Henderson Aff. ¶ 5).

232. As of the Petition Date, certain of the Company's assembly facilities were operating, while other assembly facilities continued to be shut down. JX-0006-0028 (Henderson Aff. ¶ 66).

233. A number of the assembly facilities that remained shut down were expected to resume operations in mid-July if the 363 Sale was approved. JX-0006-0028 to 0029 (Henderson Aff. ¶ 66).

234. Two of the Representative Assets at issue here, Representative Asset No. 29 (GG-1 Transfer Press) and Representative Asset No. 30 (TP-14 Transfer Press), were excluded from the 363 Sale and remained behind with Old GM, and were subsequently sold to third parties. JPTO Stipulated Facts ¶ 34.

235. The other 38 Representative Assets, along with the plants in which they were operated, were included in the 363 Sale. JPTO Stipulated Facts ¶ 35.

236. Pursuant to the terms of the 363 Sale, New GM would provide 10% of the post-closing common shares of New GM, plus New GM warrants, to Old GM for the benefit of its unsecured creditors. JPTO Stipulated Facts ¶ 36.

237. On the Petition Date, Old GM also filed a motion for DIP financing, seeking immediate, 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. JPTO Stipulated Facts ¶ 37.

238. On June 2, 2009, the Bankruptcy Court entered an order approving the DIP motion on an interim basis, permitting the Government to fund up to $15 billion of the DIP loan. JPTO Stipulated Facts ¶ 38.

239. On June 2, 2009, the Bankruptcy Court also approved bidding procedures proposed by the Debtors, imposing a deadline of June 22, 2009, for any competing bids to the proposed 363 Sale. JPTO Stipulated Facts ¶ 39.

240. Pursuant to those procedures, market participants had an opportunity to bid to acquire substantially all of Old GM's assets. JPTO Stipulated Facts ¶ 39.

241. If any bid was higher or better than the existing terms of the 363 Sale, then, subject to Bankruptcy Court approval, Old GM's assets would be sold to that bidder. JPTO Stipulated Facts ¶ 39.

242. The Bankruptcy Court described this as "a full, fair, and reasonable opportunity for any entity to make an offer to purchase the Purchased Assets." PX-0149-0004 (Bankr. Pro. Dkt. No. 2968, Order (I) Authorizing Sale of Assets Pursuant to Amended and Restated Master Sale and Purchase Agreement With NGMCO, Inc., a U.S. Treasury-Sponsored Purchaser; (II) Authorizing Assumption and Assignment Of Certain Executory Contracts and Unexpired Leases in Connection with the Sale; and (III) Granting Related Relief, p. 4).

243. No other bids for Old GM's assets were submitted. JPTO Stipulated Facts ¶ 40; *In re Gen. Motors Corp.*, 407 B.R. at 480.

244. This indicates that no market participant was willing to pay a higher price for Old GM's assets. Fischel Decl. ¶ 64.

245. On June 25, 2009, the Court granted the Debtors' motion to approve the final DIP financing from the Government (Bankr. Pro. Dkt. No. 2529) (the "**Final DIP Order**") and the Government provided an additional $18.3 billion of DIP financing to Old GM. JPTO Stipulated Facts ¶ 41.

246. On July 5, 2009, the Bankruptcy Court entered an order approving the 363 Sale (the "**363 Sale Order**"). *See* JPTO Stipulated Facts ¶ 42.

247. In approving the 363 Sale, Judge Gerber 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." *In re Gen. Motors*, 407 B.R. at 474.

248. Judge Gerber further concluded: "[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." *In re Gen. Motors*, 407 B.R. at 474.

249. Judge Gerber also noted that "in light of GM's substantial secured indebtedness, approximately $50 billion, the only entity that has the financial wherewithal and is qualified to purchase the assets—and the only entity that has stepped forward to make such a purchase—is the U.S. Treasury-sponsored Purchaser." *In re Gen. Motors Corp.*, 407 B.R. at 480-81; *see* JX-0006-0007 (Henderson Aff. ¶ 14).

250. Prior to this point, the Bankruptcy Court's approval of the 363 Sale was not guaranteed. *See* Koch Dep. 69:1-69:9 (Mr. Koch was only "reasonably confident" the Bankruptcy Court would approve the transaction).

251. For example, at the time the Bankruptcy Court approved the 363 Sale, there were approximately 850 outstanding objections to the sale. *In re Gen. Motors*, 407 B.R. at 520.

252. 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. Bankr. Pro. Dkt. No. 2967 at 2; *see* Bankr. Pro. Dkt. No. 2645, Exs. A-J.

253. The 363 Sale closed on July 10, 2009. JPTO Stipulated Facts ¶ 43.

254. As of June 1, 2009, interests in the Term Loan were held by over 500 Term Lenders. JPTO Stipulated Facts ¶ 45.

255. As of that date, the outstanding principal balance on the Term Loan was over $1.4 billion. JPTO Stipulated Facts ¶ 53.

256. Per the Final DIP Order, on June 30, 2009, Old GM paid $1,481,656,507.70 to JPMorgan, which JPMorgan distributed to the other Term Lenders, in full satisfaction of all claims arising under the Term Loan Agreements. JPTO Stipulated Facts ¶ 54.

VIII. THE AVOIDANCE ACTION

257. The Bankruptcy Court's authorization for Old GM to repay the Term Loan was subject to a carve-out for permitting this action (the "**Avoidance Action**") to proceed. Bankr. Pro. Dkt. No. 2529 (Final DIP Order ¶ 19(d)).

258. It was discovered that 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. *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.)*, 777 F.3d 100, 102-03 (2d Cir. 2015).

259. The 2008 Termination Statement terminated the Delaware Umbrella Filing Statement, causing a substantial portion of Defendants' security interest to become unperfected and giving rise to the Avoidance Action. *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.)*, 777 F.3d at 102-03.

260. On July 31, 2009, the Unsecured Creditor's Committee filed the Avoidance Action. JPTO Stipulated Facts ¶ 55.

261. The initial complaint in the Avoidance Action alleged that 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.

262. On an appeal from a decision of the Bankruptcy Court in the Avoidance Action, the Second Circuit held that, on October 30, 2008, JPMorgan authorized the filing of a UCC-3 termination statement with the Delaware Secretary of State that referred to the Delaware Umbrella Financing Statement (the "**2008 Termination Statement**"). JPTO Stipulated Facts ¶ 56.

263. The Second Circuit also held that, as a result of the filing of the 2008 Termination Statement, the Delaware Umbrella Financing Statement was not effective as of the Petition Date. JPTO Stipulated Facts ¶ 57.

264. The filing of the 2008 Termination Statement did not affect any of the 26 Fixture Filings or the Delaware Saturn Financing Statement. JPTO Stipulated Facts ¶ 58.

265. On May 20, 2015, the Trust filed an amended complaint (the "**Amended Complaint**"), 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. Adv. Pro. Dkt. No 91.

266. On May 4, 2016, the Court entered an order setting a schedule for proceedings to adjudicate 40 representative assets selected by the parties (the "**Representative Assets**"). Adv. Pro. Dkt. No. 547.

267. 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.

268. June 30, 2009, the date the Term Loan was repaid in full, is the date as of which the Representative Assets are to be valued. JPTO Stipulated Facts ¶ 73; Adv. Pro. Dkt. No. 641.

269. Trial on the Representative Assets took place from April 24, 2017 until May 5, 2017.

270. Closing arguments are scheduled for June 5, 2017.

271. The parties agree that in the specific circumstances of the Avoidance Action, Defendants bear the burden of proof on the issues to be tried, except the parties disagree on

which party bears the burden with respect to the issue of whether Defendants had a perfected security interest in any fixtures at the Lansing Delta Township Assembly plant and Lansing Regional Stamping plant (collectively, the "**Lansing Facilities**"). JPTO at 4.

IX. SCOPE OF THE GRANT OF COLLATERAL

A. Representative Asset Numbers 11, 32, and 33 Are Not Within the Grant of Collateral

272. Defendants do not claim to have a security interest in Representative Asset No. 32 (AA Transfer Press) or Representative Asset No. 33 (B3-5 Transfer Press) (together, the "**Leased Presses**"). JPTO Stipulated Facts ¶ 66.

273. Because Representative Assets Nos. 32 and 33 are leased assets and not owned by Old GM, Old GM did not grant a security interest in the assets. JX-0002-0006 to 0007 (Term Loan Collateral Agreement Article II)

274. The Leased Presses also are excluded from the grant of collateral pursuant to clauses (ii) and (iii) of Article II of the Term Loan Collateral Agreement. JX-0002-0007 (Term Loan Collateral Agreement Article II clauses (ii) & (iii)).

275. Representative Asset No. 11 (the "**CUC**" or "**Lansing Delta Township Assembly Utility Services**"), is subject to three agreements relating to the CUC's 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**") (JX-0013); (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**") (JX-0012); 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**") (JX-0014).

276. Delta II and Old GM entered into the USA in connection with the construction of Lansing Delta Township Assembly. JX-0013-0006.

277. Pursuant to the USA, Delta II was to design, construct, own, operate, and maintain the CUC and provide certain utility services to Old GM. JX-0013-0006.

278. In exchange for the services provided by Delta II, Old GM provided monthly payments to Delta II. JX-0013-0006.

279. The USA provides for the CUC to be built on property encumbered by a license granted from Old GM to Delta II. JX-0013-0006.

280. The USA provides that Delta II "shall own and be solely responsible for the operation, repair and maintenance of the [CUC] . . . ." JX-0013-0041.

281. Pursuant to the USA, 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]." JX-0013-0026.

282. 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]." JX-0013-0029.

283. The USA 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. JX-0013-0036.

284. Under the USA, 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. JX-0013-0041.

285. 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. JX-0014-0005.

286. The loan was evidenced by a note and secured by a first priority interest in Delta II's right, title, and interest in certain collateral (collectively defined in the LSA as "Collateral"), including "Tangible Personal Property." JX-0014-0014.

287. "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]." JX-0014-0012.

288. 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 . . . ." JX-0014-0021.

289. 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]." JX-0014-0026.

290. In accordance with these provisions of the LSA, on July 7, 2004, GMAC perfected its security interest by recording with the Eaton County Registry of Deeds a UCC-1 fixture filing (the "**Delta II Fixture Filing**") on the subject collateral, including the CUC. PX-0041.

291. On February 10, 2009, a continuation statement was recorded with respect to the Delta II Fixture Filing, filed by Lehman Commercial Paper, Inc. (the "**Delta II Continuation Statement**"). PX-0040.

292. Delta II, GMAC, and Old GM also entered into the Tri-Party Agreement. JX-0012. 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. JX-0012-0004.

293. 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. JX-0012-0024.

294. Section 5.01 of the Tri-Party Agreement 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 . . . ." JX-0012-0025.

295. Under the Tri Party Agreement, "collateral" has the meaning set forth in Section 2.02 of the LSA (and includes Tangible Personal Property and the CUC). JX-0014-0013-0014.

296. As of June 1, 2009, Defendants did not have a first priority security interest in the CUC.

297. As of June 1, 2009, GMAC had a first priority security interest in the CUC. PX-0041-0001; PX-0040-0001.

B. The Eaton County Fixture Filing Does Not Perfect Defendants' Security Interest in Any Assets Found to Be Fixtures at Lansing Regional Stamping or Lansing Delta Township

298. A Fixture Filing was recorded on behalf of JPMorgan on April 26, 2007, in Eaton County, Michigan (the "**Eaton County Fixture Filing**"). JPTO Stipulated Facts ¶ 59.

299. The Eaton County Fixture Filing lists Old GM as the debtor. JPTO Stipulated Facts ¶ 60.

300. The Eaton County Fixture Filing lists JPMorgan as the secured party. DX-0125-0001.

301. The Eaton County Fixture Filing describes the collateral covered by it as "all fixtures located on the real estate described in Exhibit A." JPTO Stipulated Facts ¶ 61.

302. Exhibit A to the Eaton County Fixture Filing, as it is filed in the Eaton County Register of Deeds office, includes the following:

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EXHIBIT A

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

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

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

JPTO Stipulated Facts ¶ 62.

303. The metes and bounds description in Exhibit A to the Eaton County Fixture Filing is the legal description of the property. Marquardt Test. 2205:10-22.

304. The metes and bounds description is the most specific description of the property in Exhibit A to the Eaton County Fixture Filing. Marquardt Test. 2219:3-9.

305. The metes and bounds description in Exhibit A to the Eaton County Fixture Filing describes a vacant parcel of land across the street to the North of the Lansing Facilities. JPTO Stipulated Facts ¶ 63.

306. The parcel described in the metes and bounds description in Exhibit A of the Eaton County Fixture Filing is denoted in a red outline on Adv. Pro. Dkt. No. 827 Ex. 1, a sketch

plan of the metes and bounds description jointly commissioned by the parties. JPTO Stipulated Facts ¶ 64.

307. No buildings associated with either Lansing Delta Township Assembly or Lansing Regional Stamping are located on the parcel described in the metes and bounds description in Exhibit A of the Eaton County Fixture Filing. Marquardt Test. 2205:23-2206:6.

308. Exhibit A of the Eaton County Fixture Filing also contains, as a prefatory phrase to the metes and bounds description, the common street address 8400 Millett Hwy. DX-0125-0003.

309. The common street address in Exhibit A to the Eaton County Fixture Filing describes the same vacant parcel of land across the street to the North of the Lansing Facilities as the metes and bounds legal description. Marquardt Test. 2209:17-2210:21.

310. The common street addresses for the Lansing Facilities include 8175 Millett Highway, Lansing, MI and 8001 Davis Highway. JPTO Stipulated Facts ¶ 65.

311. No buildings associated with the Lansing Facilities are located at the common street address in Exhibit A to the Eaton County Fixture Filing. Marquardt Test. 2209:17-2210:21.

312. Below and apart from the common street address and metes and bounds legal description in Exhibit A to the Eaton County Fixture Filing is a stamp that reads: "GM Assembly Lansing Delta, 8400 Millett Hwy, Lansing, Eaton County, MI, LandAmerica File No. 100729." DX-0125-0003.

313. The stamp located below the metes and bounds and address description in Exhibit A to the Eaton County Fixture Filing contains the same address listed in the Eaton County

Fixture Filing, the common street address of the vacant parcel of land across the street to the North of the Lansing Facilities. Marquardt Test. 2214:8-25; DX-0125-0003.

314. The stamp contains an internal filing number for LandAmerica, a title insurance company. Marquardt Test. 2214:8-25.

315. Exhibit A of the Eaton County Fixture Filing only contains the legal description and common street address for the vacant parcel of land across the street to the North of the Lansing Facilities, and not for any other real property. DX-0125-0003.

316. The parcel described in the metes and bounds description in Exhibit A of the Eaton County Fixture Filing is within Section 28, Delta Township, Eaton County ("**Section 28**"). Marquardt Test. 2184:18-2185:3.

317. The common street address in Exhibit A to the Eaton County Fixture Filing, 8400 Millett Hwy, is associated with Section 28. It is not associated with either Section 32, Delta Township, Eaton County ("**Section 32**") or Section 33, Delta Township, Eaton County ("**Section 33**"). Marquardt Test. 2208:23-2209:9; 2211:16-25.

318. Michigan Comp. Laws Ann. § 565.28 requires a register of deeds to maintain an index of instruments accepted for recording that includes, among other things, the location of land by section, town and range, platted description, or other description authorized by law. Marquardt Test. 2176:4-2177:13.

319. The Eaton County Register of Deeds indexed the Eaton County Fixture Filing as associated with a parcel contained within Section 28. Marquardt Test. 2182:19-2183:5; 2204:13-19.

320. The buildings associated with the Lansing Facilities are primarily located on Section 33. Marquardt Test. 2211:11-15.

321. The Delta Township Assessor's online records identify two parcels of land associated with 8175 Millett Highway, the address for the Lansing Facilities. The first parcel, which has a total area of approximately 324 acres, contains a legal description that covers a 33 foot strip of land in Section 28, a 33 foot strip of land in Section 32, and a large swath of Section 33. The second parcel contains a legal description for land located entirely within Section 33. Marquardt Decl. ¶¶ 29-31.

322. A Delta Township Assessor's tax map shows the outline of the Lansing Facilities' plant buildings primarily in Section 33. DX-0122-0002; Marquardt Test. 2294:6-2296:8.

323. Defendants retained James M. Marquardt to offer an expert opinion as to whether a search of the Eaton County Register of Deeds would disclose the Eaton County Fixture Filing, and if so, whether the Eaton County Fixture Filing would be identified as a potential encumbrance upon the title of the Lansing Facilities. Marquardt Test. 2164:3-23; 2170:4-15.

324. In rendering his expert opinion, Mr. Marquardt did not consider Michigan Comp. Laws Ann. § 440.9502(2), the Michigan Uniform Commercial Code provision that requires fixture filings to provide a description of the real property to which the collateral is related sufficient to give constructive notice of a mortgage under Michigan law if the description were contained in a record of the mortgage of the real property, and he does not offer an expert opinion with regard to how that statute applies to the Eaton County Fixture Filing. Marquardt Test. 2207:4-2208:7; 2247:9-15.

325. Prior to conducting the title search, Mr. Marquardt was aware of the Eaton County Fixture Filing. Marquardt Decl. ¶ 4.

326. Mr. Marquardt regularly relies on title insurance companies to perform title searches. Marquardt Test. 2221:21-2222:8. In his practice, Mr. Marquardt also relies on title search reports by third parties. Marquardt Test. 2224:20-24.

327. Mr. Marquardt did not request an independent third-party title company to perform a title search of the parcels of land where the Lansing Facilities buildings are located. Marquardt Test. 2231:20-2232:3; 2298:6-9.

328. Mr. Marquardt conducted a search of the grantor-grantee index at the Eaton County Register of Deeds for all recorded documents (except Plats) in Delta Township against General Motors from January 1, 1987 through June 1, 2009. Marquardt Decl. ¶ 34; Marquardt Test. 2180:9-24. This search yielded 104 recorded documents. Marquardt Decl. ¶ 37 n.13.

329. The Eaton County Register of Deeds indexed the location of land for each of the 104 recorded documents. DX-0123-0001 to 0007.

330. Mr. Marquardt contends that a real property searcher examining the chain of title to the Lansing Facilities would examine each of the 104 recorded documents, including those that are not associated with the section where the Lansing Facilities are located. Marquardt Test. 2245:10-2246:9.

331. Mr. Marquardt agrees that if the Eaton County Fixture Filing only contained the common street address and the metes and bounds legal description in Exhibit A, the Eaton County Fixture Filing would not provide notice of a lien against the Lansing Facilities. Marquardt Test. 2208:8-18; 2212:2-2213:19.

332. Mr. Marquardt also agrees that if the Eaton County Fixture Filing contained the common street address and the metes and bounds legal description in Exhibit A, and only the three bottom lines of the stamp in Exhibit A, the Eaton County Fixture Filing would pertain to

the vacant parcel of land across the street to the North of the Lansing Facilities. Marquardt Test. 2216:17-2217:9.

333. Mr. Marquardt contends that a title searcher would have included the Eaton County Fixture Filing as a potential encumbrance against the property where the Lansing Facilities are located. Marquardt Test. 2170:4-15; Marquardt Decl. ¶ 7.

334. Mr. Marquardt contends that the Eaton County Fixture Filing would be included as a "Schedule B" item on a title insurance commitment. Marquardt Test. 2243:8-2244:7.

335. "Schedule B" is the schedule of a title insurance commitment that lists the exceptions to title. Marquardt Test. 2246:13-2247:8.

336. The decision to include a recorded document on a "Schedule B" of a title insurance commitment is for business reasons. To avoid a business risk, a title insurer may include a recorded document that may not necessarily apply to the given property. Marquardt Test. 2244:8-2245:4; 2264:4-23.

337. A title insurer would include the Eaton County Fixture Filing as a "Schedule B" item on a title insurance commitment to avoid the business risk of exposure to a claim requiring defense of title to the Lansing Facilities. Marquardt Test. 2264:4-23.

338. Mr. Marquardt contends that upon receipt of a title search report that lists the Eaton County Fixture Filing as a potential encumbrance on Schedule B exclusions, the potential purchaser would then have contacted an Old GM employee to inquire of the potential lien. Marquardt Decl. ¶¶ 43-44.

339. Mr. Marquardt does not know what would have been said during the hypothetical conversation between a potential purchaser and Old GM employee. Marquardt Test. 2238:22-2239:12.

340. In construing the Eaton County Fixture Filing on its face without reference to extrinsic sources, including conversations with Old GM, Mr. Marquardt agrees that the Eaton County Fixture Filing refers to the vacant parcel of land across the street to the North of the Lansing Facilities. Marquardt Test. 2220:4-18.

341. Mr. Marquardt is a member of the Land Title Standards Committee of the Michigan Bar with Robert D. Mollhagen. The Land Title Standards Committee provides guidance on many title issues. Marquardt Test. 2217:19-2218:14.

342. In a secured transaction, the standard of care in conducting a title search is the same regardless of the amount of the loan. Marquardt Test. 2223:2-20.

343. Paragraph 19(d) of the Final DIP Order expressly preserved the right of the Unsecured Creditor's Committee to investigate and bring actions based upon the purported perfection of the security interests related to the Term Loan. Specifically, the Final DIP Order provided a general release from the Debtors to the Term Lenders with the exception of certain "Reserved Claims," defined to include "the perfection of first priority liens" in connection with the Term Loan.[8] DX-0010-0025.

344. The Final DIP Order further provided that "[t]he Committee shall have automatic standing and authority to both investigate the Reserved Claims and bring actions based upon the Reserved Claims against the Prepetition Senior Facilities Secured Parties not later than July 31, 2009". DX-0010-0025.

345. The Final DIP Order also stated that the Unsecured Creditor's Committee's grant of "automatic standing shall be without any further order of this Court or any requirement that

[8] The Final DIP Order uses the term "Prepetition Senior Facilities," which is defined to include the "Prepetition Term Loan Agreement." DX-0010-0005 to 0006.

the Committee file a motion seeking standing or authority to file a motion seeking standing or authority before prosecuting any such challenge." DX-0010-0026.

346. Paragraphs 590-603 of the Amended Complaint assert claims 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.

C. Powertrain Engineering Pontiac Is Not A Related Facility And Is Therefore Excluded From the Grant of Collateral

347. Article II(a) of the Term Loan Collateral Agreement grants Defendants a security interest in all fixtures located at "any plant or facility of [GM] listed on Schedule 1, including all related or appurtenant land, buildings, Equipment and Fixtures." JPTO Stipulated Facts ¶ 69.

348. The Term Loan Collateral Agreement excludes from the grant of collateral all "Equipment" and "Fixtures" that are not located at a "U.S. Manufacturing Facility." JX-0002-0004 to 0008.

349. "U.S. Manufacturing Facility" is defined in pertinent part as the 42 facilities listed on Schedule 1 to the Term Loan Collateral Agreement, including any "related or appurtenant" land, buildings, equipment and fixtures. JX-0002-0006; JX-0002-0022.

350. The Metal Fabricating Division (Stamping) Pontiac facility ("**MFD Pontiac**") is listed as one of the 42 facilities on Schedule 1 of the Term Loan Collateral Agreement, and is a Material Facility for which a Fixture Filing was filed. JPTO Stipulated Facts ¶ 70.

351. Defendants have a perfected security interest in any fixtures owned by Old GM at MFD Pontiac. JPTO Stipulated Facts ¶ 71.

352. GM Powertrain Engineering Pontiac ("**Powertrain Engineering Pontiac**") is not listed on Schedule 1 of the Term Loan Collateral Agreement. JPTO Stipulated Facts ¶ 72.

353. MFD Pontiac and Powertrain Engineering Pontiac have two different addresses and are located on opposite sides of the street. Powertrain Engineering Pontiac is located at 895 Joslyn Road, in Pontiac, Michigan. MFD Pontiac is located across the street (Glenwood Avenue) from Powertrain Engineering Pontiac at 220 East Columbia Ave. Marquardt Decl. ¶ 53.

354. The street separating MFD Pontiac and Powertrain Engineering Pontiac is on a piece of land that Old GM deeded to the City of Pontiac, Michigan in 2008 to develop for public use. Buttermore Decl. ¶ 43; Buttermore Test. 1312:8-10; Marquardt Decl. ¶ 66.

355. MFD Pontiac is located on a parcel currently numbered "14-17-476-002," while Powertrain Engineering Pontiac is currently on parcel number "14-21-102-001." Marquardt Decl. ¶ 61.

356. MFD Pontiac and Powertrain Engineering Pontiac were historically located on former parcel number 14-21-101-004. Marquardt Decl. ¶ 69.

357. MFD Pontiac is a manufacturing stamping facility where GM stamps the body panels and motor compartments for use in GM assembly plants. Buttermore Decl. ¶ 42; Buttermore Test. 1311:15-17.

358. Powertrain Engineering Pontiac is a research and development facility where GM designs, engineers, develops, and tests engines and transmissions. Buttermore Decl. ¶ 42.

359. The engineering that takes place at Powertrain Engineering Pontiac is not specific to the manufacturing and production at MFD Pontiac. Buttermore Test. 1311:18-1312:7.

360. The work at Powertrain Engineering Pontiac has nothing to do with MFD Pontiac. Buttermore Test. 1312:4-7.

361. Both facilities get power, steam, and utilities by a utility trestle from the Central Utility Complex on the Pontiac North Campus. Buttermore Decl. ¶¶ 44-45.

362. Defendants' expert, John Buttermore, based his opinion that the two facilities are related solely on the following: employees of both MFD Pontiac and Powertrain Engineering Pontiac belong to the same union, they share the same security system allowing employee access to both facilities, filings with the Environmental Protection Agency cover all the facilities on the Pontiac North Campus, and Detroit news covers all the facilities on the Pontiac North Campus. Buttermore Test. 1307:17-1309:9.

363. On three occasions between July 26, 2000 and March 27, 2007, a single deed of conveyance transferred title to the land where both MFD Pontiac and Powertrain Engineering Pontiac are located. Marquardt Decl. ¶ 70.

X. THIRD-PARTY EVIDENCE RELEVANT TO THE FIXTURE CLASSIFICATION ISSUE

364. During the fact discovery period in this case, Plaintiff obtained substantial third-party information relevant to the fixture classification issue. The most important sources of such information include documents and testimony from Maynards and Hilco, two companies that were involved in selling a wide range of manufacturing assets from GM plants, and documents and testimony from New GM concerning Old GM's policies and practices with respect to its manufacturing assets. Basic facts gleaned from those sources of information are reviewed below.

A. SALES OF GM ASSETS BY MAYNARDS AND HILCO

365. Following GM's bankruptcy filing, there were approximately 16 plants that were excluded from the 363 Sale and were left behind with Old GM. DX-0002-0563. Old GM worked with Maynards and Hilco, two preeminent auction companies, to sell the assets from the closing plants. See, e.g., PX-0095 (marketing agreement with RACER Trust; PX-0294 (marketing agreement with MLC).

366. Taso Sofikitis, the CEO of Maynards Industries, testified in this case by deposition designation. Sofikitis Dep. 7:10-7:13. Maynards is one of the main liquidators and auctioneers in the North American automotive sector. Sofikitis Dep. 15:17-16:2.

367. Over the course of his time at Maynards, Mr. Sofikitis has done work for the Motors Liquidation Company, which included evaluating and disposing of Old GM's surplus assets via private liquidations and auction sales. Sofikitis Dep. 8:4-8:13.

368. Following the GM Bankruptcy, Mr. Sofikitis was involved in the sale of the following plants: Grand Rapids, Massena, Pontiac Assembly, Livonia, Mansfield Stamping, Willow Run, Flint North, Pontiac North, and Indianapolis Stamping. Sofikitis Dep. 30:11-31:6.

369. Robert Levy, formerly a managing partner of, and currently a senior advisor to, Hilco Industrial, also testified in this case by deposition designation. Levy Dep. 7:1-5. Mr. Levy joined Hilco in 2004 as president and partner and was responsible for running and building the business with his team and running industrial auction sales until he became managing partner in approximately 2010. Levy Dep. 7:8-7:15. Mr. Levy has been a licensed auctioneer for 36 years. Levy Dep. 7:16-7:19.

370. Since 1997 until today, Maynards has had an exclusive contract for the sale of GM's surplus assets. Sofikitis Dep. 17:4-17:6.

371. In 2009, Maynards and Hilco submitted a proposed strategy for selling six GM facilities to AlixPartners, which was working on behalf of Old GM. Levy Dep. 27:22-28:13; PX-0062.

372. For a period of time beginning in 2009, Maynards and Hilco were engaged by the Motors Liquidation Company to dispose of assets. Levy Dep. 8:3-8:5; Sofikitis Dep. 9:4-9:8.

373. At some point, Maynards' and Hilco's work for MLC transitioned into work for the RACER Trust. Sofikitis Dep. 9:4-9:8.

374. Maynards and Hilco sold plant equipment only – they did not sell facilities or land for MLC or RACER Trust. Levy Dep. 66:7-9, 66:12-23, 73:20-22.

1. The Sales Process

375. In general, Maynards and Hilco grouped the assets to be sold from a particular plant into "Group One" and "Group Two" assets. *See* PX-0091-0005 (Letter to Crowell & Moring LLP dated June 7, 2011, enclosing Hilco Industrial, LLC and Maynards Industries proposal to RACER Trust).

376. Group One assets are assets that have "potential value greater than salvage value" and "can be reutilized for [their] original intended purpose by reselling them into the secondary marketplace." Sofikitis Dep. 42:25-43:9; PX-0091-0005. Group One assets are those items determined to be easily saleable with a high liquidity curve and a large market. Levy Dep. 35:6-35:16.

377. Group One assets include such assets as robots, CNC machining centers, CNC turning centers, some presses, machine shops, fabricating equipment, air compression, foundry equipment, specific motors, specific electrical distribution, machine tools, shop and factory supplies, brakes, shears, lathes, and grinders. Sofikitis Dep. 44:17-44:22; Levy Dep. 37:12-37:18; PX-0091-0005; PX-0062-0004

378. Mr. Levy also identified a shaker conveyor from the Massena powertrain facility as an example of a "Group One" asset. Levy Dep. 38:7-38:12. A shaker conveyor is used in a foundry to shake and remove the excess materials off of casted parts. Levy Dep. 38:7-38:12. According to Mr. Levy, the shaker conveyor is a saleable asset because of its important functional purpose in any foundry operation. Levy Dep. 38:25-39:4. As compared to other types of conveyors, the shaker conveyor has more potentially interested end users in the foundry business. Levy Dep 39:5-39:6.

379. Group Two assets are those assets that are more difficult to sell, have a limited market, require more time and special buyers to accomplish a sale, and are more expensive to remove. Levy Dep. 36:7-36:12; PX-0095-0005; PX-0062-0004.

380. Group Two assets include assets such as specific motors, drives, specific electrical distribution, conveyors and drives, control panels, filters, some materials, and assembly lines. PX-0095-0005; PX-0062-0004.

381. Group One assets typically sell in the webcast auctions conducted by Maynards and Hilco and at private treaty sales, and the Group Two assets typically sell in the reclamation phase. Sofikitis Dep. 49:11-49:17.

382. A private treaty sale is a negotiated sale that occurs prior to an auction sale and is negotiated between an individual buyer and a seller, in contrast to an auction sale with multiple bidders. Sofikitis Dep. 17:15-17:22; Levy Dep. 20:12-20:15.

383. Choosing to sell equipment through a private treaty sale, as opposed to an auction, depends on the specificity of the item and the number of potential buyers. Levy Dep. 20:16-20:21.

384. According to Mr. Levy, foundry equipment, power generation equipment, and chemical processing equipment are good examples of assets best sold through a private treaty sale because of the limited marketplace and specificity of the asset. Levy Dep. 20:22-21:7.

2. Removal of Assets from the GM Facilities

385. Following the sale of a GM asset by Maynards/Hilco, the buyer is responsible for removal of the asset from the GM facility. Levy Dep. 111:6-19.

386. Thus, when selling assets by private treaty or auction sale, buyers take into account the costs of removal when deciding what to pay for the assets. Sofikitis Dep. 33:13-34:15.

387. The cost of extraction can have an effect on the auction/sale price. Sofikitis Dep. 34:16-34:20.

388. However, both Mr. Levy and Mr. Sofikitis agree that it is the desirability of the asset, as opposed to issues connected to removal, that dictates the relative liquidity of an asset. Levy Dep. 26:11-26:14, 26:16; Sofikitis Dep. 46:6-21.

389. Over the course of their work for MLC and the RACER Trust, neither Mr. Sofikitis nor Mr. Levy recall any instances of plants being damaged during the removal process. Sofikitis Dep. 39:2-39:10; Levy Dep. 27:10-27:13.

390. In the event that equipment or the plant gets damaged during the removal process, the rigger is responsible for the cost of repair. Sofikitis Dep. 38:7-39:1.

391. Neither Mr. Sofikitis nor Mr. Levy considers the removal of bolts and welds securing an asset to constitute damage to the building. Sofikitis Dep. 186:14-19; Levy Dep. 143:11-14.

392. Mr. Sofikitis does not consider the pit left behind after a press is removed, or removal from a foundation, to constitute building damage. Sofikitis Dep. 185:2-6; 15-24.

393. Even if structural steel has to be sheared off to remove a press, Mr. Sofikitis does not consider that to be damage because that step is an expected part of the removal process. Sofikitis Dep. 185:7-14.

394. Similarly, Mr. Sofikitis does not consider removing the roof or walls to take out a press to be damage as long as they are replaced after the press is removed. Sofikitis Dep. 212:9-24.

395. Mr. Sofikitis does not consider residual fluids left behind by the press to be damage. Sofikitis Dep. 212:25-213:7.

3. The State of the Automotive Equipment Market in 2009

396. Based on Mr. Sofikitis' experience selling assets from 2008 to 2012, his view is that the surplus asset market was depressed from 2008 through 2011 or 2012. Sofikitis Dep. 113:14-114:11. During this time period, there was a higher number of surplus assets on the market and not much demand. Sofikitis Dep. 113:14-114:11.

397. Mr. Levy described the market for the sale of automotive equipment in July 2009 as "terrible" and "uncertain." Levy Dep. 19:9-19:19. According to Mr. Levy, at the end of 2008, the markets had come to a halt and buyers were not spending money. Levy Dep. 19:9-19:19.

398. During the 2009 period, the market softened even further and Mr. Sofikitis was surprised that Maynards/Hilco were able to complete the sales of GM assets that they did. Sofikitis Dep. 114:12-115:4; *see also* Levy Dep. 42:2-42:3, 42:5-45:9.

399. The market began to strengthen throughout 2009: the end of year was stronger than the beginning, and in 2010 the market began to show some signs of life. Levy Dep. 41:16-41:19. Though, as already described above, it remained depressed through 2011 or 2012.

400. Even though the Maynards and Hilco sales were forced liquidations because the assets were sold over a three-month time frame, Mr. Sofikitis believes the values they got at the sales were comparable to fair market value. Sofikitis Dep. 128:24-129:12, 208:14-208:22.

401. Maynards and Hilco were heavily incentivized by the structure of the buyer's premium to maximize value from the sales. Sofikitis Dep. 93:4-93:18.

402. According to Mr. Sofikitis, custom equipment is more difficult to sell because it is very specific and there are not a lot of buyers out there that can use it. Sofikitis Dep. 173:19-174:7.

403. For example, a conveyor that costs $1,800,000 new is only worth $25,000 on the secondary market because it is specialized and there are not a lot of buyers for it. Sofikitis Dep. 219:14-220:11; PX-0112-0004. This is the case even though the buyer of the conveyor in this particular example was New GM, which was intending on reusing the conveyor. Sofikitis Dep. 220:16-25.

4. The Asset Sales on Behalf of RACER Trust

404. MLC and later RACER Trust were responsible for the remediation and sale of former GM facilities. *See* DX-0002-0037. MLC and RACER Trust worked with Maynards and Hilco in connection with the sale of assets from the facilities in advance of the RACER Trust's efforts to sell the real property. *See, e.g.*, PX-0091-0001 (letter from Maynards and Hilco to RACER Trust regarding their sale of machinery and equipment out of 20 GM facilities).

405. On June 7, 2011, Hilco and Maynards submitted a proposal to handle the sale of equipment located in 16 former GM facilities on behalf of the RACER Trust. *See generally* PX-0091.

406. In connection with their work on behalf of RACER Trust, Maynards and Hilco signed an asset marketing agreement that governed the sales of Mansfield Stamping and

Indianapolis Stamping facilities. Sofikitis Dep. 71:3-72:1; PX-0095-0001 (specifying that the agreement covers the facilities listed on Exhibit A); PX-0095-0012 (listing Mansfield Stamping and Indianapolis Stamping under Exhibit A).

407. The asset marketing agreement also specified the equipment RACER Trust did not wish to sell out of the Mansfield Stamping and Indianapolis Stamping facilities. Sofikitis Dep. 71:3-72:1; PX-0095-0013.

408. Based on conversations with RACER Trust managers, Mr. Sofikitis understood the list of not-for-sale equipment to be assets that generally benefitted the building. Because RACER Trust wished to sell the facility for reuse after removing and selling manufacturing equipment located in the building, RACER Trust desired to keep the assets that future users of the facility would need. Sofikitis Dep. 71:20-71:25, 72:8-72:18, 73:12-73:23.

409. RACER Trust indicated to Mr. Sofikitis what it considered to be a fixture that was part of the facility by carving this not-for-sale group of assets out of the asset marketing agreement. Sofikitis Dep. 141:7-141:11.

410. Mr. Levy similarly explained that if an asset was a building utility, and not related to a manufacturing process, then such an asset would typically remain with the building. For example, Mr. Levy explained that electrical distribution equipment might or might not remain with the building depending on whether its use was for the building generally or for a specific manufacturing process. Levy Dep. 66:7-23.

411. Maynards and Hilco were tasked with selling all machinery and equipment that were not in this limited not-for-sale category. Sofikitis Dep. 74:11-74:20.

412. As explained in an email from Mr. Levy to executives at RACER Trust, the marketing arrangement with Hilco and Maynards concerned the sale of machinery and equipment only. Levy Dep. 72:5-73:2, 73:8-13, 17-18 (referencing PX-0073).

413. According to Mr. Levy's email, "Building and real estate can be dealt with separately and is not affected by the machinery in the building." PX-0073-0001; Levy Dep. 74:3-14.

414. In connection with his work as a seller of automotive assets, Mr. Sofikitis distinguishes between assets that benefit the building generally, which he considers to be part of the building itself, and assets that benefit the company's specific manufacturing processes, which he considers to be personal property. Sofikitis Dep. 144:9-145:3.

415. In its work for MLC and RACER Trust, Maynards was focused on selling the machinery and equipment, not any asset related to the building itself. Thus, for example, if there was a transformer that served the facility itself, Maynards would not offer it for sale; but if the transformer served specific manufacturing machinery, Maynards would offer it for sale. Sofikitis Dep. 145:9-145:20; *see also* Sofikitis Dep. 231:17-21, 240:9-12.

5. The Marketing Efforts by Maynards/Hilco

416. Mr. Levy was strategist and lead auctioneer, and was involved in the marketing of assets in connection with Hilco's work for the Motors Liquidation Company. Levy Dep. 9:20-9:23.

417. Hilco maximized the value received through asset sales through a complex process that required an understanding of the assets and the marketplace for those specified assets. To maximize value, Hilco used appropriate sales methodologies and comprehensive marketing of the assets. Levy Dep. 13:11-13:17.

418. As part of its marketing efforts, Hilco organized the assets into logical categories and, with Maynards, employed a comprehensive multi-faceted marketing campaign that used print media, electronic distribution, the internet, e-mail, trade journals, newspapers, and printed brochures with photographs and descriptions of the assets. Levy Dep. 13:18-14:2.

419. Hilco created lists to promote the sale of assets using SIC, or standard industrial classification, codes to specifically target buyers who had bought similar assets from Hilco in the past. Levy Dep. 14:3-15:6.

420. There were lists of potential buyers that were specific to presses, plastics, screw machines, textiles, transportation, woodworking, metal workings, CNC, body, engine, transmission, parts, glass, rubber, stamping, assembly, and robots. Levy Dep. 15:7-15:19.

421. Hilco has an extensive market reach for industrial equipment auctions, and Hilco's marketing efforts reached all potential buyers of the equipment that was offered for sale as part of the Motors Liquidation Company auctions. Levy Dep. 16:5-16:11.

422. The buyers at the various auctions were an international group, including end users, resellers, and scrap dealers. Levy Dep. 19:4-19:8.

423. Marketing for private treaty sales occurred over a more extended period of time in comparison to auction sales, because marketing for private treaty sales does not involve a specific event date and the marketing is more tailored to the specific asset. Levy Dep. 21:17-21:23.

424. Hilco always tried to do as much marketing as it could, and ideally would have four to eight weeks to market for an auction and as much as six months for a private treaty sale. Levy Dep. 22:13-22:22.

6. Documentation Regarding the Asset Sales

425. During discovery, Maynards and Hilco produced documents regarding the sale of GM assets on behalf of Old GM and RACER Trust.

426. There were numerous auction catalogues produced, which included pictures of the machinery and equipment in the auction catalogues that were offered for sale at a particular auction. Sofikitis Dep. 123:23-124:4.

427. Mr. Levy and Mr. Sofikitis confirmed that Hilco prepared marketing material for MLC and RACER Trust sales that contained photographs of the assets actually being offered for sale. Levy Dep. 42:13-44:16, 44:18-44:22, 44:23-46:4, 74:15-75:24; Sofikitis Dep. 123:10-16; *see also* PX-0281-0024 (describing role of brochures in marketing in sales pitch to RACER Trust).

428. The marketing brochures that were produced during discovery related to sales of a variety of facilities and assets. *See, e.g.*, PX-0063 (May 25 auction, Pontiac, Michigan); PX-0064 (August 3, 2010 auction, Willow Run Transmission); PX-0065 (October 5, 2010 auction, Pontiac Stamping Plants 15 & 25); PX-0066 (October 14, 2010 auction, Livonia Powertrain); PX-0067 (November 4, 2010 auction, Pontiac Assembly Plant); PX-0068 (November 10 to 11, 2010 auction, Grand Rapids Die Manufacturing and Stamping); PX-0069 (January 18 auction, Flint Powertrain North #2); PX-0074 (October 19 and 20, 2011, auction at Mansfield Stamping); PX-0075 & PX-0111 (different catalogue for same April 26, 2012 auction, Indianapolis Stamping); PX-0076 (May 17 to 20, 2011 auction, Willow Run Transmission); PX-0110 (December 2, 2010 auction, Willow Run Transmission).

429. Following the sale process, Maynards prepared a preliminary sales report immediately following the auction, which remained subject to collection of payment for the sales. Sofikitis Dep. 61:8-61:15.

430. Once the sales proceeds were collected, Maynards prepared a final sales report, which identified the lot item, the purchase price, and the purchaser for each asset sold. Sofikitis Dep. 55:9-55:15, 61:8-61:15.

431. Maynards also prepared a monthly sales report, which had a section for auction sales and a section for private sales. Sofikitis Dep. 85:7-85:14. The monthly sales report included separate sheets for each different plant, and set out all of the relevant financial information (e.g., sales, expenses, commissions). Sofikitis Dep. 92:13-92:24.

432. In discovery, Maynards produced a number of final sales reports and monthly reports for the work it did for MLC and RACER Trust from approximately 2009 to 2012. Sofikitis Dep. 90:9-93:20; PX-0101 (May 20, 2011 sales report, Willow Run Auction); PX-0102 (October 5, 2010 sales report, MLC Pontiac Stamping Plant 15 and 25); PX-0103 (August 3, 2010 sales report, Willow Run Transmission); PX-0104 (October 14, 2010 sales report, Livonia Powertrain); PX-0105 (November 4, 2010 sales report, Pontiac Assembly); PX-0107 (Aril 26, 2012 sales report, MFD Indianapolis); PX-0106 (Monthly sales report); PX-0120 (May 17-20, 2011 sales report, Willow Run Transmission); PX-0302 (December 2, 2010 sales report, Willow Run Transmission); PX-0303 (January 15, 2009 sales report, Pittsburg Metal Stamping); PX-0099 (October 19-20, 2011 sales report, Mansfield Stamping); PX-0094 (November 10-11, 2010 sales report, Grand Rapids Stamping); PX-0100 (Monthly sales report).

433. In addition, KPMG produced documents containing the monthly sales report data for several Maynards sales that occurred from 2006 to 2008, prior to GM's bankruptcy and Maynards and Hilco's work for MLC and RACER Trust. PX-0289; Sofikitis Dep. 118:13-118:16, 119:9-122:19. These 13 sales report documents are combined in PX-0350 and the summary exhibits PX-0348 and PX-0347. See paragraph 562 below.

7. Maynards' Continued Work for GM

434. In addition to the sales from idled plants that it conducted for MLC and RACER Trust, Maynards also has sold, and continues to sell, assets from operating plants, including plants owned by GM and Chrysler. Sofikitis Dep. 99:3-99:8.

435. In connection with sales from operating plants on behalf of GM, Maynards gathers whatever surplus assets GM has and conducts an online sale every 6 to 8 weeks. Sofikitis Dep. 103:21-104:5.

436. For example, PX-108 relates to a sale of assets from GM and other operating plants in August 24, 2016. Sofikitis Dep. 110:4-111:17. The assets offered for sale included CNC machining centers, and robots with controllers. PX-0108-0008.

437. All of the assets listed in PX-108 are being offered for sale out of operating plants. Sofikitis Dep. 111:22-112:2.

438. Maynards sells equipment out of operating automotive plants in situations where the company no longer needs the equipment, including because of a change in the production line, the purchase of new equipment, and when equipment becomes obsolete or is no longer needed. Sofikitis Dep. 99:9-99:21.

439. The sale of equipment from operating plants may involve circumstances where an auto manufacturer is launching a new product model and thus needs to reconfigure or replace manufacturing equipment. Sofikitis Dep. 99:23-100:7.

440. For example, Maynards sold one hundred robots from the GM operating plant in Romulus, just one month before Mr. Sofikitis' deposition on August 31, 2016, because of a change in the line at Romulus. Sofikitis Dep. 100:8-100:15.

441. In general, whenever Maynards is tasked with selling a package of numerous robots from a GM plant, it is due to a line change. Sofikitis Dep. 101:14-101:19.

442. Although Mr. Sofikitis could not recall other specific examples of when Maynards sold assets in connection with GM changing production lines, he testified that Maynards had been selling GM assets for a long time and that there was "a lot of stuff" that Maynards had sold as a consequence of changes GM had made to its production lines. Sofikitis Dep. 102:2-102:17.

B. GM'S TREATMENT OF ITS FIXED ASSETS

443. In its accounting policy manual, GM defines a fixed asset as

> … those assets acquired to carry on GM's business. They may include land, land improvements, leasehold improvements, buildings, machinery and equipment, computer hardware, software . . . furniture and office equipment owned by the Corporation or being acquired by the Corporation through a capital lease. Typically, these assets must have a useful life exceeding one year. . . . Fixed assets also include the cost of rebuilding, modernizing and other repair and maintenance that extend the useful life of the asset . . . .

JX-0017-0009 to 0010.

444. The database that GM uses to do its fixed asset accounting is called eFAST. Goesling Test. 2928:3-25; *see also* Fulcher Dep. 37:12-18.

445. There is extensive information in the eFAST database. Goesling Test. 2928:3-25. There are approximately 425 different fields within eFAST that contain asset-specific information regarding financial accounting, federal tax accounting and property tax reporting. Goesling Test. 2928:3-25; *see* PX-0290 (describing categories of information contained in the eFAST database).

446. In this case, New GM produced an extract from eFAST that specifically relates to information regarding the 40 Representative Assets. PX-0231; Goesling Test. 2931:15-2932:10. PX-0231 contains approximately 35 or 40 fields of information out of the 425 that are available in the eFAST database. Goesling Test. 2931:15-2932:10. The eFAST extract, PX-0231, includes information relating to each fixed asset, such as: the Asset ID number (column A); a

description of the asset (column B); the in service date (column Q), which is the date the asset was capitalized and put into production (Fulcher Dep. 41:25-42:2); the installed cost (column U); Lease Contract (i.e., whether the asset is subject to a lease) (column Z); the manufacturer and model number (columns AG and AH); the Book Depreciable Life (column AI) in years and months (i.e., 1300 in the column means 13 years, 0 months); and "PT Real Personal" (column AN), which is GM's classification of an asset as real estate or personal property for tax purposes (Fulcher Dep. 46:23-47:1).

447. Jeffrey Niszczak, a director with GM's Global Business Services group, testified by deposition designation in this case. Niszczak Dep. 11:5-19. Mr. Niszczak has a master's of science degree in finance and has extensive experience with GM's eFAST ledger. Niszczak Dep. 8:8-15, 19:1-5, 20:11-13, 21:3-5. Mr. Niszczak has worked at GM since 1998. Niszczak Dep. 10:11-12. At the point in time when he was the assistant director of fixed assets and special tools for Global Financial Shared Services, he was the "keeper of the eFAST system" and was responsible for making sure that each fixed asset was accounted for in a manner consistent with GM's accounting policy. Niszczak Dep. 19:17-20, 22:20-23:1, 91:9-14.

448. GM makes efforts to ensure that eFAST accurately reflects the physical assets in the GM facilities. For example, at least once every five years, GM performs an inventory to compare the actual physical assets with the information contained in eFAST. JX-0017-0021. However, GM's policy manual notes that:

> [O]ccurrences such as major or substantial expansion programs, plant rearrangements, replacement or modernization programs, etc., may indicate the need for a more frequent physical verification than otherwise would be necessary. During programs of this nature, the plant is often exposed to extensive change involving the movement or disposal of many types of assets.

JX-0017-0021; *see also* Fulcher Dep. 10:16-11:1, 13:22-14:12.

1. GM Has Various Policies and Procedures in Place Relating to the Movement of Fixed Assets

449. In the 2008 time period, there was a team of people at GM whose "sole responsibility was to make adjustments to the eFAST system when assets were moved within General Motors." Niszczak Dep. 55:14-17. The team was responsible for both asset disposals and asset transfers between facilities. Niszczak Dep. 55:18-56:3. There were three to six people on the team. Niszczak Dep. 56:4-10.

450. As of June 2009, GM had a written policy encouraging transfers of fixed assets within GM legal entities: "[t]o secure the maximum use and to minimize the investment therein." JX-0017-0038.

451. In order to effectuate this policy, GM had an asset recovery governance board (the "**ARGB**"). Miller Test. 1101:20-1102:2; *see also* Fulcher Dep. 24:22-25:7. The ARGB was formed "to manage the disposition of GM's surplus fixed assets under a common asset recovery process." JX-0017-0052. The ARGB was responsible for optimizing recovery of the residual value of surplus assets through "the most appropriate means of disposition," which "may include, but are not limited to, internal transfer, outside sale, donation, return to lessor, manufacturer or distributor, consignment, scrap, abandonment, demolition, and storage for future use." JX-0017-0052.

452. When a manufacturing plant had an asset that was no longer of value to that particular facility, the asset was included on a master list that the ARGB circulated to different plants, and those plants then had 90 days to select an asset off the list if those other plants had a need for the asset. Miller Test. 1102:17-1103:5; *see also* Niszczak Dep. 67:21-68:6.

453. Similarly, when a manufacturing plant needed a particular kind of asset, the plant managers would first look to see if there were assets on the list that they could relocate and reuse, rather than buying new equipment. Miller Test. 1105:8-11:05-19.

454. There were times when entire assembly lines were moved or rearranged. Niszczak Dep. 56:11-20; 58:16-19. And conveyors, robots, transfer presses and stamping presses have all been moved from one plant to another for reuse. Fulcher Dep. 29:2-23.

455. GM has Maynards on retainer to sell surplus assets that are no longer needed for its ongoing business operations and conducts a sale approximately every six to eight weeks. Sofikitis Dep. 17:4-6; 103:21-104:5.

2. GM Regularly Changes Its Manufacturing Assets Due to Product and Model Changes

456. Defendants' own experts provided evidence at trial about how GM regularly changes its manufacturing assets at powertrain facilities, foundries, and assembly plants.

457. For example, Mr. Deeds testified that over the course of his 39-year career, GM transitioned from making 3-speed transmissions to 4-speed transmissions, and then from 4-speed transmissions to 6-speed transmissions. Deeds Test. 567:22-572:5.

458. These changes in transmission products required significant changes in manufacturing assets in the transmission plants where Mr. Deeds worked, including Warren Transmission. Deeds Test. 567:22-572:5. And when Mr. Deeds left GM, it was moving towards higher speed transmissions. Deeds Test. 568:15-568:19.

459. Mr. Deeds himself was involved in the removal of manufacturing equipment on seven or eight different occasions. Deeds Test. 572:6-572:10.

460. Mr. Deeds was involved in the removal of assets related to the manufacture of rear-wheel drive transmissions to make way for assets to manufacture front-wheel drive transmissions at the Willow Run plant. Deeds Test. 572:15-572:25.

461. Mr. Deeds was involved in the removal of virtually all of the three-speed transmission manufacturing assets from the Windsor plant, including assembly lines, conveyors, machining transfer lines and gear machines; and Mr. Deeds described these changes as driven by regulation and fuel economy, acknowledging that assets were removed before the end of their useful lives. Deeds Test. 573:15-575:2.

462. Mr. Deeds was involved in the removal of assets from the Romulus plant to make room for new V8 manufacturing assets at that plant, Deeds Test. 575:3-575:20; and at the Flint V6 plant, he was involved in the removal of manufacturing assets to make room for new assets to manufacture a crankshaft product, Deeds Test. 575:21-576:15.

463. At Flint North, Mr. Deeds was involved in removing torque converter manufacturing equipment even though Flint North was not shutting down. Deeds Test. 576:16-577:7.

464. Then, at Livonia Engine, Mr. Deeds removed manufacturing assets related to a V8 truck engine crankshaft as well as assets related to the manufacture of a V6 engine and these assets were either sold or moved to other GM plants. Deeds Test. 577:8-579:14.

465. Mr. Deeds did a second stint at Willow Run, where he was again involved in removing manufacturing assets. Deeds Test. 579:15-580:9.

466. Mr. Deeds also was involved in removing the 4-speed equipment from the Warren Transmission facility, which Warren Transmission no longer needed after GM moved to a 6-speed transmission. Deeds Test. 580:10-580:14.

467. Mr. Thomas testified about multiple production processes that changed at the Defiance foundry. As discussed further below in paragraphs 592 to 602, GM installed and removed within a period of three years manufacturing assets related to the malleable iron production process. In addition, Mr. Thomas testified about how Defiance not only changed from iron to aluminum production but also within this same time period changed from the lost foam aluminum process to the precision sand aluminum process.

468. Mr. Stevens and Mr. Miller testified about the changes that have occurred at Lansing Delta Township Assembly since it was constructed as a state-of-the-art facility in 2006.

469. Since Lansing Delta Township Assembly was constructed in 2006, GM has invested more than a half a billion dollars into it. Stevens Test. 422:25-423:6.

470. Portions of the subassembly area in the body shop were reconfigured or changed as part of a model change. Stevens Test. 423:7-424:17.

471. In addition, the buildings were extended by a hundred feet and an additional 200 feet of conveyor was built and installed. Stevens Test. 423:7-424:17.

472. Framing gates were added to the framing stations in the body shop. Stevens Test. 427:7-16.

473. The body shop expanded into the stamping facility during this time period and stamping equipment was moved. Miller Test. 1223:6-14.

474. Changes in certain equipment were made to accommodate a new aluminum vehicle that was going into production. Miller Test. 1119:17-1120:19; Goesling Test. 3097:21-3098:22.

3. Plant Closings Were a Frequent Occurrence in the Automotive Industry

475. The only type of comprehensive data presented at trial about auto manufacturing plant closings, the Center for Automotive Research Report (the "**CAR Report**"), showed that plant closings in the auto manufacturing industry – and for GM in particular – were a frequent occurrence.

476. Specifically, the CAR Report indicates that there were 267 automotive manufacturing facilities that closed between 1979 and 2011. PX-0508-0016. While there were more auto manufacturing plant closures in the United States in the late 80s and between 2004 and 2010, the CAR Report documents that auto manufacturing plant closures have occurred in every year except 1986 from 1979 to 2011. PX-0508-0016.

477. General Motors owned 173, or 65%, of the facilities that closed during the period between 1979 and 2011. PX-0508-0017. This number includes facilities owned by GM subsidiaries Delphi and American Axle, as well as those GM plants that were transferred to the RACER Trust. PX-0508-0017.

478. Defendants' interpretation of the CAR Report chart shows only 56 closed GM facilities of the 173 listed in the Report. Stevens Test. 290:9-13, 295:3-296:11. Defendants' chart excludes 69 Delphi and American Axle facilities that closed and 5 plants that were listed in the CAR Report as "transitioning." Stevens Test. 290:14-291:14. Defendants have provided no justification for their exclusion of 42 additional plants and no data backup for their conclusions. Stevens Test. 295:9-296:11.

479. Plant closings occur often enough that GM's policy manual dictates the appropriate accounting for plant closures, defined as the "complete cessation of production." JX-0017-0052. And contains a detailed "decision tree" related to plant closures. JX-0017-0097.

480. The CAR Report further indicates that nearly half, or 128 of the 267 automotive manufacturing facilities that closed between 1979 and 2011, have either been repurposed or are transitioning to a new use. JX-0508-0019. Further, the majority of the repurposed facilities (76 of the 128) were originally owned by General Motors. JX-0508-0020; *see also* PX-0508-0007 (chart showing two GM facilities being used for general industrial purposes).

481. Although auto manufacturing buildings are sometimes demolished, the CAR Report provided multiple factors that impact the likelihood of reuse, including the density of closed plants and population growth in the area. PX-0508-0009 to 0011; PX-0508-0023 to 0031.

482. In an effort to respond to the detailed evidence about plant closures and repurposing in the CAR Report, well after the close of discovery and without any disclosure to Plaintiff, Defendants' expert went on a tour of a limited number of demolished GM facilities. Miller Decl. ¶ 53. On the basis of that tour of facilities selected by Defendants, Defendants' expert argued that plants are often destroyed and not repurposed. This selective evidence does not rebut the data from the CAR Report indicating that auto manufacturing facilities are often repurposed for other uses.

4. GM's Tax Classification of its Fixed Assets

483. Raymond Fulcher, a property tax specialist at GM, testified by deposition designation in this case. Fulcher Dep. 29:24-30:2. Mr. Fulcher has a master's degree in taxation and is a certified public accountant in the state of Michigan. Fulcher Dep. 8:8-21.

484. Mr. Fulcher has worked at General Motors since March 2006. Fulcher Dep. 9:21-25. Prior to joining GM, Mr. Fulcher worked for Asset Management Resources, a consulting firm, where he did personal property tax consulting work for GM. Fulcher Dep. 9:25-10:12. As part of his consulting work, Mr. Fulcher was involved in conducting fixed asset inventories for GM plants and incorporating the results into GM's fixed asset ledger system to make the ledger

more accurately reflect what assets are in the plant. Fulcher Dep. 10:16-11:1. Mr. Fulcher was involved in the preparation of updates to GM's eFAST system to reflect assets that were disposed, idled or transferred. Fulcher Dep. 13:22-14:12.

485. GM has to classify each fixed asset in its eFAST ledger as either real or personal property. Fulcher Dep. 34:7-18.

486. GM's policy when making determinations as to whether something is real or personal property for tax classification purposes is that it is based on "the nature of the asset and its intended use." Fulcher Dep. 34:20-35:19. Assets can be either real or personal, depending on what the intention was when the asset was purchased. Fulcher Dep. 34:20-35:24.

487. In addition, if the real estate would be damaged in the process of removing the asset, then generally GM would consider that asset to be real estate for purposes of tax classification. Fulcher Dep. 95:4-24. In classifying assets for tax purposes, GM also considers the intent of management in terms of how an asset is going to be used in a plant. Fulcher Dep. 96:9-11; 96:13-17.

488. For example, if GM installs additional electrical wiring or ventilation to support specific machinery, the process-specific electrical and ventilation is not considered "natural to the building" and would be classified as personal property. However, if the additional electrical and ventilation was installed to support a general administrative area of the building, then it would be considered "natural to the building" and treated as real property. Fulcher Dep. 34:20-35:19.

489. GM classifies robots, stamping presses and transfer presses as personal property for tax purposes. Fulcher Dep. 36:5-10. With regard to cranes, the crane itself would be considered personal property, but there are instances where the beams and supporting equipment

to hold up the crane are integral to the building and could not be removed without damaging the structure of the building. Fulcher Dep. 36:11-18. In that case, the beams and supporting equipment would be considered real estate. Fulcher Dep. 36:11-18. That determination would be made on a case-by-case basis. Fulcher Dep. 36:11-18.

490. With regard to a press pit, even though Mr. Fulcher would consider that to be real property, GM considers the pit to be part of the installed cost of the M&E and thus classifies it as personal property. Fulcher Dep. 95:4-24. With regard to the Pits and Trenches that are Representative Asset No. 2 in this case, which are pits for a conveyor, GM classified the asset as real property. PX-0231.

491. During discovery in this case, New GM produced the tax returns relating to the relevant facilities that were filed with the State of Michigan. There were numerous personal property tax return statements filed for each of Lansing Regional Stamping, Lansing Delta Township Assembly and Warren Transmission based on various tax exemptions and abatements that were applicable. *See, e.g.*, PX-0042 (Warren Transmission); PX-0043 (Warren Transmission); PX-0046 (Lansing Delta Township Assembly); PX-0047 (Lansing Delta Township Assembly); PX-00234 (Lansing Delta Township Assembly); PX-0236 (Lansing Delta Township Assembly); PX-0233 (Lansing Regional Stamping).

492. New GM also produced the supporting documentation for the personal property tax returns that include tax classification information at the asset level. PX-0292; PX-0232; *see also* Fulcher Dep. 61:7-16; 61:22-63:6. Plaintiff created a summary exhibit, PX-0349, which connects the assets from the supporting documentation to the personal property tax returns that correspond to each tax return filed for a particular facility.

XI. MR. GOESLING'S APPROACH TO FIXTURE CLASSIFICATION

A. Mr. Goesling's Background and Experience

493. David K. Goesling, Plaintiff's fixture classification and appraisal expert, has over 35 years of appraisal experience. Goesling Test. 2894:18-2895:3.

494. Prior to his work as an appraiser, Mr. Goesling worked as a steel welder for several years. Goesling Test. 2894:20-2895:17. Mr. Goesling also spent time at a metal manufacturing company where, among other things, he was responsible for moving a company's machinery and equipment from Pennsylvania and reinstalling the equipment at a facility in Michigan. Goesling Test. 2894:20-2895:17.

495. Mr. Goesling began his career as a machinery and equipment appraiser in 1981. Goesling Test. 2895:18-2896:3. Thereafter, he held positions with various companies, *see generally* Goesling Test. 2896:4-2897:22, before joining KPMG in 1998 as a senior manager and the national practice leader for tangible assets valuation work, Goesling Test. 2897:23-2898:11.

496. In his position at KPMG, Mr. Goesling was responsible for the tangible asset valuation appraisers in the U.S. and for setting the standards for the valuation of tangible assets, which involved creating a uniform approach to valuation at a time when approaches to valuation varied between different offices and from appraiser to appraiser. Goesling Test. 2898:2-2898:24.

497. In 2002, Mr. Goesling went to work for DoveBid, Inc., joining a part of the company called DoveBid Valuation Services with the responsibility of conducting corporate valuation work. Goesling Test. 2900:6-2900:22. During his time at DoveBid, Mr. Goesling performed valuations involving purchase price allocation and asset impairment work. Goesling Test. 2900:6-2900:22. During Mr. Goesling's time at DoveBid Inc., the company oversaw a program to dispose of Ford's excess capital assets. Goesling Test. 2900:6-2900:22.

498. In 2006, Mr. Goesling joined Stout Risius Ross ("**SRR**") as a managing director responsible for the machinery and equipment group. Goesling Test. 2901:19-2902:15. At SRR, Mr. Goesling's responsibilities included the establishment of standards of valuation, performing valuations, reviewing the work of his appraisers, working with the group of business valuation appraisers, estimating fees, coordinating with clients regarding the scope of work to be performed and responding to reviews of the machinery and equipment group from accounting firms and other third parties. Goesling Test. 2901:19-2902:15.

499. Over the course of his career, Mr. Goesling has performed appraisal work for a broad array of purposes, including for federal tax reporting, financial reporting, leasing, valuations for property tax appeals, mixed asset reconciliations, some of which involved valuation, appraisals for condemnation purposes, and valuations for financing purposes. Goesling Test. 2904:4-2904:23.

500. Mr. Goesling has performed valuations in the context of bankruptcy, specifically relating to the automatic stay of protection where a lender was concerned about the diminishment of the value of its assets. Goesling Test. 2904:24-2905:13. Mr. Goesling has performed valuations in connection with valuing the collateral of secured lenders, and he has been involved in a substantial number of fresh start accounting valuations. Goesling Test. 2904:24-2905:13.

501. Mr. Goesling has been an expert in litigation matters on 8 to 10 occasions. Goesling Test. 2905:14-2905:21.

502. Mr. Goesling served as an expert witness in a case with issues similar to those in this case. Goesling Test. 2905:22-2905:25. Specifically, in 2015, Mr. Goesling testified before a Michigan tax tribunal in a matter that involved the property tax assessment of a yogurt manufacturing plant, Yoplait. Goesling Test. 2906:2-2906:14.

503. In the Yoplait case, Mr. Goesling was asked to review the valuation of certain tanks and also, applying the three-part fixture test, to provide an opinion as to whether or not the tanks could be considered fixtures. Goesling Test. 2906:2-2906:14, 2907:10-2907:17.

504. Mr. Goesling has had to classify property as real property or personal property in virtually every appraisal that he has done. Goesling Test. 2907:18-2908:7.

505. He regularly classifies assets as personal property or real property in every appraisal that he does for a business enterprise that owns both real estate and personal property. Goesling Test. 2908:8-2908:17.

506. In appraising a condemned property, Mr. Goesling must determine whether the assets he is being asked to value are fixtures or are moveable. Goesling Test. 2908:18-2909:8.

507. Mr. Goesling has done appraisal work in the pharmaceutical, chemical production, food processing, telecommunication, data communication, and metal working industries. Goesling Test. 2909:9-2910:9.

508. Mr. Goesling has extensive appraisal experience in the automotive industry. In the course of his work as an appraiser, Mr. Goesling has valued automotive assets that produce carpeting, steering wheels, instrument panels, navigation systems, seats, seat frames, leather seat covers, headliners, interior panels for doors, glass, windshields, side windows, backlights, rearview mirrors, headlights, taillights, radiators, condensers, evaporators, engines, transmissions, gears, bearings, pistons, piston rings, hoses that are used throughout a car, motors, power windows, power sears, sunroofs, aluminum wheels, brake disks, brake drums, brake pads, ignition coils, throttle bodies, chips that are used in transmissions to control the shifting, and more. Goesling Test. 2913:20-2915:18.

509. In addition, Mr. Goesling has been involved in appraising all assets in an automotive assembly plant several times. Goesling Test. 2910:17-2910:20.

510. In 1988, Mr. Goesling did an appraisal for Diamond-Star Motors of an automotive assembly plant for a sale leaseback in a plant in Normal, Illinois, which was a 2 million square foot plant with a production capacity of about 240,000 vehicles per year. Goesling Test. 2910:21-2912:16.

511. In 2008, while with SRR, Mr. Goesling performed an appraisal of Ford Germany, which included an aluminum foundry, a transmission plant, an engine plant, two body shops, four assembly lines, a stamping shop, and a distribution center. Goesling Test. 2910:21-2912:16.

512. In 2008, Mr. Goesling led a team of equipment appraisers in the valuation of a recently acquired Ford plant in Prahova, Romania. Goesling Test. 2910:21-2912:16.

B. Mr. Goesling's Analysis of Relevant Data

513. In addition to the information gathered during the site inspections, Mr. Goesling considered documents relating to the Representative Assets that were produced during the course of discovery. Goesling Decl. ¶ 58. These materials included installation instructions, equipment lists, spare parts lists, packing lists, blueprints and diagrams of equipment assemblies, equipment components, installed equipment layouts and elevations, operating instructions and manuals, maintenance records, photographs, and leases. Goesling Decl. ¶ 58. Mr. Goesling also considered publicly available information regarding the Representative Assets, the automotive manufacturing industry in general, GM's history and manufacturing practices, and other relevant information. Goesling Decl. ¶ 59.

514. In addition, Mr. Goesling considered information contained in eFAST relating to GM's internal asset classifications for purposes of property tax filings and financial accounting

depreciation. Goesling Decl. ¶ 44. The information contained in eFAST also allowed Mr. Goesling to perform his Transfer Analysis, discussed below.

515. Information produced by KPMG also formed the basis of Mr. Goesling's Retirement Analysis, also discussed below.

516. Mr. Goesling analyzed the secondary market for the Representative Assets by considering, among other things, asset sales data from a series of auctions and private treaty sales conducted by Maynards/Hilco for Old GM, MLC, the RACER Trust, and New GM between 2006 and 2012. Goesling Decl. ¶ 48.

517. Finally, Mr. Goesling considered the Maynards/Hilco sales of GM assets out of closed GM facilities, including the fact that, with only two exceptions, the closed Old GM facilities were sold separately from the manufacturing machinery and equipment inside. Goesling Decl. ¶ 23. Mr. Goesling also relied on his extensive knowledge and experience in the automobile manufacturing industry to draw conclusions about what machinery and equipment is typically sold with, or separate from, the land. Goesling Decl. ¶ 23.

C. GM's Fixed Asset Ledger (eFAST)

518. Over the course of his career, Mr. Goesling has experience working with fixed asset ledgers similar to eFAST. Goesling Test. 2970:7-10.

519. A significant portion of Mr. Goesling's appraisal work has been based on the client's fixed asset listings. Goesling Test. 2970:11-2971:4.

520. Mr. Goesling has reviewed thousands of fixed asset listings during his career. Goesling Test. 2970:11-2971:4.

521. Among other uses, Mr. Goesling relied on eFAST to determine whether GM classified the Representative Assets as real or personal property for property tax purposes. Goesling Test. 2932:11-2933:3.

D. Transfer Analysis

522. Mr. Goesling was provided three eFAST listings from July 2009, May 2010, and the end of 2015. Goesling Test. 2943:3-13.

523. The data was limited to GM legal entity 001 (GM Corp.) legal entity 003 (Saturn) and further limited to the 35 plants that are part of the current matter. Goesling Test. 2959:9-2959:17.

524. In PX-0022 (the "**Transfer Analysis**"), Mr. Goesling then compared the location information for each asset listing as of each of the three years for which eFAST data was available and identified those instances where an asset had changed location. Goesling Test. 2943:25-2944:19.

525. Thus, if an asset moved between the years 2010 and 2011, the movement would be captured if the asset was still in its second location at the end of 2015. Goesling Test. 2944:21-25.

526. Column K of the Transfer Analysis (PX-0022) shows the location of the asset as of 2009, column B shows the location as of 2010, and column A shows the location as of 2015. Goesling Test. 2945:5-2946:2; *see* PX-0022.

527. If an asset was transferred to one of the 35 properties not at issue in the case, the eFAST data would capture the movement as disposed of and not as a transfer. Goesling Test. 2946:21-2947:23.

528. For column AB and each of the columns to the right of AB, Mr. Goesling indicated with a check mark whether he believed that a particular asset being transferred was similar to one of the 40 Representative Assets. Goesling Test. 2953:20-2954:2.

529. Mr. Goesling created the Transfer Analysis in order to determine whether General Motors in fact did move assets that were similar to the 40 Representative Assets from one location to another. Goesling Test. 2954:17-2955:4.

530. The Summary tab on the Transfer Analysis, PX-0022, shows the asset ID, description, manufacture, and model data of the 40 Representative Assets, and column F summarizes the number of asset entries that Mr. Goesling concluded based on the spreadsheet were similar to each particular asset. Goesling Test. 2957:6-15; *see* PX-0022.

531. The number in Column F corresponds to asset entries, not necessarily to entirely separate assets. Goesling Test. 2960:11-2961:20; *see* PX-0022.

532. For example, it is difficult to determine for robot entries whether an entry is a complete robot installation or whether the entry is for the robot alone or the controller alone. Goesling Test. 2961:11-2961:20.

533. In addition to the excel spreadsheet version of PX-0022, PX-0022C is a PDF version of the Transfer Analysis that extracts the data for each of the 40 Representative Assets.

E. Retirement Analysis

534. Mr. Goesling also analyzed a KPMG document that included all the data from May 2009 eFAST, including a list of assets that had been retired from 2004 to the middle of 2009. Goesling Test. 2962:5-2963:2; *see* PX-0213.

535. The file had approximately 600,000 entries in it and from that file Mr. Goesling identified approximately 215,000 assets that had been retired. Goesling Test. 2962:5-2963:2.

536. The file included all assets owned by GM Corp. described on the spreadsheet as entity 001. Goesling Test. 2962:5-2963:2.

537. "Retirement" for purposes of the spreadsheet meant that GM had written off the cost of that asset and it no longer appears in the fixed asset listing. Goesling Test. 2963:3-13.

538. An asset could be considered "retired" if it was removed or idled in place. Goesling Test. 2963:3-13.

539. Thus, whereas the eFAST provided by New GM only contained active listings, the KPMG document had additional information from GM on assets no longer in service. Goesling Test. 2963:14-25.

540. PX-0213 is an excel spreadsheet created by KPMG in which KPMG aggregated GM's retirement data into a single file, with tabs 1 to 4 relating to entity 001 and tab 5 relating to other GM entities. Goesling Test. 2964:5-24; *see* PX-0213.

541. In order to create his retirement analysis (the "**Retirement Analysis**"), which is PX-0020, Mr. Goesling combined the assets that had been retired on tabs 1 to 4 of PX-0213 onto a single sheet and then added column CC and the columns to the right for each of the 40 Representative Assets. Goesling Test. 2964:5-2965:24, 2965:9-2966:9.

542. Mr. Goesling and his team from SRR then went through and marked an X on those rows of PX-0020, the GM Retirement Analysis, that had assets that Mr. Goesling determined were similar to one of the 40 Representative Assets. Goesling Test. 2966:10-2967:3.

543. Similar to the Transfer Analysis, Mr. Goesling created a summary tab in which he indicated how many retired assets were similar to each of the 40 Representative Assets. Goesling Test. 2966:10-2967:3.

544. In determining whether a line entry was similar to a Representative Asset, Mr. Goesling used his professional opinion and knowledge of the subject asset and made judgements based on the eFAST description and the manufacturer make and model. Goesling Test. 2967:4-2968:4.

545. Based on the "X" marks in the Retirement Analysis (PX-0020) and the Transfer Analysis (PX-0022) spreadsheets, a reader can see which specific assets Mr. Goesling determined were similar to the 40 Representative Assets. PX-0020; PX-0022.

546. Based on Mr. Goesling's Retirement Analysis, it is possible to determine that more than 215,000 assets were retired for a combined installed cost of $12.3 billion from GM North America for the five-and-one-half years covered by the data. PX-0020.

547. In addition, based on this Retirement Analysis, it is possible to compare when GM assets were retired from service in relation to Defendants' useful life estimates for the assets. PX-0020.

548. For example, in addition to identifying specific line items that are similar to the 40 Representative Assets and comparing them to assets retired prior to the Defendants' useful life estimate, it is possible to calculate a weighted average are of retirement that is weighted by installed cost.

549. The weighted average is calculated for the population of assets identified as similar to each of the 40 representative assets according to the formula:

$$\frac{\sum(Installed\ Cost\ *\ Age\ at\ Retirement)}{\sum(Installed\ Cost)}$$

550. An example is the calculation of the weighted average age at retirement for six asset entries that comprise the NN-1 Transfer Press and vary in cost from $2,880 to $4,684,647. PX-0022.

551. The first step in calculating the weighted average age of retirement, is to multiply the installed cost (highlighted in orange) with the age of retirement (highlighted in orange) to get the Age at Retirement * Installed Cost for each asset entry (highlighted in yellow):

ASSET STATUS	ASSET ID	DESCRIPTION	INSTALLED COST	Re-formatted In Svc Date	Re-formatted Ret Date	Age at retirement	Age * Cost
99	BF2016815 01	TRANSFER PRESS (NN-1)	4,684,647	12/1/1988	5/30/2007	18.5	86,685,223
99	BF2016815 02	TRANSFER PRESS	72,039	2/28/1990	5/30/2007	17.3	1,243,419
99	BF2016815 03	TRANSFER PRESS	17,107	1/28/1991	5/30/2007	16.3	279,614
99	BF2016815 04	TRANSFER PRESS	2,880	2/28/1992	5/30/2007	15.3	43,945
99	BF2016815A01	TRANSFER PRESS	33,896	1/28/1989	5/30/2007	18.3	621,837
99	100013490	TRANSFER PRESS (NN-1)	159,005	1/1/2007	5/30/2007	0.4	64,909

552. The second step is to add the Age at Retirement * Installed Cost values for each asset entry, the sum of which is highlighted in yellow:

ASSET STATUS	ASSET ID	DESCRIPTION	INSTALLED COST	Re-formatted In Svc Date	Re-formatted Ret Date	Age at retirement	Age * Cost
99	BF2016815 01	TRANSFER PRESS (NN-1)	4,684,647	12/1/1988	5/30/2007	18.5	86,685,223
99	BF2016815 02	TRANSFER PRESS	72,039	2/28/1990	5/30/2007	17.3	1,243,419
99	BF2016815 03	TRANSFER PRESS	17,107	1/28/1991	5/30/2007	16.3	279,614
99	BF2016815 04	TRANSFER PRESS	2,880	2/28/1992	5/30/2007	15.3	43,945
99	BF2016815A01	TRANSFER PRESS	33,896	1/28/1989	5/30/2007	18.3	621,837
99	100013490	TRANSFER PRESS (NN-1)	159,005	1/1/2007	5/30/2007	0.4	64,909
						Total	**88,938,945**

553. The third step is to add the Installed Cost for each asset entry, the sum of which is highlighted in yellow.

ASSET STATUS	ASSET ID	DESCRIPTION	INSTALLED COST	Re-formatted In Svc Date	Re-formatted Ret Date	Age at retirement	Age * Cost
99	BF2016815 01	TRANSFER PRESS (NN-1)	4,684,647	12/1/1988	5/30/2007	18.5	86,685,223
99	BF2016815 02	TRANSFER PRESS	72,039	2/28/1990	5/30/2007	17.3	1,243,419
99	BF2016815 03	TRANSFER PRESS	17,107	1/28/1991	5/30/2007	16.3	279,614
99	BF2016815 04	TRANSFER PRESS	2,880	2/28/1992	5/30/2007	15.3	43,945
99	BF2016815A01	TRANSFER PRESS	33,896	1/28/1989	5/30/2007	18.3	621,837
99	100013490	TRANSFER PRESS (NN-1)	159,005	1/1/2007	5/30/2007	0.4	64,909
		Total	**4,969,574**			Total	**88,938,945**

554. The fourth step is to Divide the Sum of the Age at Retirement * Installed Cost by the Sum of the Installed Cost (highlighted in yellow) to get the weighted average age at retirement (highlighted in green):

ASSET STATUS	ASSET ID	DESCRIPTION	INSTALLED COST	Re-formatted In Svc Date	Re-formatted Ret Date	Age at retirement	Age * Cost
99	BF2016815 01	TRANSFER PRESS (NN-1)	4,684,647	12/1/1988	5/30/2007	18.5	86,685,223
99	BF2016815 02	TRANSFER PRESS	72,039	2/28/1990	5/30/2007	17.3	1,243,419
99	BF2016815 03	TRANSFER PRESS	17,107	1/28/1991	5/30/2007	16.3	279,614
99	BF2016815 04	TRANSFER PRESS	2,880	2/28/1992	5/30/2007	15.3	43,945
99	BF2016815A01	TRANSFER PRESS	33,896	1/28/1989	5/30/2007	18.3	621,837
99	100013490	TRANSFER PRESS (NN-1)	159,005	1/1/2007	5/30/2007	0.4	64,909
		Total	**4,969,574**			Total	**88,938,945**

Sum of (Age at Retirement * Installed Cost)	88,938,945
Sum of (Installed Cost)	4,969,574
Weighted Average Age at Retirement =	17.90

555. The unweighted average age at retirement for the NN-1 Transfer Press is presented as the average age at retirement (unweighted) in column 'BP' of the 'GM Retired Assets 2004-2009' tab in PX-0213.

556. Because of the wide variation in installed cost as seen in the example of the NN-1 Transfer Press, in addition to the unweighted average, it also is useful to consider the weighted average age of retirement because the weighted average assigns more importance to the asset entries with greater installed costs.

557. Below is a comparison of the weighted average age at retirement for the NN-1 Transfer Press (highlighted in green) as compared to the average unweighted age at retirement (highlighted in red):

ASSET STATUS	ASSET ID	DESCRIPTION	INSTALLED COST	Re-formatted In Svc Date	Re-formatted Ret Date	Age at retirement	Age * Cost
99	BF2016815 01	TRANSFER PRESS (NN-1)	4,684,647	12/1/1988	5/30/2007	18.5	86,685,223
99	BF2016815 02	TRANSFER PRESS	72,039	2/28/1990	5/30/2007	17.3	1,243,419
99	BF2016815 03	TRANSFER PRESS	17,107	1/28/1991	5/30/2007	16.3	279,614
99	BF2016815 04	TRANSFER PRESS	2,880	2/28/1992	5/30/2007	15.3	43,945
99	BF2016815A01	TRANSFER PRESS	33,896	1/28/1989	5/30/2007	18.3	621,837
99	100013490	TRANSFER PRESS (NN-1)	159,005	1/1/2007	5/30/2007	0.4	64,909
		Total	**4,969,574**			**86.1**	**88,938,945**

Weighted Average			**Average (unweighted)**
Sum of (Age at Retirement * Installed Cost)	88,938,945	86.1	Sum of (Installed Cost)
Sum of (Installed Cost)	4,969,574	6	Quantity of Asset Entries
Weighted Average Age at Retirement =	17.90	14.35	= Average (unweighted)

558. As is evident in the comparison, the average weighted age at retirement for the NN-1 is higher because the calculation placed less weight on the insignificant costs of the NN-1 Transfer Press that were capitalized after 1988.

F. Auction Analysis

559. As part of Mr. Goesling's work in this case, he considered the sale of assets in the secondary market. Goesling Test. 2974:9-12.

560. To identify sales of similar assets, Mr. Goesling considered auction sales conducted by Maynards and Hilco on behalf of GM, the online database DataRef, and any other source he and his team could find that showed whether similar assets were being sold on a somewhat regular basis on the open market. Goesling Test. 2974:13-25.

561. Although not determinative, Mr. Goesling found the data significant because the existence of a secondary market indicated to him that these types of assets were capable of, and actually were, removed and reused. Goesling Test. 2975:12-21.

562. In addition to the above analysis, as discussed above in paragraph 433, Mr. Goesling created a Secondary Market Analysis by combining records of 13 different sales of GM

assets conducted by Maynards, and in most instances also Hilco, into PX-0350. Goesling Test. 2976:2-8.

563. Referring to PX-350, Mr. Goesling then made judgments about whether a sold asset was similar to one of the 40 Representative Assets and grouped the assets by these categories in PX-0348. Goesling Test. 2984:4-2985:5; PX-0348B (a PDF of the asset sales that correspond to each of the 40 Representative Assets).

564. Finally, PX-0347 is a summary sheet that summarizes the groupings of assets from PX-0348. *See* PX-0347.

G. Tax Analysis

565. Mr. Goesling reviewed the deposition testimony of Raymond Fulcher with respect to how GM classified its machinery and equipment for tax purposes. Goesling Test. 2934:5-11.

566. Mr. Fulcher's testimony about tax classification suggests an approach at GM that is consistent with elements of the legal test that applies to this case. Accordingly, Mr. Goesling considered GM's classification of the assets as informative, but not determinative. Goesling Test. 2940:22-2941:17.

567. Mr. Goesling found that there was a "fairly decent" correlation between his classification and GM's classification for those assets that were personal property, but less of a correlation for those assets that Mr. Goesling classified as real property. Goesling Test. 2941:18-2942:9.

568. Below is a chart comparing GM's tax classification with Mr. Goesling's fixture/non-fixture classification for the Representative Assets. The rows highlighted in yellow indicate those three assets where Mr. Goesling's determination differs from GM's tax classification, at least in part. As the chart indicates, Mr. Goesling's and GM's classifications for the Representative Assets are in agreement 92.5% of the time.

Representative Asset No.	Asset Description	Location	GM Tax Classification	Plaintiff Fixture/Non-Fixture Classification
1	OP-150 Select; Check Place Shims Auto Station	Warren	Personal	Non-fixture
2	GA Pits & Trenches	LDTA[9]	Real	Fixture
3	Power Zone Roller Conveyor Automation TCH MOD	Warren	Personal	Non-fixture
4	Paint BLDG Lines – Process Waste ELPO	LDTA	Real	Fixture
5	Paint Mix & Circulation – Electrical	LDTA	Personal	Non-fixture
6	Paint Dip Conveyor – ELPO Oven IMC	LDTA	Personal	Non-fixture
7	Paint TC Automation Software	LDTA	Personal	Non-fixture
8	GA EOL Paint Spot Reprocess Sys Paint Mix Room	LDTA	Personal	Non-fixture
9	Paint TC2 CC Bell Zone	LDTA	Personal	Non-fixture
10	Opticell – Robotic Measurement System	LRS	Personal	Non-fixture
11	Lansing Delta Township Assembly Utility Services	LDTA	Personal	Real Property/Fixture/Non-fixture
12	BS Robot LAZN-150R1	LDT	Personal	Non-fixture
13	BS Weld Bus Ducts	LDTA	Real	Non-fixture
14	Leak Test Base Machine Qty = 1	Warren	Personal	Non-fixture
15	GA T/W: Soap; Mount and Inflate	LDTA	Personal	Non-fixture
16	BS Skid Conveyor - LAZA	LDTA	Personal	Non-fixture
17	BS P&F Conveyor – Body Side Inner LH DEL	LDTA	Personal	Non-fixture
18	GA Conveyor: Vertical Adjusting Carrier (VAC) Sys – Carriers (Qty 87)	LDTA	Personal	Non-fixture
19	BS CMM Full Body Machine – LY90	LDTA	Personal	Non-fixture
20	GA Conveyor Sub-ASM Receiving (SAR): WTD100 – Wheel & Tire Delivery	LDTA	Personal	Non-fixture
21	GA Conveyor: Skillet-Final-Leg 1	LDTA	Personal	Non-fixture
22	Fanuc M-710IB/70T Robot	Warren	Personal	Non-fixture
23	Aluminum Machining System	Warren	Personal	Fixture/Non-fixture
24	LFS220 Base Shaping Machine-Op 20 Transfer Drive	Warren	Personal	Non-fixture
25	Liebherr Hobb Machine from St. Catharines	Warren	Personal	Non-fixture
26	Core Delivery Conveyor System CB116 & 122	Defiance	Personal	Non-fixture
27	Emissions System #4 Cupola	Defiance	Personal	Non-fixture
28	100 Ton Vertical Channel Holding Furnace	Defiance	Personal	Non-fixture
29	Transfer Press-GG-1	Grand Rapids	Personal	Non-fixture
30	TP-14 CS1-1 Transfer Press Danly ET-2	Mansfield Stamping	Personal	Non-fixture
31	Danly 4000 Ton Press	LRS	Personal	Non-fixture
32	AA-11 Schuler #1 AA Crossbar Transfer Press	LRS	Personal	Non-fixture
33	B3-5 Transfer Press System Incl. Destacker and EOL	LRS	Personal	Non-fixture
34	Build Line W/ Foundation	Warren	Personal	Non-fixture
35	Button up and Test Conveyor System	Warren	Personal	Non-fixture
36	Helical Broaching Equipment	Warren	Personal	Non-fixture
37	Courtyard Enclosure	Warren	Real	Non-fixture (Real property)
38	System Gas Cleaning No. 4 Cupola	Defiance	Personal	Non-fixture

[9] LDTA refers to Lansing Delta Township Assembly and LRS refers to Lansing Regional Stamping.

Representative Asset No.	Asset Description	Location	GM Tax Classification	Plaintiff Fixture/Non-Fixture Classification
39	CB 91 Robot	Defiance	Personal	Non-fixture
40	P&H 7 ½ Ton Charger Crane 6E Cupola	Defiance	Personal	Non-fixture

XII. DEFENDANTS' ASSET CLASSIFICATION EXPERTS FAILED TO LOOK AT OBJECTIVE FACTORS

569. Defendants' hired seven former GM employees to testify regarding asset classification issues; at trial, Defendants' called six as expert witnesses (John Buttermore, Dan Deeds, Max Miller, Eric Stevens, John Thomas, Steve Topping) and one as a fact witness (Ron Pniewski) (collectively, the "**Former GM Employee Witnesses**"). JPTO ¶ (Defendants' Witness List).

570. Dan Deeds testified about the eleven Representative Assets at Warren Transmission, Deeds Decl. ¶ 3; Max Miller testified about the four Representative Assets at Lansing Regional Stamping and the two presses sold by RACER Trust, Miller Decl. ¶ 3; Eric Stevens testified in part about the eleven Representative Assets at the Lansing Delta Township Assembly general assembly and body shops, Stevens Decl. ¶ 3; John Thomas testified about the six Representative Assets at Defiance, Thomas Decl. ¶ 2; and Steve Topping testified about the five Representative Assets at Lansing Delta Township Assembly paint shop as well as the paint mix room Representative Asset in the general assembly area, Topping Decl. ¶ 3.

571. None of the six expert witnesses had ever previously been qualified as an expert and none had ever applied the three-part fixture test. *See, e.g.*, Stevens Test. 205:7-24; Deeds Test. 546:19-23; Thomas Test. 831:11-22. The expert witnesses based their opinions entirely on observations of the assets during the site inspections and anecdotal evidence from their time working at GM. *See, e.g.*, Stevens Test. 238:2-9, 325:3-8; Deeds Test. 710:23-711:14; Topping Test. 979:9-21; Miller Test. 1225:8-10.

572. Three of the witnesses—John Buttermore, Ron Pniewski, and in part Eric Stevens—provided generalized statements about GM's corporate policies not tied to any of the 40 Representative Assets. *See, e.g.*, Buttermore Test. 1312:23-1313:2. These "overview witnesses" also based their testimony exclusively on anecdotal evidence from their time as GM employees. *See, e.g.*, Stevens Test. 275:19-276:22; Buttermore Test. 1313:3-8.

573. For the reasons set forth in Section I.C.2 of Plaintiff's Conclusions of Law, the Former GM Employee Witnesses' opinions should be given little, if any, weight.

XIII. BASED ON THE OBJECTIVE FACTS, 36 OF THE 40 REPRESENTATIVE ASSETS ARE NOT FIXTURES

574. The Representative Assets are located at four facilities that were sold to New GM as part of the 363 Sale: Defiance, Warren Transmission, Lansing Regional Stamping and Lansing Delta Township Assembly.

575. There are also two assets located at plants that stayed behind with Old GM after the 363 Sale: GM Metal Fabricating Division Mansfield in Ohio ("**Mansfield Stamping**") and GM Metal Fabricating Division Grand Rapids in Michigan ("**Grand Rapids**").

576. All 40 of the Representative Assets are discussed below.

A. The Representative Assets in Ohio Are Not Fixtures Because They Are Not Essential to the Use of the Realty

577. There are a total of seven Representative Assets located at facilities in Ohio. There are six Representative Assets that are, or were, located at Defiance, and there is one asset that was sold from Mansfield Stamping. All of these Representative Assets are discussed below.

1. The Representative Assets at Defiance Are Not Fixtures Because They Are Not Essential to the Use of the Realty

578. A foundry, such as the GM Powertrain Defiance Foundry ("**Defiance**"), takes raw materials, including iron scrap metal or aluminum, melts the material, and forms it into products for use in car transmissions or engines. Thomas Test. 738:22-739:12.

579. GM has operated Defiance as a foundry since 1948 and initially operated Defiance exclusively as an iron foundry. Thomas Test. 744:2-744:8; 844:6-844:12.

580. As a result of the need to reduce vehicle mass to comply with fuel economy requirements and in response to consumer demand for higher gas mileage, over the years, powertrain components have largely moved from iron to aluminum. Thomas Test. 821:22-822:5; Thomas Decl., Ex. A at 9.

581. In order to adjust to changes in the industry, starting in the early 2000s, GM's operations at Defiance shifted towards aluminum component production. Thomas Decl., Ex. A at 9; Thomas Test. 820:17-9-821:20.

582. By 2008, Defiance was GM's last domestic iron foundry, having absorbed the operations of other GM iron foundries that had closed down. Thomas Test. 820:2-8; Thomas Decl. ¶ 22.

583. Since the manufacturing equipment used to make aluminum parts is different from that used to manufacture iron parts, GM had to install new equipment for the production of aluminum components. Thomas Test. 844:18-24; 855:21-856:2.

584. Even with respect to its manufacture of aluminum components, over the years, GM has used different processes and equipment in connection with the manufacture of aluminum parts. Thomas Test. 849:19-850:22.

585. When GM first started producing aluminum parts at Defiance, it used a process called lost-foam technology. Thomas Test. 849:19-24. A total of four lost foam cells were installed in Defiance from approximately 2001 to 2004. Thomas Test. 850:20-22; 852:3-9. By 2009, however, the installation of new precision sand technology at Defiance was substantially complete. Thomas Test. 853:25-854:5. The lost foam technology was phased out and is no longer used by GM. Thomas Test. 850:23-851:24.852:10-12.

586. Defiance could have a very different mix of manufacturing assets than what it currently has and still operate as a foundry. Thomas Test. 856:3-7. For example, if GM ceased the manufacture of iron parts at Defiance and continued to produce only aluminum parts, it would have different manufacturing equipment, but would still be a foundry. Thomas Test. 856:8-13.

587. There are a total of six Representative Assets located at Defiance: one overhead conveyor system, one robot, one bridge crane, one furnace, and two emissions control systems. Goesling Decl. ¶ 316. All of these assets are specific to the production of iron parts but are not essential to the operation of Defiance. For example, GM could install entirely different equipment for the manufacture of aluminum parts and Defiance would still be operating as a foundry. Thomas Test. 856:8-13.

a. 100 Ton Vertical Channel Holding Furnace (Representative Asset No. 28)

588. Representative Asset No. 28, the 100 Ton Vertical Channel Holding Furnace, is a furnace that holds molten iron at a stable temperature until the mold line at Defiance requires the molten iron. JPTO Stipulated Facts ¶ 101.

589. Representative Asset No. 28 was put into service in December 2007, and had an installed cost of $4,174,288. JPTO Stipulated Facts ¶ 101.

590. Representative Asset No. 28 was removed from Defiance a little more than three years later in 2010 or 2011. JPTO Stipulated Facts ¶ 101.

591. The 100 Ton Vertical Channel Holding Furnace was comprised primarily of the holding furnace, a pit with foundation and equipment mounting pedestals, a control panel, and associated utilities. Goesling Decl. ¶ 332.

592. The 100 Ton Vertical Channel Holding Furnace was installed in 2007 as part of the project of moving the malleable iron business to Defiance from a foundry in Saginaw, Michigan, which was shut down in 2007. Thomas Test. 822:14-23; *see also* Goesling Decl. ¶ 336.

593. There were other assets, in addition to Representative Asset No. 28, that were installed at Defiance as part of the malleable iron business, including two induction melting furnaces and a charging system. Thomas Test. 825:14-24. The total expense of moving the malleable iron business to Defiance was approximately $35 million. Thomas Test. 774:9-13.

594. When the malleable iron line was installed at Defiance in 2007, GM knew that there was a finite life of the malleable business. Thomas Test. 825:25-826:5. The malleable iron operations supplied parts for four-speed transmissions, Thomas Test. 773:3-17, and when Representative Asset No. 28 was installed, GM expected that the life of four-speed transmissions would be only three to five years, Thomas Test. 826:11-15. *See also* Goesling Decl. ¶ 336.

595. Thus, GM knew at the time the holding furnace was installed that the malleable iron product would only be needed for about three to four more years. Thomas Test. 826:16-20.

596. Mr. Thomas, Defendants' expert who testified about this asset, assigned a 25-year normal useful life for the 100 Ton Vertical Channel Holding Furnace. Thomas Test. 826:21-24.

597. As reflected in the June 2009 eFAST, New GM assigned a three-year depreciable life to Representative Asset No. 28. Thomas Test. 827:25-828:4; PX-0219 (Asset ID: 1000991251). In contrast, GM assigned a depreciable life of 16 years to two similar Ajax Holdings Furnaces at Defiance. PX-0219 (Asset IDs: 100025421 (Ajax Induction Holding Furnace) & NJL6082100 (130 Ton Ajax Holding Furnace).

598. Mr. Niszczak confirmed that GM depreciates its fixed assets over the item's useful life, as defined in GM's accounting policy. Niszczak Dep. 34:12-35:6. The years of depreciation should be equal to the useful life of the actual asset. Niszczak Dep. 35:4-6; 44:4-11.

599. The comparatively shorter depreciable life shows that GM knew and acknowledged in its own accounting records that within a few years after installation, the equipment would no longer be needed. Goesling Decl. ¶ 336.

600. Consistent with GM's expectations, the malleable iron line, in fact, ceased production about three years after its installation. Thomas Test. 828:19-22; *see also* Goesling Decl. ¶ 336.

601. The holding furnace was ultimately removed from Defiance in 2010 or 2011 because GM needed the floor space to expand its production of aluminum castings, Thomas Test. 826:16-23; *see also* Thomas Test. 777:17-24, and different assets are used to make aluminum castings as compared to malleable iron, Thomas Test. 828:8-11.

602. Despite the significant cost of Representative Asset No. 28 (approximately $4.2 million) and its large size and relatively permanent method of attachment, GM installed the 100 Ton Vertical Channel Holding Furnace expecting to remove it after only a few years, well before the end of its useful life. Goesling Decl. ¶ 337; Thomas Test. 826: 21-24 (Mr. Thomas,

Defendants' expert, stating that he estimated the normal useful life of Representative Asset No. 28 to be 25 years).

603. GM attempted to resell the holding furnace, but could not find a buyer, so it was ultimately scrapped. Thomas Test. 829:7-18.

604. GM classified Representative Asset No. 28 as personal property for purposes of tax classification. Goesling Direct ¶ 334; *see also* PX-0231.

605. Representative Asset No. 28 was specific to GM's malleable iron line, and once that line was discontinued, the holding furnace was idled and removed a short time later. Goesling Decl. ¶ 335.

606. Representative Asset No. 28 primarily benefitted GM's business and not the realty. Goesling Decl. ¶ 335.

607. Representative Asset No. 28 is not a fixture. Goesling Decl. ¶ 334.

b. CB 91 Robot (Representative Asset No. 39)

608. Representative Asset No. 39, the CB 91 Robot, is a robot that unloads engine cores from the CB 91 core making machine. JPTO Stipulated Facts ¶ 112.

609. The CB 91 Robot delivers each core to several work stations before delivering a complete core sub-assembly to a conveyor for further processing. JPTO Stipulated Facts ¶ 112.

610. The sub-assemblies are used later in the iron casting process at Defiance. JPTO Stipulated Facts ¶ 112.

611. Representative Asset No. 39 was put into service in March 2005. JPTO Stipulated Facts ¶ 112.

612. The CB 91 Robot is made up of a six-axis robot and a standalone robot control cabinet. Goesling Decl. ¶ 342.

613. The CB 91 Robot is mounted on a steel plate that is, in turn, attached with eight lag bolts to the floor. Goesling Decl. ¶ 346; *see also* Thomas Test. 834:19-835:14; 838:18-24. There are also two utilities connections to the CB 91 Robot: Electric and compressed air. Thomas Test. 835:18-25; *see also* JX-1579.

614. The robot controller rests directly on the building floor, without further attachment. Goesling Decl. ¶ 346; Thomas Test. 836:23-837:2; JX-1584. The robot controller was designed with forklift carrying tubes and the cabinet top has four side-mounted eye hooks to assist with moving the controller. Goesling Decl. ¶ 347; *see also* JX-1584.

615. GM used a quick connect fitting to connect the CB 91 Robot and the controller. Thomas Test. 837:3-6.

616. Removal of the robot, without the baseplate, would take approximately two to two and a half hours. Thomas Test. 837:7-838:17.

617. Removing the baseplate would take approximately 35 minutes. Thomas Test. 838:18-839:14.

618. Healing and reconcreting the floor would take approximately three hours. Thomas Test. 839:15-25.

619. And to take the feed lines back to their source it would take about six to eight hours. Thomas Test. 840:2-5.

620. You could remove this robot from the cell where it is located and reprogram it for use in another area of the foundry. Thomas Test. 842:25-843:4. All robots are reprogrammable. Thomas Test. 843:14-16.

621. Representative Asset No. 39 is a standard heavy duty ABB 6400 robot. Thomas Test. 843:11-13; Thomas Decl., Ex. A at 28. "And as long as the robot is operating within its

specified range of movement, weight capability and specification, there's really no restrictions on where you could use and place" Representative Asset No. 39. Thomas Test. 843:17-22.

622. GM moved robots similar to Representative Asset No. 39, including at least 90 individual ABB IRB-6400 model robots (determined based on a review of the Description, Manufacturer, Model, and Cost columns), within its facilities between 2009 and 2015. PX-0022C--Asset #39-0001-0006.

623. There is also a robust secondary market for robots similar to the CB 91 Robot. Goesling Decl. ¶ 348; see also Levy Dep. Tr. 60:6-11. In a single auction of assets from Pontiac assembly that took place in November 2010, there were 250 ABB IRB-6400 robots for sale. Levy Dep. Tr. 58:17-59:7; 59:13-17.

624. As another example of the robust secondary market for assets similar to Representative Asset No. 39, Maynards and Hilco sold almost 750 robot lot items at GM auctions between 2006 and 2012, including 450 individual ABB IRB-6400 model robots, with some bulk purchases of robots with quantities ranging from 2 to 400 robots. PX-0348B.

625. The Retirement Analysis shows 5,743 asset entries related to the retirement of robots similar to the CB 91 Unload Robot between 2004 and 2009 with a total installed cost of $97.5 million. PX-0020. The weighted average age upon retirement for the assets described in these asset entries is 10 years – less than half the 25-year useful life that Defendants estimated for this robot. Thomas Decl. ¶ 132.

626. The CB 91 Robot is necessary only to GM's iron casting process as it is currently configured. Goesling Decl. ¶ 345. The CB 91 Robot primarily benefits GM's business, not the general use of the realty. Goesling Decl. ¶ 345.

627. GM classified Representative Asset No. 39 as personal property for purposes of tax classification. Goesling Decl. ¶ 344; *see also* PX-0231.

628. Representative Asset No. 39 is not a fixture. Goesling Decl. ¶ 344.

c. P&H 7 ½ Ton Charger Crane 6E Cupola (Representative Asset No. 40)

629. Representative Asset No. 40, P&H 7 ½ Ton Charger Crane 6E Cupola, is a seven-and-a-half-ton capacity charging bridge crane, suspended above the ground, that moves along rails (which were part of a separate eFAST ledger line) within a raw material bay at Defiance. JPTO Stipulated Facts ¶ 113.

630. Representative Asset No. 40 was put into service in July 1997 and had an installed cost of $639,653. JPTO Stipulated Facts ¶ 113.

631. The P&H 7 ½ Ton Charger Crane 6E Cupola is the primary scrap metal delivery mechanism for the 6E cupola, which melts iron. Thomas Test. 863:13-19.

632. As part of the iron casting process, Representative Asset No. 40 picks up raw scrap metal from rail cars with a magnet and brings the metal to one of the charging feeders for Defiance's cupolas. JPTO Stipulated Facts ¶ 113.

633. The P&H 7 ½ Ton Charger Crane 6E Cupola is not capable of delivering non-ferrous materials in the manner that it delivers iron. Thomas Test. 864:5-14.

634. The P&H 7 ½ Ton Charger Crane 6E Cupola is a magnet crane, and its magnet cannot pick up aluminum materials. Aluminum materials are delivered by truck to Defiance – not railcar – and are unloaded at a dock, which is an entirely different area than where iron materials are unloaded and then moved by this crane. Thomas Test. 864:5-14; 758:23-759:13.

635. The asset includes only the P&H 7 ½ Ton Charger Crane 6E Cupola – the rails on which the crane travels and the magnet are separately capitalized assets. Goesling Decl. ¶ 350.

636. The P&H 7 ½ Ton Charger Crane 6E Cupola 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. Goesling Decl. ¶ 351.

637. Prior to the installation of Representative Asset No. 40, there was a predecessor crane that ran along the same rails. Thomas Test. 861:4-10. GM removed the predecessor crane and installed the P&H 7 ½ Ton Charger Crane 6E Cupola in a sixteen-day period. Thomas Test. 861:16-862:7.

638. The P&H 7 ½ Ton Charger Crane 6E Cupola is assembled with nuts and bolts. Thomas Test. 859:24-860:2.

639. The P&H 7 ½ Ton Charger Crane 6E Cupola was assembled and tested off site at the manufacturer prior to its installation at Defiance. Thomas Test. 860:3-8.

640. The P&H 7 ½ Ton Charger Crane 6E Cupola is not bolted or welded to the realty. Thomas Test. 860:16-20. Gravity attaches the P&H 7 ½ Ton Charger Crane 6E Cupola through its wheels to rails that are bolted to crane ways that are more permanently affixed to the building. Goesling Decl. ¶ 355.

641. In addition, the connections to utilities use non-permanent methods. Goesling Decl. ¶ 355. For example, common busbar rails run along the far side runway to supply power to the trolley motors. Goesling Decl. ¶ 355. Power is then transferred to the bridge by festoon wiring with quick disconnect fittings. Goesling Decl. ¶ 355.

642. GM has moved assets similar to Representative Asset No. 40 in the past. Goesling Decl. ¶ 356. Specifically, between 2009 and 2015, 22 asset line items similar to the P&H 7 ½ Ton Charger Crane 6E Cupola were transferred from one GM plant to another, including at least 6 large overhead bridge cranes, some with lifting capacities over 80 tons,

which were relocated between GM's Doraville, Grand Rapids, Mansfield Stamping, Parma, Flint, and Marion facilities. PX-0022C--Asset #40-0001 (the 6 cranes entries identified by installed cost of $400,000 to $600,000 each and size determined based on lifting capacity of 65 to 80 tons).

643. There is a secondary market for cranes similar to Representative Asset No. 40. Goesling Decl. ¶ 356. For example, Maynards and Hilco sold 36 bridge cranes with spans of 60-100+ feet and lifting capacities of 15-80 tons from approximately 2006 to 2012. PX-0348B – Asset 40-0001 – 0009 (showing 36 GM bridge cranes sold by Maynards and Hilco, with spans of 60-100+ feet and lifting capacities of 15-80 tons).

644. From a single GM facility in Grand Rapids, Maynards/Hilco sold 11 overhead bridge cranes with the same manufacturer (P&H) as the subject asset. PX-0348B – Asset #40-0001 (rows 84 and 88); Asset #40-0002 (row 92); Asset #40-0003 (rows 93, 97, 98, 99, and 105 through 108). All 11 of these cranes have lift capacities between 30 and 80 tons, significantly greater than the 7.5 ton lift capacity of the P&H Charger Crane. Additionally, the cranes have span lengths of between 70 and 108 feet, which is comparable to the 100 foot span of the P&H Charger Crane.

645. Based on Mr. Goesling's Retirement Analysis, GM retired assets described in 454 asset entries similar to the P&H Charger Crane between 2004 and 2009 with a total installed cost of $13.5 million. PX-0020. The weighted average age upon retirement for the assets described in this group of asset entries is 15 years. The Defendants estimate the useful life of the P&H Charger Crane to be 25 years. Thomas Decl. ¶ 132.

646. The P&H 7 ½ Ton Charger Crane 6E Cupola is specific to the transport of iron scrap to the 6E cupola, and therefore primarily benefits GM's business, not the general use of the realty. Goesling Decl. ¶ 354; Thomas Test. 864:5-14.

647. GM classified Representative Asset No. 40 as personal property for tax classification purposes. Goesling Decl. ¶ 353; *see also* PX-0231.

648. Representative Asset No. 40 is not a fixture. Goesling Decl. ¶ 353.

d. Core Delivery Conveyor System CB 116 & 122 (Representative Asset No. 26)

649. Representative Asset No. 26, Core Delivery Conveyor System CB116 & 122, is a conveyor system and associated support platform that transports engine core sub-assemblies as part of the iron casting process at Defiance. JPTO Stipulated Facts ¶ 99.

650. Representative Asset No. 26 was put in service in November 2007 and had an installed cost of $280,816. JPTO Stipulated Facts ¶ 99.

651. The Core Delivery Conveyor System CB116 & 122 transports molded core assemblies from the CB 116 robotic assembly cell located on the ground level, up an incline and down again to the CB 122 robot dip cell located on ground level. Goesling Decl. ¶ 317.

652. The Core Delivery Conveyor System CB116 & 122 consists of six distinct conveyor sections, in addition to a mezzanine and an HMI control panel. Goesling Decl. ¶ 317.

653. The six conveyor sections correspond with the requirements of the system: A chain-on-edge conveyor that removes core assemblies from the CB 116 robotic assembly cell; an ascending inclined/flat belt conveyor; three suspended conveyor section comprised of a section that turns 45 degrees, a flat belt section, and a sections that turns 90 degrees; and a descending section that connects to the CB 122 robotic dip cell. Goesling Decl. ¶ 317.

654. Each conveyor section is independently powered and controlled. Goesling Decl. ¶ 317.

655. The Core Delivery Conveyor System CB116 & 122 was delivered piecemeal to Defiance for installation. Thomas Test. 857:21-24.

656. The Core Delivery Conveyor System CB116 & 122 is modular and attached together with bolts to form a conveyor approximately 130-feet long and 30-inches wide. Goesling Direct ¶¶ 317, 322; *see also* Thomas Test. 857:25-858:4.

657. The ground-level belt conveyor is supported by floor posts bolted to the ground, and the overhead portions are bolted or spot welded to the mezzanine. Goesling Decl. ¶ 322.

658. The sections of the mezzanine are bolted together and the mezzanine is suspended by angle iron members clipped to a steel framework attached to the building trusses. Goesling Decl. ¶ 322; *see also* JX-1404; JX-1402. The mezzanine is also bolted to a column for additional support. Goesling Decl. ¶ 322; *see also* JX-1405.

659. The main control panel rests directly on the floor with no further attachment methods beyond utility connections. Goesling Decl. ¶ 322; *see also* JX-1406. In addition, the control panel has four top-mounted eye-bolts designed as lift points to move the unit. Goesling Decl. ¶ 323; *see also* JX-1406.

660. The control panel feeds electrical power to the belt conveyor by conduit running underneath the mezzanine. Goesling Decl. ¶ 322; *see also* JX-1404.

661. The sectional/modular nature of the conveying equipment, the sectional fabrication of the mezzanine, and the methods of attachment all allow for removal of the asset without damage to the building or the equipment. Goesling Decl. ¶ 323.

662. The conveyor sections can be removed by simply detaching them from the mezzanine, disconnecting the electrical/data wiring and unbolting the modular sections and various components. Goesling Decl. ¶ 323.

663. Moreover, good access to the equipment makes Representative Asset No. 26 one of the easier conveyors of the eight to remove. Goesling Decl. ¶ 323; *see also* Goesling Decl. Ex. D (Mr. Goesling's Conveyor System Chart).

664. The Core Delivery Conveyor System CB116 & 122 is used to connect two core machines that are situated in less than ideal positions in the plant. Thomas Test. 858:5-12; *see also id.* 806:20-807:13; Goesling Decl. ¶ 321.

665. If there had been available floor space elsewhere in Defiance, the CB116 & 122 core machines "would have ideally been placed adjacent to one another." Thomas Test. 858:13-18.

666. And if the CB116 & 122 core machines had been situated in close proximity to one another, there would have been no need for the Core Delivery Conveyor System CB116 & 122. Thomas Test. 858:19-23.

667. The reason the Core Delivery Conveyor System CB116 & 122 is positioned overhead is to avoid blocking the aisle and work area below. Thomas Test. 858:24-859:7.

668. There is nothing about the building itself that required the conveyor to be placed overhead. Thomas Test. 859:8-13.

669. The Core Delivery Conveyor System CB116 & 122 is necessary only to accommodate the location of the equipment used in the current process and would not be useful should GM or another user of the building change to a process configured in some different way. Goesling Decl. ¶ 320.

670. The Core Delivery Conveyor System CB116 & 122 is tailored to GM's particular manufacturing process and is not adapted to the building itself. Goesling Decl. ¶ 321.

671. Portions of the Core Delivery Conveyor System CB116 & 122 are similar to the conveyors used in the EOL systems for the leased Schuler and B3-5 Transfer Presses (Representative Asset Nos. 32 and 33) that are the subject of the same leases as the presses and require that the EOL systems remain as personal property. Goesling Decl. ¶ 324; PX-0283-0071; PX-0220-0082.

672. The leases indicate that GM intended equipment similar to components of the Core Delivery Conveyor System CB116 & 122 to be treated as personal property, and not as fixtures, because it does not make sense that GM would treat similar assets differently. Goesling Decl. ¶ 324.

673. GM classified Representative Asset No. 26 as personal property for tax classification purposes. Goesling Decl. ¶ 319; *see also* PX-0231.

674. Representative Asset No. 26 primarily benefits GM's business and not the realty and is therefore not a fixture. Goesling Decl. ¶ 319.

e. Emissions System #4 Cupola (Representative Asset No. 27)

675. Representative Asset No. 27, Emissions System #4 Cupola, is a gas cleaning system that heats the hot blast air injected into the No. 4 melting furnace at Defiance (also known as a cupola) and removes and controls particulates and toxic gases generated by the foundry melting operations. JPTO Stipulated Facts ¶ 100.

676. The number 4 cupola furnace is used in Defiance to melt and refine iron as part of the metal casting process. Goesling Decl. ¶ 325; *see also* Thomas Test. 865:17-19.

677. Representative Asset No. 27 replaced an earlier system that served a similar function, Representative Asset No. 38, the System Gas Cleaning No. 4 Cupola. JPTO Stipulated Facts ¶ 100.

678. Representative Asset No. 27 was put into service in November 2007 and had an installed cost of $9,811,712. JPTO Stipulated Facts ¶ 100.

679. The Emissions System #4 Cupola has four primary parts: (1) the thermal oxidizer with crossover duct; (2) the heat recuperator; (3) the hot blast turbine blower; and (4) the scrubber vessel. Goesling Decl. ¶ 325.

680. The thermal oxidizer is a large vertical vessel approximately 108 feet tall and 12 feet in diameter that extends through the roof of the melt shop building and also connects to the heat recuperator via a duct that is 45 feet long and 10 feet in diameter. Goesling Decl. ¶ 326; *see also* JX-1425; JX-1426. The thermal oxidizer pulls and incinerates off-gas from the melting process. Goesling Decl. ¶ 326.

681. The heat recuperator is another large vessel, approximately 53 feet high and 7 and a half feet in diameter that extends through the roof. Goesling Decl. ¶ 326; *see also* JX-1424; JX-1422. The heat recuperator receives and cools hot exhaust from the thermal oxidizer while heating outside air used in the cupola melting process. Goesling Decl. ¶ 326.

682. 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. Goesling Decl. ¶ 326; *see also* JX-1420; JX-1421.

683. 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. Goesling Decl. ¶ 326; *see also* JX-1435; JX-1423.

684. Although the Cupola No. 4 Emissions System is very large and heavy, portions of the asset are attached using non-permanent methods. Goesling Decl. ¶ 330.

685. 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. Goesling Decl. ¶ 330; *see also* JX-1422.

686. Similarly, the scrubber vessel is not attached to the building but rather is supported by legs attached to the base of the vessel and there is a floor opening to accommodate for removal without damage. Goesling Decl. ¶ 330; *see also* JX-1435.

687. The turbine blower has lifting eyes for ease of removal and installation, and a nearby floor opening and overhead crane were specifically designed to allow the turbine blower to be removed from the building without damage to the realty. Goesling Decl. ¶ 330; *see also* JX-1420; JX-1421.

688. The method of attachment of Representative Asset No. 27 is more modular and less permanent than the older emissions cleaning system that this system replaced (Representative Asset No. 38). Goesling Decl. ¶ 330.

689. GM classified Representative Asset No. 27 as personal property for tax classification purposes. Goesling Decl. ¶ 334; *see also* PX-0231.

690. Representative Asset No. 27 is necessary only to the iron casting process and thus is not useful should GM or another user change to a different foundry process, such as making aluminum castings. Goesling Decl. ¶ 329.

691. 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 a particular foundry process—namely, iron melting and casting. Goesling Decl. ¶ 329.

692. Although Representative Asset No. 27 replaced a previous emissions system, and the large size of the Cupola No. 4 Emissions System would make removal difficult, Representative Asset No. 28 is not a fixture principally because it primarily benefits GM's business and not the realty. Goesling Decl. ¶ 331.

f. System Gas Cleaning No. 4 Cupola (Representative Asset No. 38)

693. Representative Asset No. 38, System Gas Cleaning No. 4 Cupola, is a gas cleaning system that cleaned high-temperature exhaust gases from a cupola at Defiance. JPTO Stipulated Facts ¶ 111.

694. Representative Asset No. 38 was put into service in May 1976 and had an installed cost of $1,173,272. JPTO Stipulated Facts ¶ 111.

695. Representative Asset No. 38 was idled in 2007. JPTO Stipulated Facts ¶ 111.

696. Two significant portions of Representative Asset No. 38 have been removed, and the remaining portions of the asset remain abandoned in place. Thomas Test. 784:6-15; Goesling Decl. ¶ 338.

697. The portions of Representative Asset No. 38 that remain in place include the venturi scrubber and separator, a supporting metal superstructure, a gas compressor, and a small portion of ductwork. Goesling Decl. ¶ 338.

698. 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. Goesling Decl. ¶ 338.

699. An elaborate stair and railing system surrounds both units and is attached to the two vessels and steel structure with welds and bolts. Goesling Decl. ¶ 338.

700. The size of the remaining portions of Representative Asset No. 38 makes removal very difficult and expensive and would cause serious damage to the building and destroy much of the remaining asset. Goesling Decl. ¶ 338.

701. GM classified Representative Asset No. 38 as personal property for tax classification purposes. Goesling Decl. ¶ 340; *see also* PX-0231.

702. Representative Asset No. 38 is not adapted to the use of the realty generally, but rather to support the #4 Cupola as part of a particular foundry process — namely, iron melting and casting. Thomas Test. 865:8-19; Goesling Decl. ¶ 341.

703. Representative Asset No. 38 primarily benefitted GM's business and not the realty and is therefore not a fixture. Goesling Decl. ¶ 341.

2. Representative Asset No. 30, the Transfer Press that Was Sold Out of Mansfield Stamping, Is Not a Fixture

704. GM's Mansfield Stamping is a similar height and size to GM's Lansing Regional Stamping, a standard high bay manufacturing building. Miller Test. 1219:4-15.

705. GM's Mansfield Stamping was closed because a decreased demand for mid-size sport utility vehicles led to the closing of Moraine Assembly and Mansfield Stamping was not closely situated to other assembly facilities. Miller Decl. Ex. A at 54.

706. Mansfield Stamping remained with Old GM and RACER Trust sold the facility to a development group that had "identified two tenants that are interested in occupying much of the 2.5 million-square-foot building." Miller Decl. Ex. A at 54.

707. Despite the development group's representations to RACER Trust, it ultimately demolished the building. Miller Decl. Ex. A at 54.

708. Prior to the RACER Trust's efforts to sell the building, all of the presses were removed from Mansfield Stamping after it closed. Miller Test. 1149:15-23. None of the presses were sold with the building. Miller Test. 1149:15-23.

709. One of the presses sold out of Mansfield Stamping after it closed was Representative Asset No. 30, TP-14 CS1-1 Transfer Press Danly ET-2, which was sold by Maynards and Hilco in 2011. JPTO Stipulated Facts ¶ 103; PX-0096-0003 (Bill of Sale Agreement between RACER and Flex-N-Gate Mexico); Goesling Decl. ¶ 363.

710. As evidenced by the sale of Representative Asset No. 30 prior to the sale of Mansfield Stamping, the press primarily benefitted GM's business and not the realty and is therefore not a fixture. Goesling Decl. ¶¶ 362, 364. This asset is discussed in further detail below in Section XIII.A.2.

B. 29 of the 33 Representative Assets Located in Michigan Are Not Fixtures

711. The Representative Assets located in Michigan are primarily located at Lansing Regional Stamping, Lansing Delta Township Assembly, and Warren Transmission.

712. Warren Transmission was constructed by the government in the 1940s as a munition facility for naval ships. Deeds Test. 597:11-20.

713. The facility was purchased by Ford Motor Company in 1948, and Ford used the plant to produce axles. Deeds Test. 597:25-598:14. Ford needed different machinery and equipment to make axles than was needed to make munitions. Deeds Test. 598:21-599:4. In approximately 1960 Ford sold the facility to GM because Ford no longer needed the site due to of business changes that Ford had made. Deeds Test. 599:5-22.

714. Initially, GM also used the facility to make axles. Deeds Test. 599:5-25. GM at some time removed all of the Ford equipment and turned the axle making plant into a powertrain facility. Deeds Test. 600:2-12.

715. Warren Transmission plant is an appropriate facility for the manufacture of any kind of propulsion or powertrain-type business. Deeds Test. 600:13-600:23.

716. Lansing Regional Stamping is a high bay industrial building. Miller Test. 1219:10-1219:15. The facility was completed in 2003. Stevens Test. 193:11-16; *see also* DX-0031 (eFAST excerpt of the 40 Representative Asset showing that the stamping presses at Lansing Regional Stamping have an installed date of 2003).

717. Lansing Regional Stamping supplies parts to Lansing Delta Township Assembly and other regional assembly plants. Miller Decl. Ex. A at 14.

718. Lansing Delta Township Assembly plant was completed in 2006. Stevens Test. 194:18-195:7. Lansing Delta Township Assembly was created as a greenfield plant, meaning GM constructed it new as opposed to retrofitting an exhibiting facility. Stevens Test. 421:18-24.

719. Lansing Delta Township Assembly was the first new U.S. plant where GM could bring together the current Global Manufacturing System ("**GMS**") concepts. Stevens Test. 330:4-17.

1. The Stamping Presses Among The Representative Assets Are Not Fixtures

720. Five of the Representative Assets are presses, the GG-1 (Representative Asset 29); TP-14 (Representative Asset 30); Danly 4000 Tryout press (Representative Asset 31); AA-11 Schuler Crossbar Transfer press (Representative Asset 32); and the B3-5 Transfer Press System (Representative Asset 33). Miller Decl. Ex. A at 14.

a. Press Background Information

721. Three of the presses, the Danly 4000, the AA Schuler Crossbar, and the B3-5, are located at Lansing Regional Stamping; and the GG-1 and the TP-14 were sold from closed Old GM stamping facilities. JPTO Stipulated Facts ¶ 34, 104-106.

722. These five presses vary in size from the largest (the five ram AA Schuler crossbar transfer press) to the smallest (the TP-14 single ram transfer press). Miller Test. 1011:15-1012:12; Miller Decl. Ex. A at 14.

723. Although GM has different transfer press sizes, from AA down to C, Defendants admit that there is no meaningful distinction between the press sizes for purposes of the fixture test. Miller Test. 1018:25-1019:6.

724. Transfer presses utilize a transfer system to process sheet metal blanks through a series of rams that transform the metal using large dies to produce finished automotive body parts. JPTO Stipulated Facts ¶ 105; Goesling Decl. ¶ 64.

725. Press technology in the industry has changed over time from conventional presses, in which people moved parts between presses, to these transfer presses, where the movement between presses is automated. Miller Test. 1015:19-1016:17.

726. The switch to transfer presses allowed the size of the stamped parts to increase and subsequently caused presses to increase in size. Miller Test. 1016:18-1017:24.

727. Each of the ram stations is assembled from the following components: Press bed and rolling bolsters (which hold the dies), four uprights, the slide, and the crown. *See* PX-256 (Schematic of Asset 32, AA-11 Schuler #1 AA Crossbar Transfer Press) at NEWGM000095376; PX-256 (Schematic of Asset 32, AA-11 Schuler #1 AA Crossbar Transfer Press) at NEWGM000095382; Goesling Decl. ¶ 64.

728. The press station components are held together by heavy duty tie rods that run vertically through the press bed, uprights and crown at the corners of each station, and have nuts on both ends. *See* Goesling Decl. ¶ 64.

729. The Representative Asset presses are installed in pits that are capitalized separately. *See* Goesling Decl. ¶ 71.

730. The transfer presses use a feed system to lift and load steel sheet metal blanks stacked on a pallet and to position the blanks, one at a time, in the first press station. Goesling Decl. ¶ 65.

731. An end-of-line system ("**EOL**") is used to remove stamped parts from the press and load them into racks for transport to Lansing Delta Township Assembly body shop or to other regional GM plants. JX-1474; Goesling Decl. ¶ 65.

732. Depending on how the particular representative asset press is defined in eFAST, the asset will or will not include the front-of-line destacker/feeder and the EOL. PX-0219 (the B3-5 is described as a "system" that includes the destacker and EOL whereas the AA-11 Schuler is listed independently).

733. None of the five Representative Assets that are presses are fixtures. Goesling Decl. ¶¶ 67 (AA-11 Schuler), 76 (B3-5), 82 (Danly Tryout), 362 (TP-14), and 368 (GG-1).

i. Despite the Cost and Relative Difficulty, Presses Are Consistently Moved

734. Although Defendants' expert Max Miller stated that presses only moved in extraordinary situations, Miller Test. 1090:10-20, there is significant evidence that GM consistently moved its presses.

735. That presses of this size are in fact moved for re-use is evidenced by GM's movement of at least 14 similar large press systems for re-use at other facilities as shown in Mr. Goesling's Transfer Analysis. For example, GM moved two AA presses from its Doraville, Georgia assembly plant to its Lordstown, Ohio plant in 2008. PX-0022C--(Asset #32-0001 (Main press asset entries are on rows 7386 and 7398); Miller Test. 1090:14-1091:10.

736. Following the closing of the Grand Rapids and Mansfield Stamping, Ohio stamping plants in 2009, GM also moved other AA and B transfer presses for reuse at other GM locations. PX-0022C (Asset #32-0001, Main press asset entries are on rows 240, 249, 274, 5421, 5660, and 5702).

737. During the site tour in May 2016, Mr. Miller was given a list of all stamping presses at GM stamping plants in 2016 by a GM employee. Miller Test. 1169:5-22.

738. The Transfer Analysis and trial testimony shows that a high percentage of the presses on the list have been moved:

Press	Movement	Source
GM has two AA crossbar 5 ram transfer presses at its Flint facility that are similar to Representative Asset 32	These AA crossbar presses at Flint were roughly 10 years old when moved from Grand Rapids and Mansfield Stamping, well short of Defendants' estimated useful life of 35 years	Miller Test. 1170:5-1171:2, 1173:9-23; 1175:5-12; PX-0547-001; PX-0022C -- Asset #32-0001 (rows 240-243, 274-276)
GM currently has one B3-5 press at its Lordstown facility that is similar to Representative Asset 33	The Lordstown B3-5 press was transferred from GM's Mansfield Stamping	Miller Test. 1177:2-7; PX-0547-001; PX-0022C (rows 5659,5660,5661, 5662)
GM currently has two B3-5 presses at its Marion facility that are similar to Representative Asset 33	One of the B3-5 presses at Marion was transferred from Grand Rapids	Miller Test. 1178:4-15; PX-0547-001; PX-0022C -- Asset #33-0001 (rows 5419, 5420, 5421, 5422, 5423)
GM has two AA crossbar 5 ram transfer presses at its Marion facility that are similar to Representative Asset 32	One of the AA crossbar transfer presses at Marion was transferred from Grand Rapids before the end of its useful life	Miller Test. 1179:16-1180:15, 1180:19-1181:2; PX-0547-001 & PX-0547-001; PX-0022C -- Asset #32-0001 (rows 249, 250, 251, 252, 253)
GM has four AA presses at its Pontiac facility that are similar to Representative Asset 32	Two of the four AA presses at Pontiac were transferred from Doraville	Miller Test. 1181:3-8; PX-0547-002; Miller Test. 1181:16-18;

GM has three B2 presses at its Parma facility that are similar to Representative Asset 30	Two of the three B2 presses at Parma were transferred from Mansfield Stamping	PX-0547-0002; PX-0022C -- Asset #30-0001 (rows 5695-5697, 5702-5704)

739. In fact, comparing the list of presses found in PX-0547 and the Asset Transfer Analysis, it is evident that significant percentage of GM's largest press systems have in fact been moved by GM between facilities. PX-0547 (6 identified as "AAL5X" and "AAS5x" press type); PX-0022C -- Asset #32-0001 (3 identified, main press entries on rows 240, 249, and 274). Furthermore, using the same comparison, it is evident that at least one third of GM's second largest category of press systems, the B size, specifically the B3, have in fact been relocated for reuse between GM facilities. PX-0547 (6 identified as "B3" press type); PX-0022C -- Asset #33-0001 (2 identified, main press entries on rows 5421 and 5660).

740. Mr. Miller did not give the movement of these press systems any significance when applying the three-part fixture test. Miller Test. 1099:10-15, Miller Test. 1172:12-17.

741. GM always installs presses, whether leased by GM or owned by GM, in the manner required by the manufacturer. Miller Test. 1193:12-21.

742. Before being shipped by the manufacturer, presses are assembled and then disassembled as part of the press buyoff process, in which presses are partially assembled for testing and then disassembled, transported, and installed at the GM facility. Goesling Decl. ¶ 68; Miller Test. 1106:18-1107:25; *see also* PX-0254-0004 to 0005; PX-0230-0007.

743. It takes two to four months working diligently to remove a press with a size of 2,000 tons or more for reuse. Sofikitis Dep. 68:16-69:3. The removal process is faster if the press is being removed for scrap. Sofikitis Dep. 69:4-12.

744. Despite the cost and difficulty of removal and installation, Maynards and Hilco sold more than 150 GM stamping presses at auctions and through private treaty sales as part of their arrangement with MLC and the RACER Trust. PX-0348B (Asset 29, 30, 31, 32-0001 through 0018).

745. There are companies that specialize in installing, removing, and transporting heavy equipment. PX-0082; Goesling Test. 3076:2-11.

746. One of these companies, Professional Industrial Consultants, advertised on its website that it had relocated 9 GM transfer press lines ahead of schedule. PX-0082.

ii. Presses Are Frequently Retired Before the End of their Useful Lives

747. The Retirement Analysis produced in this case again shows that GM retired presses from its facilities before the end of their useful lives. The GM Retirement Analysis documents that press assets described in over 320 asset entries were retired in the five-year period between January 2004 and May 2009, preceding GM's bankruptcy. PX-0020. Of these stamping press assets, there are 21 individual transfer press systems with a total installed cost of approximately $245 million out of the retired stamping press population. PX-0020.

748. The average age of these press systems at the date of retirement and removal was 16.5 years, far less than, and in some cases less than half of, Defendants' estimated useful life for the transfer presses among the Representative Assets. Miller's Decl. ¶ 165 (estimating a 30 to 35 year useful life for transfer presses).

749. In fact, only two transfer presses were in service for longer than 20 years at the time of retirement. PX-0020 (Asset ID BF511036701 was 24.6 years old at retirement and Asset ID THI11864301 was 21 years old at retirement).

750. Furthermore, even in the outlier case where a transfer press system was in service for 24.6 years, GM still removed the press from service prior to Defendants' expected normal useful life. Compare PX-0213 (Asset ID BF511036701 was 24.6 years old at retirement) with Miller's Decl. ¶ 165 (estimating a 30 to 35 year useful life for transfer presses).

iii. GM Has Treated Presses As Personal Property

751. GM classifies presses as personal property in its tax classifications. PX-0231.

752. GM leases many of its press assets, including Representative Assets 32 and 33 discussed below in Section XIII.B.1.b, as personal property. The leases require GM to ensure that the presses remain personal property.

753. GM does not install its leased assets any differently than its non-leased assets. Miller Test. 1115:7-15. Accordingly, it is reasonable to infer that all presses similar to the leased presses are also personal property.

iv. There is a Secondary Market for Presses

754. Beyond GM, there is a robust secondary market for stamping presses used in auto manufacturing facilities. For example, Robert Levy of Hilco stated, "we sell presses frequently. We've had stamping plants, many stamping plants over the years that we've sold. I can't give you an exact count of presses, but we've sold a lot of presses." Levy Dep. 53:15-19.

755. Similarly, Maynards has sold a number of different presses, including presses out of operating stamping plants. Sofikitis Dep. 28:15-29:11; 135:2-135:6.

756. Taso Sofikitis of Maynards stated, "at the same time when this [GM] bankruptcy was going on we bought the Chrysler Twinsburg facility, and that was state of the art, late model presses. That was a press deal. We paid 45 million for it, we sold all 30 machines and we ended up doing 70, 80 million in sales out of that facility. That's one example." Sofikitis Dep. 28:22-29:2.

757. In the last 15 years, Maynards has probably sold: (i) approximately 70 to 100 presses that were over 700 to 800 tons, Sofikitis Dep. 28:6-29:6; (ii) over 50 presses that were over 1,500 tons, Sofikitis Dep. 215:6-14; and (iii) 20 to 30 presses that were over 2,000 tons, Sofikitis Dep. 215:15-17.

758. Maynards has sold several dual ram presses in the past from a Chrysler facility. 215:9-17. and as of his deposition on August 31, 2016, was trying to sell several dual-ram presses from a Mitsubishi plant, Sofikitis Dep. 215:18-24, and two stamping presses out of an operating Chrysler facility, Sofikitis Dep. 135:2-6.

759. As part of the marketing campaign that Maynards and Hilco undertook on behalf of MLC and the RACER Trust (discussed above in Section X.A), there was an email distribution list that was focused on potential purchasers of presses. Levy Dep. 15:7-8.

760. Generally, the marketability of a press is driven by its specifications and desirability, not issues connected to removal of the press. Levy Dep. 26:5-16. Presses that are more difficult to sell are presses with smaller beds, presses that are slower, and presses that are single as opposed to double-ram. Sofikitis Dep. 22:21-24:1. For example, older presses that are slow and the wrong bed size would be more difficult to sell. Levy Dep. 136:11-15.

v. Presses Are Never Abandoned in Place

761. When presses are removed, the pits are left behind (Levy Dep. 143:8-10); however, the remaining pit is not considered damage to the building (Levy Dep. 142:8-10; Sofikitis Dep. 27:8-28:5). Press pits and foundations are separately capitalized assets in GM's e-FAST fixed asset ledger. PX-0231 (listing Representative Asset 2, Pits and Trenches, separately from the conveyor that sits in it); *see also* Goesling Decl. ¶ 71.

762. Mr. Miller has never heard of a situation in which GM abandoned a press in place. Miller Test. 1167:11-15.

763. Mr. Miller has never heard of a situation in which any auto manufacturer has ever abandoned a press in place. Miller Test. 1167:16-22.

b. Leased Press Assets

764. Defendants do not claim to have a security interest in Representative Asset No. 32 (AA Transfer Press) or Representative Asset No. 33 (B3-5 Transfer Press), two of the presses at Lansing Regional Stamping. JPTO Stipulated Facts ¶ 66.

765. There are a total of six presses at Lansing Regional Stamping, five of which are leased assets. *See, e.g.*, PX-0219.

766. Defendants acknowledge that because Representative Assets Nos. 32 and 33 are leased assets, they are excluded from the collateral securing the Term Loan. *See* discussion in Section IX.A above.

i. AA-11 Schuler No. 1 AA Crossbar Transfer Press (Representative Asset No. 32)

767. Representative Asset No. 32 is an AA transfer press with 5 press stations manufactured by Schuler. DX-1083; JPTO Stipulated Facts ¶ 105.

768. The asset was put into service in September 2003 and had an installed cost of $33,767,895. JPTO Stipulated Facts ¶ 105.

769. It is the largest of the presses owned by GM in every category, including weight and height, and it occupies the most floor space. Miller Test. 1011:22-1012:12, 1018:21-24, 1175:13-25; Goesling Decl. ¶ 64.

770. In addition, Representative Asset No. 32 is 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 changed. JX-1469; JX-1470; Goesling Decl. ¶ 64.

771. As discussed above in Section XIII.B.1.a.i, GM has moved several AA presses in the past.

772. Unlike the B3-5 Transfer Press (Representative Asset No. 33) described below, the destacker/feeder and the EOL are capitalized separately and are not capitalized as part of this asset by GM. *See* PX-0219 (eFAST data 2009) at Asset IDs BUYR503470FA (AA-11 Schuler #1 AA Crossbar Transfer Press Front of Line), BUYR503471FA (AA-11 Schuler #1 AA Crossbar Transfer Press End of Line); Goesling Decl. ¶ 65.

773. Although large, the parties agree that the AA Schuler can be broken down into pieces for transport. Miller Test. 1019:7-1021:2; PX-0082 (showing photos of installation or removal of transfer press sections); Goesling Decl. ¶ 68.

774. For example, the drive shaft is constructed in sections and can be decoupled. Goesling Decl. ¶ 68. The hydraulic power units are mounted on skids with lift brackets to assist with relocation. JX-1475; Goesling Decl. ¶ 68. Each of the five press stations can be disassembled after removing the tie rods. Goesling Decl. ¶ 68. The tie rod nuts above the press crown have eyehooks to assist in removal of the tie rod. JX-1468; Goesling Decl. ¶ 68.

775. Although the pits and foundation would be left behind should Representative Asset No. 32 be removed, the press foundation work (including pit, piers, etc.) are capitalized separately from this asset. *See* PX-0219 (eFAST data 2009 at Asset IDs 2AAEP100101A1 to 2AAEP100107A1 (Basement Press Pit Area – Stamping Bldg)); Goesling Decl. ¶ 65.

776. The Schuler Transfer Press is the subject of a sale/leaseback ("2003-A Lease Agreement") and is not actually owned by GM. *See* PX-0283 (2003-A Lease Agreement); PX-0275 (2003-A Participation Agreement); Goesling Decl. ¶ 70.

777. The 2003-A Lease Agreement lists Representative Asset No. 32 in the description of equipment covered by the lease. PX-0283-0071.

778. Although not included in Representative Asset No. 32, the AA Schuler's feeder/destacker and EOL are also leased as part of one press system. PX-0283-0071 (listing three Asset IDs as being covered by the lease: BUYR503469FA (the AA-11 Schuler Press); BUYR503470FA (AA-11 Schuler Press Front of Line); and BUYR503471FA (AA-11 Schuler Press End of Line); *see also* PX-219.

779. The description of equipment also shows that another AA press system located at the Lansing Regional Stamping facility is also subject to the 2003-A Lease Agreement. PX-0283-0071.

780. Section 24 of the 2003-A Lease Agreement is entitled "Equipment to Remain Personal Property." PX-0283-0041.

781. Section 24 states:

> 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.

PX-0283-0041.

782. Section 25 of the 2003-A Lease Agreement is entitled "Survival." PX-0283-0041.

783. Subsection (b) to Section 25 states, "The obligations of the Lessee to be performed under this Lease prior to the date this Lease is terminated and the obligations of Lessee pursuant to Sections 2(c), 2(d), 3(c), 3(e), 3(f), 5, 6, 9(c), 9(d), 10, 13, 14, 16, 18, 22, 23, 24 and 25 shall survive the expiration or termination of this lease." PX-0283-0041.

784. The 2003-A Lease Agreement is dated December 23, 2003 with an end of Base Term of December 23, 2023. PX-0283-0050.

785. Section 5 of the 2003-A Lease Agreement, which provides for the "Return of the Equipment, states that unless the press systems are purchased by GM, upon the termination of the 2003-A Lease Agreement, GM "at its own expense, will deliver such Unit to the Lessor, . . ., the Unit disassembled and crated for shipment to the nearest railhead . . ." PX-0283-0010.

786. Representative Asset No. 32, the AA-11 Schuler crossbar press is not a fixture. Goesling Decl. ¶ 67.

ii. B3-5 Transfer Press System Incl. Destacker and End of Line (Representative Asset No. 33)

787. Representative Asset No. 32 is a B3-5 transfer press system with three rams manufactured by IHI, which includes the press itself, the destacker/feeder that feeds the metal into the press, and an end-of-line system that removes the stamped parts from the press. JPTO Stipulated Facts ¶ 106.

788. The asset was put into service in December 2003 and had an installed cost of $27,682,072. JPTO Stipulated Facts ¶ 106.

789. The B3-5 press is GM's third largest press size. Goesling Decl. ¶ 72.

790. Although the destacker and EOL are included with this asset, the press foundation work (including pit, piers, tracks, etc.) is not part of this asset. See PX-0219 (eFAST data 2009) at Asset IDs 2AAEP100101A1 to 2AAEP100107A1 (Basement Press Pit Area – Stamping Bldg)); Goesling Decl. ¶ 74.

791. The destacker feeder for this B3-5 Transfer Press was assembled in Japan before it was disassembled and shipped to the United States. PX-0255 (IHI documentation of destacker feeder); *see also* PX-0254-0004 to 0005; PX-0230-0007; Goesling Decl. ¶ 78.

792. This type of pre-shipment testing regularly occurs for large pieces of equipment. Goesling Decl. ¶ 78.

793. In May 2016, approximately 13 years after installation, the front-of-line stacker/de-stacker was changed as part of GM's migration to aluminum products at Lansing Delta Township Assembly. Stevens Test. 428:12-19; Miller Test. 1118:16-22.

794. In addition, the front-of-line stacker/de-stacker was not capable of keeping up with production demands on the B3-5 press. Miller Test. 1119:17-1120:19.

795. Mr. Miller did not find it significant that a portion of Representative Asset 33 had exhausted its useful life only 13 years after installation and approximately 20 years prior to the useful life that Mr. Miller assigned to the asset. Miller Test. 1122:10-21; Miller Decl. ¶ 165 (stating that useful life is 35 years).

796. The B3-5 is leased by GM under a sales/leaseback agreement that is similar to the one governing the AA Schuler. *See* PX-0220.

797. The 2003C-1 Lease Agreement lists Representative Asset No. 33 in the description of equipment covered by the lease. PX-0220-0082 (listing Asset ID BUYR503481FA that corresponds to Representative Asset No. 33).

798. The description of equipment also shows that the same lease covers a B3-6 press system at Lansing Regional Stamping, an A3-3 press system and Flint Metal Center, and two Tryout Cells from Grand Rapids Metal Center and Pontiac Metal Center similar to the Danly 4000 (Representative Asset No. 31). PX-0220-0082 to 0083.

799. Section 24 of the 2003C-1 Lease Agreement, like the 2003-A Lease Agreement, is entitled "Equipment to Remain Personal Property." PX-0220-0038.

800. Section 24 states:

> 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.

PX-0220-0038.

801. Section 25 of the 2003C-1 Lease Agreement is entitled "Survival." PX-0220-0038.

802. Subsection (b) to Section 25 states, "The obligations of the Lessee to be performed under this Lease prior to the date this Lease is terminated and the obligations of Lessee pursuant to Sections 2(c), 2(d), 3(c), 3(f), 5, 6, 9(c), 9(d), 10, 13, 14, 16, 18, 22, 23, 24 and 25 shall survive the expiration or termination of this lease." PX-0220-0038.

803. The 2003C-1 Lease Agreement is dated December 10, 2003 with an end of Base Term of September 30, 2023. PX-0220-0043.

804. Section 5(a) of the 2003C-1 Lease Agreement, which provides for the "Return of the Equipment," states that unless the press systems are purchased by GM, upon the termination of the 2003C-1 Lease Agreement, GM "at its own expense, will deliver such Unit to the Lessor . . . the Unit disassembled and crated for shipment to the nearest railhead . . ." PX-0220-0011. PX-0220-0011.

805. In addition to the more general press movement listed above in Section XIII.B.1.a.i, GM removed from service at least four B-sized transfer press systems similar to the B3-5 Transfer Press in 2006 and 2007 with a combined installed cost of over $67 million and an average age at retirement of 16.6 years. PX-0020 (Asset IDs BF511090750, BF511090301, BF511017600, and BF511018750).

806. Representative Asset No. 33 is not a fixture. Goesling Decl. ¶ 76.

c. Danly 4000 Ton Press (Representative Asset No. 31)

807. Representative Asset No. 31 is a Danly 4000 ton press. JPTO Stipulated Facts ¶ 104.

808. The Danly 4000 is a tryout press, which validates dies before the dies are used in the press systems. Miller Test. 1012:13-1013:22. A tryout press is not a part of the regular production line. Miller Test. 1126:25-1128:22.

809. The alternative to a tryout press like this asset is to have a production press check the dies but this could cause disruption to the production line. Miller Test. 1126:4-24.

810. The pit and foundation are treated as a separate asset with a unique Asset ID. PX-0219 (eFAST data 2009 at Asset IDs 2AAEP100101A1 to 2AAEP100107A1 (Basement Press Pit Area – Stamping Bldg.)); Goesling Decl. ¶ 80.

811. Similar to the B3-5 and Schuler 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, meaning that the basement is not specially sized for this particular press. JX-1444; JX-1445; JX-1451; Goesling Decl. ¶ 80.

812. This press is currently used to test or "tryout" dies, which are the tools used in the production presses to stamp sheet metal into specific shapes. JPTO Stipulated Facts ¶ 104.

813. The asset was originally put into service in October 1980 at the GM Indianapolis stamping plant to make truck body components and had an installed cost of $2,729,407. JPTO Stipulated Facts ¶ 104; Miller Test. 1010:3-11.

814. The Danly 4000 was operated at Indianapolis as part of the production line for approximately 20 years. Miller Test. 1124:4-23. An engineering modification at Indianapolis rendered obsolete the press line to which the Danly 4000 press belonged. Miller Test. 1124:4-23.

815. In 2000, the press line, along with the Danly 4000, was taken out of production and the Danly 4000 was idled in place at Indianapolis. Miller Test. 1127:13-22.

816. The Danly 4000 and the other parts of the press line were not simply superseded by a more technologically advanced press. Miller Test. 1132:5-14.

817. Instead, the engineering modification at Indianapolis was an entirely different way of forming the truck bed: GM switched from stamped box beds for trucks to rolled box beds. Miller Test. 1127:13-22. This new product was manufactured using completely different equipment. Miller Test. 1132:5-14.

818. Lansing Regional Stamping needed a tryout press and the Danly 4000 fit the engineering requirements, so GM decided to remove the Danly 4000 from Indianapolis and ship it to Lansing Regional Stamping. Miller Test. 1127:13-1128:22. Miller Test. 1127:13-1128:22.

819. Representative Asset No. 31 was moved to the Lansing Regional Stamping in 2003. JPTO Stipulated Facts ¶ 104.

820. It took 3 to 6 months to remove Representative Asset No. 31 from Indianapolis and prepare it for shipment. Miller Test. 1128:23-1129:13. GM took extra care in the removal process because the asset was going to be reused. Miller Test. 1128:23-1129:13.

821. GM then repaired the hole left in the floor at Indianapolis after the Danly 4000 was removed. Miller Test. 1129:18-1130:7.

822. The Danly 4000 was removed 23 years after it had been originally installed at Indianapolis, which was seven years prior to Mr. Miller's useful life estimate of 30 years for this asset. Miller Test. 1133:2-20; Miller Decl. ¶ 165.

823. Because GM had already begun construction of Lansing Regional Stamping and GM had not planned for the installation of a tryout press, GM dug the pit for Representative Asset No. 31 into the existing facility floor. Miller Test. 1130:24-1131:12.

824. GM removed from service at least 2 C-sized transfer presses similar to the Danly Transfer Press in 2004 and 2007 with a combined installed cost of $18.8 million. PX-0020 (Asset ID's BF511036250 and BF511009300).

825. One press was 15.6 years old when it was retired and the other was 18.7 years old. PX-0020 (Asset ID's BF511036250 (TRANSFER PRESS - TP2 SN10-4661 10-4667) and BF511009300 (TRANSFER PRESS - TP3 CL2C-7)).

826. The Danly Tryout Press is not a fixture. Goesling Decl. ¶ 82.

d. MLC/RACER Assets

827. Two of the Representative Assets in this case were not part of the 363 sale and remained with Old GM. Goesling Decl. ¶ 357; JPTO Stipulated Facts ¶ 34.

828. Both Representative Assets were subsequently sold. JPTO Stipulated Facts ¶ 34.

829. Neither Representative Asset was inspected as part of this case. Goesling Decl. ¶ 357.

i. TP-14 CS1-1 Transfer Press Danly ET-2 (Representative Asset No. 30)

830. Representative Asset No. 30, TP-14 CS1-1 Transfer Press Danly ET-2, was located at Mansfield Stamping. JPTO Stipulated Facts ¶ 103. Because it was located in Ohio as of June 30, 2009, the standard the Court applies to the Defiance assets should also be applied to Representative Asset No. 30.

831. The asset was put into service at Mansfield Stamping in September 1987 and had an installed cost of $4,636,106. JPTO Stipulated Facts ¶ 103.

832. Representative Asset No. 30 is a transfer press that processes metal coil through a single ram that transforms the metal using large dies to produce finished automotive body parts. JPTO Stipulated Facts ¶ 103.

833. This press had essentially the same construction characteristics as the Danly Tryout Press, although it had a lower pressing capacity (2,000 tons vs. 4,000 tons for the Tryout Press) and a larger bed and rolling bolsters (216”x108” vs 180”x96” for the Tryout Press). Goesling Decl. ¶ 360.

834. From review of the complete asset listing for Mansfield Stamping, the coil feed system, servo transfer system, turntable, press foundation, and scrap metal conveyor are not included in the subject asset, having been separately capitalized. Goesling Decl. ¶ 360.

835. Mansfield Stamping was closed in 2010. Goesling Decl. ¶ 359. All of the presses were removed from Mansfield Stamping after it closed; none were sold with the building. Miller Test. 1149:15-23.

836. The TP-14 was sold by Maynards and Hilco in 2011. JPTO Stipulated Facts ¶ 103; PX-0096-0003 (Bill of Sale Agreement between RACER and Flex-N-Gate Mexico); Goesling Decl. ¶ 363.

837. Defendants' expert Max Miller estimates that the TP-14 has a useful life of 30 years. Miller Decl. ¶ 165. The TP-14 was sold out of Mansfield Stamping approximately 24 years after installation and thus before the end of Defendants' estimated useful life.

838. The TP-14 Danly Transfer Press was scheduled to be part of the equipment auction 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). PX-0096-0003; Goesling Decl. ¶ 359; Sofikitis Dep. 76:6-7; 77:19-21.

839. Because Representative Asset No. 30 itself was sold, there is no question that there is a market for it and that this asset is considered a removeable and saleable asset. *See also* PX-0350 (Reviewed Asset Auction Lots) & PX-0348 (Similar Asset Auction Lots) (showing 153 GM stamping press lot items sold by Maynards and Hilco); Goesling Decl. ¶ 363.

840. However, Defendants' expert Mr. Miller did not consider the sale of the TP-14 as particularly relevant to his fixture determination. Miller Test. 1188:9-15.

841. Representative Asset No. 30 was sold with a similar press to Flex-N-Gate. Sofikitis Dep. 75:16-76:10; PX-0096. Flex-N-Gate paid one million for each of the two presses plus a buyer's premium. Sofikitis Dep. 77:19-78:3.

842. Flex-N-Gate is a Tier 1 automotive supplier who knew of the plants that were closing and reached out to Maynards and Hilco. Sofikitis Dep. 76:11-21. Flex-N-Gate was going to use Representative Asset 30 for its production. Sofikitis Dep. 76:25-77:4.

843. The private sale price was better than what the press would have sold for at auction based on comparable sales. Sofikitis Dep. 78:4-13.

844. Flex-N-Gate took the presses to Mexico. PX-0096-0004 (the Ohio sales tax exemption form indicates that the press was being transported to Mexico); *see also* Sofikitis Dep. 78:14-79:4.

845. In addition, the movement of the 2 C-sized transfer presses with a combined installed cost of $18.8 million are also similar to the TP-14 Transfer Press.

846. The TP-14 Danly Transfer Press is not a fixture. Goesling Decl. ¶ 362.

ii. Transfer Press (Representative Asset No. 29)

847. Representative Asset No. 29 was located at GM Metal Fabricating Division (Grand Rapids and is a two ram transfer press. JPTO Stipulated Facts ¶ 102.

848. The GG-1 press was put into service in September 1989 and had an installed cost of $11,340,238.

849. Representative Asset No. 29 was left with Old GM and not included in the 363 sale.

850. It was sold by Maynards and Hilco in 2010. JPTO Stipulated Facts ¶ 102; Miller Test. 1137:3-11. It was sold with an electronic transfer rail system, and an end of line conveyor system as a single item (called a "lot") at the equipment auction of the Grand Rapids plant in November 2010 for $275,000 (excluding a 13.5% buyer's premium). *See* PX-0094 (Asset list for Grand Rapids Auction); Goesling Decl. ¶ 365.

851. Each press station of the GG1 Clearing Transfer Press would have had essentially the same construction characteristics as the Danly Tryout Press, although with a lower pressing capacity (3,000 and 1,500 tons for GG1 vs. 4,000 tons for the Tryout Press), and it is likely that each press station of the GG1 Clearing Transfer Press had the same basic components as the Tryout Press—a bed and rolling bolsters, uprights, a slide, and a crown with top side drive system. Goesling Decl. ¶ 366.

852. It is also likely that the GG1 Clearing Transfer Press was mounted on concrete piers in a pit; attached to the piers with threaded rod, and had electrical connections and utility piping similar to the Tryout Press. Goesling Decl. ¶ 366.

853. Mr. Miller concedes it would be unlikely that a buyer of Grand Rapids would want the GG-1 press left in place. Miller Test. 1138:6-22.

854. Representative Asset No. 29 was sold to Diamond Press Solutions for $275,000. Sofikitis Dep. 60:4-11, 61:1-4 (referencing PX-0094, Lot number 610).

855. Diamond Press Solutions is a press dealer and so it likely bought Representative Asset No. 29 for inventory or it had a customer already lined up. Sofikitis Dep. 66:14-19.

856. Because Representative Asset No. 29 was purchased by a press dealer, it suggests the press was removed for reuse. Sofikitis Dep. 69:22-70:1. However, that is not entirely clear because the relatively low price suggests scrap value. Goesling Decl. ¶ 369.

857. The GG1 Clearing Transfer Press is not a fixture. Goesling Decl. ¶ 368.

2. The Robots Among the Representative Assets Are Not Fixtures

858. The robots among the Representative Assets are substitutable assets. Goesling Test. 3060:20-23. The "very nature of a robot is that it is highly adaptable to many purposes." Goesling Test. 3060:24-3061:11. A robot is a "programmable device, so the ultimate functionality of it depends on what the user wants it to be." Goesling Test. 3060:24-3061:11.

859. There are a remarkable number of potential uses for a robot – for example, robots can move parts from one place to another, apply adhesives, locate parts in a jig for welding purposes, perform welding operations, and serve many other functions. Goesling Test. 3060:24-3061:11.

860. Robots can be removed in as little as two hours, Thomas Test. 837:7-838:17, and, in general, can be removed in a day, Sofikitis Dep. 97:7-18.

861. Even after robots are installed, they can be relocated and reprogrammed for other uses. Thomas Test. 843:14-16; 842:25-843:4. "[A]s long as the robot is operating within its specified range of movement, weight capability and specification, there's really no restrictions on where you could use and place" a robot. Thomas Test. 843:17-22.

862. There is a robust secondary market for robots. Maynards, for example, has experience selling thousands of robots. Sofikitis Dep. 97:1-4. In 2009 alone, Hilco sold hundreds and possibly thousands of robots. Levy Dep. 60:18-61:1.

863. In July or August 2016, in connection with its work selling GM's surplus assets from plants that remain in operation, Maynards sold 100 robots out of GM's Romulus facility because of a line changeover. Sofikitis Dep. 100:8-15.

864. There are a total of four robots that are among the 40 Representative Assets: (1) the Opticell – Robotic Measurement System (Representative Asset No. 10); (2) the Body Shop Robot LAZN-150R1 (Representative Asset No. 12); (3) the Fanuc M-710IB/70T Robot – Assembly (Representative Asset No. 22); and (4) the CB 91 Robot (Representative Asset No. 39). Representative Asset No. 39, the CB 91 Robot, is discussed above at paragraphs 608 to 628, and the remaining robots are discussed below.

a. Opticell – Robotic Measurement System (Representative Asset No. 10)

865. Representative Asset No. 10, Opticell – Robotic Measurement System, is a robotic measuring system that uses white light scanning technology to check a sampling of the finished stamped metal panels for quality assurance purposes. JPTO Stipulated Facts ¶ 83.

866. Representative Asset No. 10 was put into service in March 2006 and had an installed cost of $630,726. JPTO Stipulated Facts ¶ 83.

867. The components of the Opticell – Robotic Measurement System include: a six-axis Fanuc model R2000iA 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. Goesling Decl. ¶¶ 86, 87; JX-1103.

868. The various components of the Opticell – Robotic Measurement 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. Goesling Decl. ¶ 90.

869. The robot itself is bolted to a pedestal, which is in turn secured to a trolley with Allen bolts; the trolley is not itself connected to the building and moves freely along a slide system metal rail that is lag bolted to the floor. Goesling Decl. ¶ 90; JX-1105.

870. The hydraulic lift is attached to the floor with lag bolts and the cart mounted on it has castor wheels for movement. Goesling Decl. ¶ 90; JX-1104.

871. A system control panel, which operates the scanning system and robot together, is attached by a handful of lag bolts to the floor and has eye bolts mounted on the top as lift points. Goesling Decl. ¶¶ 87, 90; JX-1111.

872. In 2016, GM relocated Representative Asset No. 10 within the Lansing Regional Stamping facility as part of the expansion of the body shop at Lansing Delta Township Assembly. Miller Decl. ¶ 158; Stevens Test. 425:6-17; Goesling Decl. ¶ 91.

873. The relocation of Representative Asset No. 10 took place over a weekend. Miller Test. 1223:20-1225:3.

874. Such intra-plant relocation confirms that the Opticell – Robotic Measurement System can be removed, moved, and reinstalled without damage to the asset or the building and also indicates that GM treated the asset as a moveable asset that could be relocated and redeployed as necessary to meet production needs. Goesling Decl. ¶ 91.

875. By the time the OptiCell Measuring System was installed in 2006, GM already had an established practice of moving die measuring systems, like this asset. Goesling Decl. ¶ 92; *see also* PX-0154.

876. Between 2009 and 2015, GM moved approximately 20 similar assets between its various facilities. *See* PX-0022C-- Asset #10-0001; Goesling Decl. ¶ 93.

877. Two of these asset movements resulted from GM's consolidation of its die manufacturing to GM MFD Flint Tool and Die. This consolidation required GM to relocate tool and die equipment (including an Opticell and, likely, an Optigo). Miller Decl. ¶¶ 160, 161. The other similar assets that were moved came from closed or idled plants. Miller Decl. ¶ 159.

878. There is a secondary market for the robot and slide rail system that are part of the OptiCell Measuring System. Goesling Decl. ¶ 94.

879. Finally, the EOL system for the Schuler Transfer Press (Representative Asset No. 32), which contains two floor-mounted robots that are similar to the robot that is part of the OptiCell Measuring System, is the subject of the same lease as the Schuler Transfer Press, even

though it has a separate eFAST entry. Goesling Decl. ¶ 95. The language in the leases requiring GM to maintain the robots that are part of the EOL system as personal property is consistent with Plaintiff's conclusion that the similar robot in the OptiCell Measuring System is also personal property. Goesling Decl. ¶ 95; PX-0283-0071 (listing three Asset IDs as being covered by the lease, including BUYR503471FA (AA-11 Schuler Press End of Line)).

880. GM classified Representative Asset No. 10 as personal property for tax classification purposes. Goesling Decl. ¶ 89; *see also* PX-0231.

881. Representative Asset No. 10 is not a fixture. Goesling Decl. ¶ 89.

b. Body Shop Robot LAZN-150R1 (Representative Asset No. 12)

882. Representative Asset No. 12, the Body Shop Robot LAZN-150R1, is a framing robot that is installed on an overhead structure. JPTO Stipulated Facts ¶ 85. 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. Goesling Decl. ¶ 147.

883. Representative Asset No. 12 is one of a dozen robots in the outer body framing station in the body shop that apply spot welds to join together body panels into a complete vehicle body outer frame. Goesling Decl. ¶ 147; *see also* JPTO Stipulated Facts ¶ 85.

884. The Body Shop Robot LAZN-150R1 consists of a single Fanuc model R-2000iA/200R six-axis robot, a six-inch high riser, and a mounting plate. Goesling Decl. ¶ 146.

885. Representative Asset No. 12 was put into service in November 2006 and had an installed cost of $27,526. JPTO Stipulated Facts ¶ 85.

886. The robot is bolted to the riser plate, and the riser is in turn bolted to the mounting plate with eight bolts. Goesling Decl. ¶ 147.

887. The Fanuc RJ3iB robot controller is mounted on casters and is also equipped with forklift carrying tubes to aid in transporting the asset. Goesling Decl. ¶ 148.

888. Incoming electrical power is supplied from an overhead bus duct via loose flexible cabling to a quick disconnect fitting at the cabinet. Goesling Decl. ¶ 148. The controller then feeds power and data to the robot by loose cabling contained in reconfigurable metal cable trays. Goesling Decl. ¶ 148. The data and control wiring also utilizes quick disconnect fittings for easy separation. Goesling Decl. ¶ 148.

889. The overhead mounting position makes removal of Representative Asset No. 12 slightly more difficult than a robot mounted on the floor, but the bolts can be removed and the robot easily lifted out of position without damage to either the asset or the building. Goesling Decl. ¶ 152.

890. The Body Shop Robot LAZN-150R1 is one of approximately 800 robots in the body shop and, as with most robots, is designed to be an interchangeable component within a larger process. Goesling Decl. ¶ 153; Goesling Test. 3059:7-11.

891. There were 1507 asset entries related to assets similar to the Body Shop Robot LAZN-150R1, with an installed cost of approximately $27 million that were transferred by GM between 2009 and 2015. PX-0022C -- Asset #12-0021(row 10607). These entries included over 1,000 similar robots, which were reused by GM between facilities, 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. *See* PX-0022C -- Asset #12-0001-0021; Goesling Decl. ¶ 154. GM's Orion, Fairfax, Lansing Grand River, and Spring Hill facilities are all currently operating plants. Goesling Test. 3063:22-3064:13; Stevens Test. 308:10-19 (discussing which car models were made in Fairfax in the 2009/2010 timeframe).

892. In addition, GM relocated over 150 of the Fanuc R-2000iA model robots to GM's Hamtramck Assembly facility between 2009 and 2015. *See* PX-0022C --Asset #12-0001-0021; Goesling Decl. ¶ 154.

893. There is an active secondary market for similar robots. Goesling Decl. ¶ 155. For example, in connection with the Maynards and Hilco sales as part of the RACER Trust liquidation, there were approximately 740 robot lot items that were sold, including 24 Fanuc R-2000iA model robots at auction. *See* PX- PX-0348B - Asset 12, 39-0001 to 0023; Goesling Decl. ¶ 155.

894. Mr. Goesling's Retirement Analysis illustrated that GM retired 4 robots similar to the BS Framing Robot less than 5 years after their initial installation. PX-0020 (Asset IDs BF511500601B, FF8103165, FF8103163 01, and FF8103167 01). The Defendants estimate the useful life of the BS Framing Robot to be 10 years. Stevens Decl. ¶ 315. These robots were installed at a total cost of $240,000 and were retired in 2005, four years prior to GM's bankruptcy.

895. Finally, the EOL systems for the Schuler Transfer Press (discussed above), which are the subject of the same lease as the press, contain two robots that are floor-mounted robots similar to the Body Shop Robot LAZN-150R1. Goesling Decl. ¶ 156. Accordingly, the language in the lease mandating that the assets be treated as personal property and allowing for removal in the event of default is consistent with the conclusion that GM intended equipment similar to the Body Shop Robot LAZN-150R1 to be treated as personal property, and not a fixture. Goesling Decl. ¶ 156.

896. GM classified Representative Asset No. 12 as personal property for tax classification purposes. Goesling Decl. ¶ 150; *see also* PX-0231.

897. Representative Asset No. 12 is not a fixture. Goesling Decl. ¶ 150.

c. Fanuc M-710IB/70T Robot – Assembly (Representative Asset No. 22)

898. Representative Asset No. 22, Fanuc M-710IB/70T Robot – Assembly, which is located at Warren Transmission, is a Fanuc robot mounted on a gantry rail. JPTO Stipulated Facts ¶ 95. The asset is used to move gears within a subassembly process before the finished gears are sent to the transmission assembly line. JPTO Stipulated Facts ¶ 95.

899. Representative Asset No. 22 was put into service in July 2007 and had an installed cost of $270,101. JPTO Stipulated Facts ¶ 95.

900. The components of the Fanuc M-710IB/70T Robot – Assembly are a Fanuc six-axis robot, a Gantry rail, and a Fanuc robot controller. Goesling Decl. ¶ 277.

901. 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. Goesling Decl. ¶ 280. The three columns support the approximately 50-foot-long horizontal Gantry rail using right angle brackets and various Allen bolts. Goesling Decl. ¶ 280; *see also* JX-1309. The Gantry installation does not require any bracing or support from the building structure. Goesling Decl. ¶ 280.

902. 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. Goesling Decl. ¶ 280; *see also* JX-1314. Electrical wiring is fed to the robot through loose wiring contained in an open cable tray on top of the Gantry rail. Goesling Decl. ¶ 280; *see also* JX-1308.

903. The robot controller is mounted on casters, and has top-mounted eye-bolts, designed as lift points in the event the controller needs to be lifted or removed. Goesling Decl. ¶ 280; *see also* JX-1307; Deeds Test. 618:19-619:5. The power and data feeds to and from the

controller utilize loose cabling and quick disconnect fittings for easy separation. Goesling Decl. ¶ 280.

904. There are numerous assets similar to Representative Asset No. 22 at Warren Transmission. Deeds Test. 623:9-13.

905. GM itself has moved similar robots and other Gantry systems. PX-0022C -- Asset #22-0001 (showing the transfer of 54 asset line items similar to gantry mounted robots from one GM plant to another between 2009 and 2015). The assets described in these 54 line items were transferred from GM's Fairfax Assembly, Spring Hill Assembly, Lansing Grand River Assembly, and Orion Assembly facilities. PX-0022C-- Asset #22-0001 (rows 700 through 4532). All of these assembly plants are currently operating facilities. Goesling Test. 3063:22-3064:13; Stevens Test. 308:10-19 (discussing which car models were made in Fairfax in the 2009/2010 timeframe).

906. There is a secondary market for robots similar to the Fanuc M-710IB/70T Robot – Assembly. Goesling Test. 3070:19-21. The Maynards and Hilco auction data identifies 25 individual gantry rail-mounted robots that were auctioned, including 4 robot gantry systems fitted with Fanuc M710iB model robots with rail lengths of approximately 75-85 feet. PX-0348B – Asset 22-0002, rows 14794 through 14797. One can purchase assets similar to Representative Asset No. 22 on eBay. Deeds Test. 624:8-625:24; PX-0530.

907. The Retirement Analysis shows that GM retired assets associated with 5,523 asset entries similar to the Fanuc M-710IB/70T Robot – Assembly between 2004 and 2009 with a total installed cost of $169 million. PX-0020. The weighted average age upon retirement for this group of asset entries is 12 years, as compared to Defendants' estimate of the useful life of the Robot Gantry System of 20 years. Deeds Decl. ¶ 214.

908. GM classified Representative Asset No. 22 as personal property for tax classification purposes. Goesling Decl. ¶ 279; *see also* PX-0231.

909. Representative Asset No. 22 is not a fixture. Goesling Decl. ¶ 279.

3. The Machining Equipment Assets Are Not Fixtures

910. The Helical Broach (Representative Asset No. 36), the Liebherr Hobb Machine from St. Catharines (Representative Asset No. 25), and the Base Shaping Machine (Representative Asset 24) are all types of machining equipment. Goesling Test. 3085:6-19.

911. Machining equipment mills rough castings. Goesling Test. 3086:3-14.

912. All three Representative Assets that are machining equipment are Computer Numerically Controlled, or "CNC," machines used to cut gear teeth on a steel gear blank for use in GM transmissions. JPTO Stipulated Facts ¶ 109 (Helical Broach); JPTO Stipulated Facts ¶ 98 (Liebherr Hobb); JPTO Stipulated Facts ¶ 97 (Base Shaping Machine).

913. All three machines are located in the same gear area at Warren Transmission. *See, e.g.*, DDX-0103.

914. The floor for this area of the Warren Transmission building was not poured specifically for these assets. Deeds Test. 626:12-24; Goesling Test. 3110:12-3111:16.

915. GM did not vary the thickness of the floor depending on the needs of the particular machinery and equipment installed. Deeds Test. 627:11-628:2.

916. Instead, throughout the gear area there is a 12-inch thick floor. Deeds Test. 627:8-627:10; Goesling Test. 3110:12-3111:16.

917. The Warren Transmission building was in existence long before these Representative Assets were installed. Deeds Test. 633:2-5 (discussing in reference to Helical Broach).

918. The building was not designed to accommodate these specific assets. Deeds Test. 631:25-632:16 (discussing in reference to Helical Broach); Deeds Test. 633:17-23 (gear area is part of the original 1941 portion of Warren Transmission).

919. For example, the roof of the Warren Transmission building was not changed in any way to accommodate the height of these assets. Deeds Test. 633:6-9 (discussing in reference to Helical Broach).

920. The portion of Warren Transmission with adequate ceiling height is approximately 100,000 square feet. Deeds Test. 633:24-634:2.

921. And the machining assets occupy only a small fraction of this portion of the building. PX-0225-0006 (Helical Broach manual estimates approximately 725 square feet); Deeds Test. 633:10-16 (Deeds estimates approximately 300 square feet).

922. Machining equipment is generic and is used in many different types of industries, including aerospace and bearing manufacturing facilities. Goesling Test. 3087:9-3088:7.

923. There is a robust secondary market for this type of equipment. CNC Machining centers, like the three Representative Assets, are easily sold, depending on their size and age. Levy Dep. 35:17-19, 160:23-161:6.

924. When selling machinery and equipment for MLC and the RACER Trust, Hilco and Maynards considered these assets to be in Group One, equipment that was easiest to sell. Levy Dep. 35:6-16; Sofikitis Dep. 44:17-22.

925. In fact, Hilco had a separate marketing distribution list for buyers who were interested in CNC equipment. Levy Dep. 15-9-12.

926. Machining equipment is generally easier to remove than larger assets such as presses and even larger machining assets take no more than one to two weeks to remove. Sofikitis Dep. 95:21-96:4 (referencing the machining equipment pictured in PX-0092-0004).

927. Instead, these three Representative Assets are installed at floor level, making these assets less expensive and easier to remove. Deeds Test. 635:16-24 (discussing in regard to Helical Broach).

928. GM moved one of these CNC machines, Representative Asset No. 25 the Liebherr Hobb, between its facilities, as discussed below at paragraphs 967 to 971.

929. Further, GM classified all three of these representative assets as personal property on its Michigan tax forms. PX-0231.

a. Helical Broaching Equipment (Representative Asset No. 36)

930. The Helical Broach was put into service in June 2006 with an installed cost of $1,472,023. JPTO Stipulated Facts ¶ 109.

931. The main components of the asset include a broaching machine, a standalone control and electrical cabinet, a chip conveyor and filtration system, a hydraulic powerpack, and a centralized lubrication system. JX-1550; Goesling Decl. ¶ 299.

932. 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. JX-1541; Goesling Decl. ¶ 302; Deeds Test. 629:4-631:10.

933. Other than a few minor attachments, Representative Asset No. 36 is held in place by its weight and size alone. Deeds Test. 630:21-631:7; Goesling Decl. ¶ 305.

934. Helical Broaches are less permanently installed now than they were in the past. If GM had purchased and installed Representative Asset 36 in the 1990s, it likely would have been installed in a pit. Deeds Test. 635:10-635:12; Goesling Decl. ¶ 307.

935. Three small six foot high, self-supporting operator platforms are attached to the Helical Broach with bolts, and the platform legs simply rest on the building floor. Goesling Decl. ¶ 302.

936. All utilities attached to the Helical Broach use connections (such as a bolted flange) that allow for disconnection or modification. Goesling Decl. ¶ 302.

937. The standalone control and electrical cabinet is secured to the building floor by lag bolts. Deeds Test. 630:21-631:7; Goesling Decl. ¶ 303.

938. The control and electrical cabinet was designed and constructed with forklift carrying tubes and top-mounted eye-bolts to assist with movement of the machine. JX-1545; Goesling Decl. ¶ 303.

939. Next to the control cabinet is a small transformer that is secured to the building floor by lag bolts. Deeds Test. 630:21-631:7.

940. The hydraulic powerpack, which sits next to the Helical Broach, is mounted on vibration pads that simply rest on the building floor. JX-1541. Goesling Decl. ¶ 304.

941. A central lubrication pumping unit is attached to the side of the hydraulic powerpack reservoir, and connected to the broaching machine with flexible hose. JX-1548. Goesling Decl. ¶ 304.

942. Finally, a coolant filtration system with a chip conveyor is bolted to the side of the Helical Broach and runs on the building floor between the Helical Broach and the control cabinet. Goesling Decl. ¶ 304; JX-1547.

943. The coolant filtration system is designed as a modular unit that can provide filtration services to many different machining operations. Goesling Decl. ¶ 305.

944. There is another helical broach at Warren Transmission that is very similar to Representative Asset No. 36. Deeds Test. 634:15-18.

945. If there were to be a reduced production demand at Warren Transmission, then it could make economic sense to relocate one of the two helical broaching machines. Deeds Test. 635:5-9.

946. Representative Asset No. 36 could be removed from Warren Transmission without damage to either the asset or the facility. Goesling Decl. ¶ 301.

947. 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. Goesling Decl. ¶ 308.

948. For example, GM has previously relocated similar assets, including a Crankshaft Turn Broach (Asset ID NSA203568) that was moved from GM's Flint Engine North facility to GM's Spring Hill facility. PX-0022 (Transfer Analysis). Goesling Decl. ¶ 308.

949. GM also transferred four other individual broaching machines with costs ranging from $275,000 to $940,000 from its Willow Run and Livonia facilities to its Toledo and Tonawanda facilities. PX-0022C -- Asset #36-0001 (rows 467, 9278, 9283, and 9292).

950. In the 2006 auction sale from a plant known as Manual Transmission of Muncie (a GM-owned company), eleven broaches were offered for sale and some were sold. PX-0348B (Asset #36-0001, rows 276 through 286). PX-0184 (Maynards Industries auction advertisement); Goesling Decl. ¶ 308.

951. The 2010 auction of GM's Willow Run facility resulted in the sale of seven similar broaches. PX-0348B (Asset #36-0001, rows 288 through 294). Three of the seven were

re-purchased by GM and relocated to GM plants in Mexico or the United States. PX-0103 (List of assets to be sold at auction at Willow Run Transmission held on 8/3/2010). Goesling Decl. ¶ 308.

952. Retirement data shows that GM retired assets related to 295 asset entries similar to the Helical Broach between 2004 and 2009 with a total installed cost of $28 million. PX-0020.

953. The weighted average age upon retirement for the assets associated with this group of asset entries is 14 years. The useful life of the Helical Broach is 25 years, according to Defendants. Deeds Decl. ¶ 214.

954. The Helical Broach, Representative Asset No. 36, is not a fixture. Goesling Decl. ¶ 301.

b. Liebherr Hobb Machine from St. Catharines (Representative Asset No. 25)

955. The Liebherr Hobb 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 to load and unload parts. JX-1368; JX-1373; JX-1381; Goesling Decl. ¶ 309.

956. The exit conveyor belt is completely separate from the main conveyor belt and is connected to the main conveyor with nut and bolt fasteners. Goesling Decl. ¶ 313; JX-1383.

957. The exit conveyor frame is constructed of modular aluminum extrusions that allow for multiple configurations and various interchangeable parts. Goesling Decl. ¶ 313; JX-1375; JX-1376.

958. The pieces of tubing are connected by machine bolts and brackets. Goesling Decl. ¶ 313.

959. The gear hobbing machine, which is the largest component of Representative Asset No. 25, rests in a drip pan that lays on the building floor—the machine is not affixed to the building floor in any way. JX-1371; Goesling Decl. ¶ 314.

960. The hydraulic powerpacks rest on the building floor without attachment. JX-1373; JX-1374; Goesling Decl. ¶ 315.

961. The HMI control cabinet is attached to the floor with bolts through L-shaped brackets. JX-1370; JX-1384; Goesling Decl. ¶ 315.

962. The exit conveyor is attached to the frame of the gear hobbing machine in four places (two on each side of the conveyor) for stability. JX-1375; JX-1376; Goesling Decl. ¶ 315.

963. Certain sections of the conveyor frame are stabilized by a bracket that is affixed to the building floor with a lag bolt. JX-1382; JX-1383; Goesling Decl. ¶ 315.

964. In addition, certain components of the Liebherr Hobb (the HMI control cabinet and the hydraulic powerpacks) were designed with eye-bolts or lifting brackets to assist with relocation of the machinery. *See* JX-1372; JX-1373; Goesling Decl. ¶ 315.

965. 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. *See* JX-1367; JX-1369; Goesling Decl. ¶ 315.

966. Representative Asset No. 25 was manufactured in 2005. Deeds Test. 694:24-695:18.

967. The asset was installed and used in Old GM's St. Catharines, Ontario facility from 2005 to late 2007. Goesling Decl. ¶ 312; Deeds Test. 517:21-518:7.

968. Two years after GM purchased the asset for use at GM's St. Catharines facility, the asset was transported and installed for use at Warren Transmission. Deeds Test. 513:23-514:23; Goesling Decl. ¶ 312.

969. There is a preventative maintenance record for Representative Asset No. 25 from Warren in December 2007. Deeds Test: 693:18-694:17.

970. The installation date for Representative Asset No. 25 in at Warren Transmission is January 1, 2008 with an installed cost of $1,192,377. Deeds Test. 693:18-694:17; JPTO Stipulated Facts ¶ 98.

971. Defendants concede that the Liebherr Hobb was moved from St. Catharines before the end of its useful life. Deeds Test. 513:23-514:23 (asset moved after two years at St. Catharines); Deeds Test. 694:18-23 (Deeds assigned a 25 year useful life to this asset).

972. GM has relocated 14 machines similar to the Liebherr Hobb from one GM facility to another between 2009 and 2015. PX-0022C -- Asset #25-0001; Goesling Decl. ¶ 312.

973. The total original installed cost of these 14 transferred machines was $8 million. PX-0022C -- Asset #25-0001.

974. There is an active secondary market for gear hobbers and other similar machining tools, evidenced by the fact that there were 214 individual GM shaving and hobbing machines that were sold by Maynards and Hilco from approximately 2006 to 2012. *See* PX-0348B; Goesling Decl. ¶ 313.

975. Retirement data shows that GM retired assets associated with 447 asset entries similar to the CNC Gear Hobber between 2004 and 2009 with a total installed cost of $54 million. PX-0020.

976. The weighted average age upon retirement for the assets associated with this group of asset entries is 13 years. Defendants estimate the useful life of the CNC Gear Hobber to be 25 years. Deeds Decl. ¶ 214.

977. The Liebherr Hobb, Representative Asset No. 25, is not a fixture. Goesling Decl. ¶ 311.

c. LFS220 Base Shaping Machine-Op 20 Transfer Drive Gear (Representative Asset No. 24)

978. Representative Asset No. 24 is a CNC Gear Shaper that was put into service in December 2007 and had an installed cost of $1,050,540. JPTO Stipulated Facts ¶ 97.

979. The main components of the asset include the gear shaping machine, a control panel, a hydraulic power pack, and an entry/exit conveyor section. JX-1350; Goesling Decl. ¶ 292.

980. The CNC Gear Shaper is mounted on a number of vibration isolation pads that rest in a drip pan that is sitting on the building floor without further attachment. JX-1354; JX-1349; Goesling Decl. ¶ 295.

981. The connection between machine and pad serves to control vibrations, not to attach the machine to the floor. Goesling Decl. ¶ 295.

982. 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. JX-1355; JX-1347; Goesling Decl. ¶ 296.

983. 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. JX-1348; Goesling Decl. ¶ 296.

984. 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. JX-1351; Goesling Decl. ¶ 296.

985. Next to the control cabinet is a small transformer that is secured to the building floor by lag bolts. JX-1351; Goesling Decl. ¶ 297.

986. 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 to the floor by single lag bolts. JX-1353; Goesling Decl. ¶ 297.

987. 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. Goesling Decl. ¶ 297.

988. Hydraulic fluid is pumped to the CNC Gear Shaper through small diameter piping and attached using threaded compression fittings. JX-1356; Goesling Decl. ¶ 297.

989. GM has previously relocated 14 individual gear shaping machines (with capitalized costs from $290,000 to $900,000) from one plant to another between 2009 and 2015. PX-0022 (Transfer Analysis); Goesling Decl. ¶ 298.

990. Four out of the 14 similar gear shaping machines, representing a total initial investment of over $2 million, were transferred as of 2010, three years after their original purchase and installation. PX-0022C--Asset #24-0001(rows 472 through 726).

991. There is an active secondary market for assets similar to the CNC Gear Shaper illustrated by the sale of over 100 individual GM gear shaping machines by Maynards and Hilco from approximately 2006 to 2012. *See* PX-0348B; Goesling Decl. ¶ 298.

992. Retirement data shows that GM retired assets associated with 504 asset entries similar to the CNC Gear Shaper between 2004 and 2009 with a total installed cost of $74 million. PX-0020.

993. The weighted average age upon retirement for this group of assets is 10 years whereas the Defendants estimate the CNC Gear Shaper to have a 25 year useful life. Compare PX-0020 with Deeds Decl. ¶ 214 (stating 25 year useful life).

994. The CNC Gear Shaper is not a fixture. Goesling Decl. ¶ 294.

4. The Conveyors Among the Representative Assets Are Not Fixtures

995. There are eight conveyors included among the Representative Assets.

996. Two of the conveyors are at Warren Transmission: Power Zone Roller Conveyor (Representative Asset No. 3) and Button Up and Test Conveyor (Representative Asset No. 35).

997. Five of the conveyors are at Lansing Delta Township Assembly: Paint Dip Conveyor (Representative Asset No. 6); Skid Conveyor (Representative Asset No. 16); P&F Conveyor (Representative Asset No. 17); Wheel & Tire Delivery Conveyor (Representative Asset No. 20); Skillet Conveyor System (Representative Asset No. 21). The Paint Dip Conveyor is discussed above in paragraphs 1143 to 1158 in relation to the paint assets.

998. One of the conveyors is at Defiance: Core Delivery Conveyor (Representative Asset No. 26). This conveyor is discussed above in paragraphs 649 to 674 in relation to the discussions of the Defiance assets.

999. In addition, part of the build line with foundation, discussed below at paragraphs 1288 to 1305, was an assembly line conveyor.

1000. In terms of relative ease of removal, conveyors fall along a spectrum with floor conveyors on the easier end and overhead conveyors on the more difficult end. Levy Dep. 31:2-21; Goesling Decl. Ex. D (Conveyor System Chart); Sofikitis Dep. 221:14-20, 221:22-25 (stating difficulty in removal depends on size and how it is located).

1001. Mr. Sofikitis testified that conveyors that are not in pits or underground are not that difficult to remove, as they only take days or weeks to remove. Sofikitis Dep. 221:14-222:3.

1002. Even for the conveyors that are easier to remove, there is not always a market for them because buyers often prefer configuring a new system rather than trying to piece together used pieces. Sofikitis Dep. 217:8-20, 241:16-22.

1003. All of the conveyors owned by GM are constructed from sections. Stevens Test. 106:11-107:6, 176:20-177:2; Deeds Test. 605:5-18.

1004. GM configures the conveyors to meet its particular process needs. For example, the significant length of the Wheel & Tire Delivery Conveyor (Representative Asset No. 20) is due to where the wheel and tire inflate machine (Representative Asset No. 15) was positioned in relation to the final line. Stevens Test. 160:24-161:16.

1005. In another example, the button up test conveyor is configured in a path so that it can transport transmissions on pallets to all of the test stands. Stevens Test. 538:11-539:14.

1006. In another example, the power zone conveyor, Representative Asset No. 3, was configured with only two or three foot long modular sections because GM's CNC machining centers were only two or three feet apart. Deeds Test. 607:3-12.

1007. When the three-speed was removed at GM's Windsor facility in 1993, the conveyor that was part of the three-speed was removed. Deeds Test. 573:12-574:19.

1008. The arrangement of the CNC machining centers and thus the arrangement of the conveyor were driven by the product that GM was making. Deeds Test. 607:13-23.

1009. Windsor was not shutting down. Deeds Test. 574:5-7.

1010. The conveyor that had been part of the three-speed was removed after 13 years, well before the average useful life of 20 to 25 years assigned to conveyors by Defendants' experts. Deeds Decl. ¶ 214 (estimating a 20-year useful life for the Power Zone Conveyor (Representative Asset No. 3) and the Button Up Conveyor System (Representative Asset No. 35)); Stevens Decl. ¶ 315 (estimating a 25-year useful life for the Body Shop – Skid Conveyor (Representative Asset No. 16), the Body Shop – Overhead Power and Free Conveyor (Representative Asset No. 17), the Wheel & Tire Conveyor (Representative Asset No. 20), and the General Assembly – Final Line Skillet Conveyor (Representative Asset No. 21)).

1011. GM categorizes conveyors as personal property in its tax filings. PX-0231.

1012. Although some conveyors are easier to categorize than others, all of the conveyors at issue are not fixtures. Goesling Decl. ¶¶ 125, 133, 140, 144, 184, 249, 255, and 319.

a. Floor Conveyors

1013. The floor conveyors include the Skillet Conveyor (Representative Asset No. 21) at Lansing Delta Township Assembly and the Power Zone Roller Conveyor (Representative Asset No. 3) and Button Up and Test Conveyor (Representative Asset No. 35) at Warren Transmission.

1014. The three floor conveyors are freestanding, making them more portable and saleable. Levy Dep. 31:2-12.

1015. Additionally, there are instances where GM has added 200 feet to a similar floor conveyor, Stevens Test. 423:7-424:17 (confirming GM increased the length of the conveyor

under the framing robots at Lansing Delta Township Assembly), demonstrating the flexibility and reconfigurability of the floor conveyors.

i. Button Up and Test Conveyor System (Representative Asset No. 35)

1016. The Button up and Test Conveyor System, located at Warren Transmission, is a conveyor system that moves transmissions through the final leg of the transmission assembly and testing process. JPTO Stipulated Facts ¶ 108.

1017. The asset was put into service in June 2006 and had an installed cost of $2,689,706. JPTO Stipulated Facts ¶ 108.

1018. The components of Representative Asset No. 35 include 18-inch-wide powered friction roll conveyor modules, rotary tables, elevator and lowerator sections, a control panel, and a human machine interface. JX-1523. Goesling Decl. ¶ 253.

1019. The Button Up and Test Conveyor is 340 total linear feet of conveyor and assembled from conveyor frame modules that are approximately 25 feet long. Goesling Decl. ¶ 257.

1020. Each module contains an independent drive unit and leg supports and is linked to the other conveyor sections with bolted connector plates which permit simplified reconfiguration or relocation. JX-1525; Goesling Decl. ¶ 257.

1021. Representative Asset No. 35 is lag bolted to the floor, including the conveyor sections, JX-1527; the rotary tables, JX-1531; and the control panel, JX-1524; Goesling Decl. ¶ 256.

1022. Incoming electrical power to the controller is supplied from an overhead bus duct through metal conduit. Goesling Decl. ¶ 256.

1023. The controller feeds power and data to the Button Up and Test Conveyor by loose cabling and, in certain places, quick disconnect fittings. JX-1525; JX-1527; Goesling Decl. ¶ 256.

1024. GM previously relocated a button up and test conveyor system from Willow Run to GM Toledo. PX-0022 (Transfer Analysis); Goesling Decl. ¶ 259.

1025. Defendants' expert testified about how he oversaw the temporary removal of a section of a conveyor similar to Representative Asset No. 35 for purposes of installing a new piece of equipment on the production line. Deeds Test. 563:19-564:8.

1026. When an automatic shim station had to be installed at Romulus to replace a manual station, a conveyor similar to the button up and test conveyor was modified. Deeds Test. 562:14-17.

1027. Two sections of the conveyor were unbolted and one section was rotated out. Deeds Test. 562:18-24.

1028. The new automatic shim station was installed and the conveyor section was rotated back in and bolted back into place. Deeds Test. 562:25-563:9.

1029. The whole process, from rotating the conveyor to installing a new station to debugging and testing the new station, took only 26 days. Deeds Test. 566:2-25.

1030. The Button Up and Test Conveyor is not a fixture. Goesling Decl. ¶ 255.

ii. Power Zone Roller Conveyor Automation TCH MOD 3 (Representative Asset No. 3)

1031. Representative Asset No. 3, Power Zone Roller Conveyor Automation TCH MOD 3, is located at Warren Transmission and is a powered conveyor system that moves rough transmission housing castings through a number of Computer Numerically Controlled, or

"CNC," milling machines that mill the housings to GM's specifications and then deliver the milled housings to smoothing and testing machines. JPTO Stipulated Facts ¶ 76.

1032. The asset was put into service in February 2007 and had an installed cost of $1,053,051. JPTO Stipulated Facts ¶ 76.

1033. The components of this asset 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 human machine interface ("HMI") control panel. Goesling Decl. ¶ 247.

1034. 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. Goesling Decl. ¶ 247.

1035. The bridges are supported by steel tube legs that are attached to the floor slab with lag bolts. Goesling Decl. ¶ 250.

1036. The bridge supports are connected to the eight foot long bridge track using bolts, and an underhung carriage is attached to the bridge track by four roller track wheels and can easily be removed at either end of the track. JX-1027. Goesling Decl. ¶ 250.

1037. The power zone conveyor is constructed from short two to three foot long modules bolted together. Deeds Test. 605:16-605:21; Goesling Decl. ¶ 250; *see also* PX-0160.

1038. Each modular section has its own drive motor and gearbox. Deeds Test. 605:25-606:6; Goesling Decl. ¶ 250.

1039. The support legs for these roller conveyor sections are attached to the building floor with lag bolts. Goesling Decl. ¶ 250; JX-1034.

1040. The modular sections are configured in a specific way to fit GM's production needs and to fit around the CNC milling machines. Deeds Test. 607:17-23.

1041. The control panel for Representative Asset No. 3 is bolted to the floor. Deeds Test. 608:4-8.

1042. The eye bolts on top of the control panel make it easier to both install and remove the control panel. Deeds Test. 608:15-609:5; Goesling Decl. ¶ 250.

1043. It would take only four weeks to remove the power zone conveyor for reuse. Deeds Test. 609:11-21.

1044. Electrical power and data are fed to the conveyor sections through wiring in cable trays attached to the conveyor frame, allowing for reconfiguration and disconnection. JX-1028; Goesling Decl. ¶ 251.

1045. Incoming electrical power is supplied from an overhead bus duct via loose cabling and also connected by quick disconnect fittings. Goesling Decl. ¶ 251.

1046. GM has previously relocated assets associated with six asset entry line items similar to this asset between 2009 and 2015. PX-0022 (Transfer Analysis); Goesling Decl. ¶ 252.

1047. Retirement data shows that GM retired assets associated with 821 asset entries similar to the Torque Converter Housing Conveyor System between 2004 and 2009 with a total installed cost of $27 million. PX-0020.

1048. The weighted average age upon retirement for this group of asset entries is 11 years, significantly less than the Defendants' estimated useful life of 20 years. Deeds Decl. ¶ 214.

1049. GM retired several multi-zone conveyors less than 10 years after their initial installation. Asset ID NSD57 37273 is described as "AUTOMATION-OP51MA-3 ZONE ROLLER CONVEYOR" and was initially capitalized in 1998 for $500,000. PX-0020, Asset ID NSD57 37273. GM retired this asset just over eight years later in 2006. That is 12 years less than the estimated operational useful life asserted by the Defendants. This specific example is not anomalous when compared with the average retirement age for the overall population of over 821 similar retirement asset entries. PX-0020.

1050. The Power Zone Conveyor is not a fixture. Goesling Decl. ¶ 249.

iii. General Assembly Conveyor: Skillet-Final-Leg 1 (Representative Asset No. 21)

1051. Representative Asset No. 21, General Assembly Conveyor: Skillet-Final-Leg 1, is located at Lansing Delta Township Assembly and transports nearly complete vehicles on skillets through the final assembly process. JPTO Stipulated Facts ¶ 94.

1052. The asset was put into service in November 2006 and had an installed cost of $1,484,980. JPTO Stipulated Facts ¶ 94.

1053. The Skillet Conveyor System 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. Goesling Decl. ¶ 129.

1054. 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 does not have to bend down to attach the part). Goesling Decl. ¶ 129.

1055. 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. Goesling Decl. ¶ 129.

1056. The track consists of two separate, floor mounted rails spaced about five feet apart that are assembled from 20 foot sections bolted to the ground, and bolted together and supported by leveling feet at two foot intervals. JX-1297; Goesling Decl. ¶¶ 130, 134.

1057. One of the track rails provides electrical power and data to the vehicle skillets through bus bars mounted to the side of the rail. Goesling Decl. ¶ 130.

1058. Because the skillets have no drive system, approximately 18 freestanding friction drive rollers are used to propel the skillets along the final assembly line. Goesling Decl. ¶ 130. The drive rollers are attached to the floor with lag bolts. JX-1300; Goesling Decl. ¶ 134.

1059. The control panel is attached to the floor with lag bolts and has two top-mounted eye bolts designed as lift points to assist with moving the unit. JX-1301; Goesling Decl. ¶ 134.

1060. Finally, the connections to the utilities and between control cabinets primarily use quick disconnect fittings (essentially an industrial electric plug) for easy separation. JX-1299; Goesling Decl. ¶ 134.

1061. The Skillet Conveyor System is installed in a pit that is part of a separate Representative Asset (the Pits and Trenches, Representative Asset No. 2, discussed above). Goesling Decl. ¶ 131.

1062. Other than being mounted inside of the shallow pit, the Skillet Conveyor System is the most lightly attached and easiest to remove of the eight conveyance systems. Goesling Decl. ¶ 134.

1063. 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 removed without damage to the asset and sometimes in fact are removed for reuse. *See* PX-0022C--Asset #21-0001 (main asset entries on rows 4901 and 4915); Goesling Decl. ¶ 135; Stevens. Test. 347:8-20.

1064. Spring Hill is not a closed facility and the conveyors were removed from Spring Hill when it was idled for a few years. Stevens Test. 348:7-13.

1065. The conveyors were installed at Orion for reuse to support a new product. Stevens Test. 348:14-349:5.

1066. These two skillet systems were capitalized in 2008 for a total installed cost of $11 million and were transferred from GM's Spring Hill facility sometime between 2010 and 2015. PX-0022C--Asset #21-0001 (rows 4901 through 4916, and 10607).

1067. GM's assembly plant in Spring Hill is currently an operating facility. At the very latest, these two skillet conveyors were transferred from the Spring Hill facility seven years after their original installation. According to Defendants, the expected useful life of the Skillet Conveyor System is 25 years. Stevens Decl. ¶ 315.

1068. Retirement data shows that GM retired assets associated with 37 asset entries similar to the Skillet Conveyor System between 2004 and 2009 with a total installed cost of $38 million. PX-0020.

1069. The weighted average age upon retirement for this group of asset entries is 10 years, far shorter than the Defendants' estimate of a 25-year useful life for the Skillet Conveyor System. Stevens Decl. ¶ 315.

1070. Although removal of the Skillet Conveyor System would leave the open pit in place, because the pit is treated as a separate fixed asset by GM, the pit is not damage to the building. Goesling Decl. ¶ 135.

1071. The Skillet Conveyor is not a fixture. Goesling Decl. ¶ 133.

b. Overhead Conveyors

1072. The overhead conveyors are the Skid Conveyor (Representative Asset No. 16); the P&F Conveyor (Representative Asset No. 17); and the Wheel & Tire Delivery Conveyor (Representative Asset No. 20) all at Lansing Delta Township Assembly. ECF 644.

1073. The overhead conveyors are on the more difficult side of the spectrum of removal and often not saleable because of the cost of removal. Levy Dep. 32:21-24, 146:2-6.

i. Body Shop Skid Conveyor – LAZA (Representative Asset No. 16)

1074. Representative Asset No. 16, Body Shop Skid Conveyor – LAZA, is located at the Lansing Delta Township Assembly and transports skids carrying complete vehicle body frames from the end of the outer framing line, where the outer body frames are welded to the inner body structures, to the start of the area where doors, hoods, lift gates and fenders are added. JPTO Stipulated Facts ¶ 89.

1075. The skids that are transported by the BS Skid Conveyor have been separately capitalized by New GM under Asset ID 100061605 (BS Skid Conveyor – Skids (Qty 265)), PX-0219 (eFAST data 2009); Goesling Decl. ¶ 142.

1076. The asset was put into service in November 2006 and had an installed cost of $2,495,283. JPTO Stipulated Facts ¶ 89.

1077. Representative Asset No. 16 consists of over 1,000 linear feet of powered roller-bed conveyor track assembled from 20-foot long conveyance sections. Stevens Test. 109:2-110:10; Goesling Decl. ¶ 142.

1078. 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 and three of which are mounted on pivoting units, allowing a skid to change direction. JX-1240; Goesling Decl. ¶¶ 142, 145.

1079. Defendants have offered no evidence to prove that the white steel is included in GM's fixed asset ledger as part of this asset and nothing in the eFAST description would suggest that the white steel, which is found throughout the plant, should be capitalized with this specific asset. PX-0219 (Asset ID 100061079).

1080. The BS Skid Conveyor is constructed of modular sections, each with its own roller drive motor. JX-1236; Goesling Decl. ¶ 145.

1081. The skids rest on the rolls, and as the rolls turn, the skid moves forward. Goesling Decl. ¶ 142.

1082. The mezzanine is suspended by steel members that are attached to the building trusses by removable clips. JX-1185; Goesling Decl. ¶ 145.

1083. The mezzanine is also sectional and the pieces are attached together with nuts and bolts. JX-1239; Goesling Decl. ¶ 145.

1084. The power distribution panel and the control panel are attached to the mezzanine floor with bolts and have top mounted eye bolts that serve as lift points for removal. JX-1235; Goesling Decl. ¶ 145.

1085. 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. Goesling Decl. ¶ 145.

1086. All wiring to the roller bed conveyor is connected using quick disconnect plugs and sockets. JX-1232; Goesling Decl. ¶ 145.

1087. Retirement data shows that GM retired 192 assets associated with asset entries similar to the BS Skid Conveyor between 2004 and 2009 with a total installed cost of $34 million. PX-0020.

1088. The weighted average age upon retirement for this group of asset entries is 11 years, shorter than the Defendants' estimate of a 25-year useful life. Stevens Decl. ¶ 315.

1089. An example is Asset ID FB40115759FA, an asset entry described as a "D/B/I SKID CONV SYSTEM-PAINT SHOP," and capitalized for $4.4 million in October 2003. PX-0020, Asset ID FB40115759FA. This asset was retired in early 2008, just over four years after installation. In this case, GM was either aware of the fact that it did not intend to use this asset in place for the entirety of its operational useful life or it was not able to reasonably predict these changes in its business four years in the future.

1090. The BS Skid Conveyor is not a fixture. Goesling Decl. ¶ 144.

ii. Body Shop Power and Free Conveyor – Body Side Inner LH DEL (Representative Asset No. 17)

1091. Representative Asset No. 17, Body Shop Power and Free Conveyor – Body Side Inner LH DEL, is located at the Lansing Delta Township Assembly and transports complete inner body subassemblies for the left side of the vehicle to the inner body framing station, where they are joined to other inner body frame components. JPTO Stipulated Facts ¶ 90.

1092. The asset was put into service in November 2006 and had an installed cost of $1,649,074. JPTO Stipulated Facts ¶ 90.

1093. 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. Goesling Decl. ¶ 138.

1094. Defendants have offered no evidence to prove the white steel is included in GM's fixed asset ledger as part of this asset and nothing in the eFAST description would suggest that the white steel should be capitalized with this specific asset. PX-0219 (Asset ID 100061614).

1095. 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.). JX-1260; Goesling Decl. ¶ 138.

1096. The mezzanine structure is made out of sections fastened together with nuts and bolts and is suspended from the roof trusses with steel members that are attached to the trusses by removable clips. JX-1261; JX-1265; Goesling Decl. ¶ 141.

1097. The majority of the mezzanine 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. JX-1263; Goesling Decl. ¶ 138.

1098. The sections of the conveyor track are connected to each other with nut and bolt fasteners. JX-1262; Goesling Decl. ¶ 141.

1099. The conveyor system is bolted to steel members that are suspended from the roof trusses. JX-1266; Goesling Decl. ¶ 141.

1100. Electrical and data wiring are fed to the chain drive units through loose cabling and quick disconnect fittings are used. JX-1274; Goesling Decl. ¶ 141.

1101. Quick disconnect cabling is used to attach electrical and data cabling to the control cabinets, and the control panels have top mounted eye bolts that serve as lift points. JX-1264; Goesling Decl. ¶ 141.

1102. Retirement data shows that GM retired assets associated with 461 asset entries similar to the BS P&F Conveyor between 2004 and 2009 with a total installed cost of $127 million. PX-0020.

1103. The weighted average age upon retirement for this group of asset entries is 10 years, far shorter than the Defendants' 25-year useful life estimate. Stevens Decl. ¶ 315.

1104. These asset entries are similar to Representative Asset No. 17 based on the descriptions. For example, three asset entries have the following descriptions and installed cost values: 1) Asset ID CJU572985000, the description is *CONVEYOR- LIFTGATE P&F SL-74754 – EPSILON* with an installed cost of $1,782,413; 2) Asset ID CJ1580947, the description is *CONVEYOR POWER & FREE* with an installed cost of $1,836,146; and 3) Asset ID ZVO51112300, the description is *CONVEYOR POWER & FREE* with an installed cost of $2,055,499. PX-0020.

1105. Further, the installed cost of each asset entry is similar to the cost of the BS P&F Conveyor, which is approximately $1.65 million. PX-0219 (Asset ID 100061614).

1106. Despite the total investment of around $5.7 million for these three asset entries, they were retired after 4.2, 6.5, and 6.1 years, respectively, well short of the estimated operational life of 25 years asserted by Defendants. PX-0020; Stevens Decl. ¶ 315.

1107. The Skid Conveyor is not a fixture. Goesling Decl. ¶ 138.

iii. General Assembly Conveyor Sub-ASM Receiving (SAR): WTD1000 – Wheel & Tire Delivery (Representative Asset No. 20)

1108. Representative Asset No. 20, General Assembly Conveyor Sub-ASM Receiving (SAR): WTD1000 – Wheel & Tire Delivery, is located at Lansing Delta Township Assembly and transports wheel and tire assemblies from the tire and wheel assembly system to the final assembly line. JPTO Stipulated Facts ¶ 93.

1109. The asset was put into service in November 2006 and had an installed cost of $1,150,919. JPTO Stipulated Facts ¶ 93.

1110. The Wheel and Tire Delivery Conveyor consists of several types of conveyors, a mezzanine "catwalk" system, and a control cabinet. Goesling Decl. ¶ 123.

1111. The conveyance system, which is approximately 400 linear 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 and act as a short-term storage buffer. *See, e.g.,* JX-1290; JX-1287; Goesling Decl. ¶ 123.

1112. 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. JX-1288; Goesling Decl. ¶ 126; Stevens Test. 162:19-163:5.

1113. The floor-level conveyance system is attached to the floor in various places with lag bolts. JX-1286; Goesling Decl. ¶ 126.

1114. Even the spiral portion of the conveyor—that travels from the second level to the first level—is attached to the floor with a small number of lag bolts. JX-1291; Goesling Decl. ¶ 126.

1115. The only other method of attachment is for certain sections of the conveyance system attached to the mezzanine structure with small tack welds, which are also relatively easy to remove. JX-1292; Goesling Decl. ¶ 126.

1116. The mezzanine structure, which has been fabricated from sections, is supported from the roof trusses in the same manner as other GM overhead conveyors—using vertical members attached to the trusses by removable clips. JX-1290; Goesling Decl. ¶ 126.

1117. The HMI Control Panel is relatively small and is attached to the floor with concrete lag bolts. JX-1289; Goesling Decl. ¶ 126.

1118. Finally, the utilities are connected to the Wheel and Tire Delivery Conveyor at several locations using quick disconnect fitting and flexible wiring that is easier to detach. JX-1288; JX-1289; Stevens Test. 90:7-18; Goesling Decl. ¶ 126.

1119. Although overhead conveyors are more difficult to remove than floor-level conveyors, similar overhead conveyors have been sold on the secondary market in the past, confirming that removal is in fact possible. *See* PX-0348 (identifying 69 GM conveyor-related lot items that were sold by Maynards and Hilco); Goesling Decl. ¶ 127.

1120. Similarly, GM transferred an asset similar to the Wheel and Tire Delivery Conveyor with an installed cost of $500,000 from its Spring Hill assembly plant to its Orion Assembly plant. PX-0022C--Asset #20-0001 (row 4681). This asset is described as an, "ACCUMULATING CONVEYOR - TIRE AND WHEEL BUFFER" in GM's eFAST system. Although idled at various points in the past, Spring Hill is currently an operating assembly plant. Goesling Test. 3063:22-3064:13. This asset was placed in service in 2008 and transferred between 2010 and 2015. PX-0022C--Asset #20-0001 (row 4681). In other words, this asset was transferred from the Spring Hill facility between 2 and 7 years after its initial installation.

1121. Retirement data shows that GM retired assets associated with 340 asset entries similar to the Wheel and Tire Delivery Conveyor between 2004 and 2009 with a total installed cost of $14 million. PX-0020. The weighted average age upon retirement for this group of asset entries is 16 years, far shorter than the Defendants' 25-year useful life estimate. Stevens Decl. ¶ 315.

1122. The Wheel and Tire Delivery Conveyor is not a fixture. Goesling Decl. ¶ 125.

5. The Representative Assets in the Paint Shop, Except for the Paint Building Lines – Process Waste ELPO (Representative Asset No. 4), Are Not Fixtures

1123. While there are certainly assets contained within a paint shop that would be considered fixtures based on the unique characteristics of a paint shop, there remain assets that, such as the Representative Assets, that do not meet the fixture test.

1124. There is a secondary market for certain assets on a paint line, such as robots. Sofikitis Dep. 241:9-241:15. However, for assets like a paint booth (which Plaintiff concedes is a fixture), it would be easier to buy something that is specifically designed for a facility rather than trying to remove and reinstall the asset from another facility. Sofikitis Dep. 241:9-241:15; *see also* Levy Dep. 162:13-23.

a. Paint Mix & Circulation (Representative Asset No. 5)

1125. Representative Asset No. Representative Asset No. 5, Paint Mix & Circulation – Electrical, is a paint mix and circulation electrical system that consists of electrical distribution and control cabinets that support the paint mixing and circulation equipment for the paint shop. JPTO Stipulated Facts ¶ 78.

1126. Representative Asset No. 5 was put into service in November 2006 and has an installed cost of $1,899,672. JPTO Stipulated Facts ¶ 78.

1127. Representative Asset No. 5 provides electrical power for paint process equipment only and does not support assets that are related to the infrastructure of the building. Goesling Decl. ¶ 176.

1128. Another user of the building who had no use for a paint shop would not need this asset. Goesling Decl. ¶ 179.

1129. The Paint Mix & Circulation – Electrical includes two motor control center ("**MCC**") cabinets and two control cabinets. Goesling Decl. ¶ 176.

1130. When purchasing this asset, GM specified to the manufacturer which off-the-shelf components were needed, such as the appropriately sized variable-frequency drive or motor starter, and the manufacturer assembled the requested components and sold the asset to GM. Goesling Test. 3256:17-25; 3257:12-23.

1131. Although the MCC cabinets are approximately seven feet tall, they were constructed with angle iron lift points running along the top of the MCC cabinet to assist in relocation. Goesling Decl. ¶ 180.

1132. Incoming power is fed by overhead wire through conduit and conduit supports are bolted to the top of the cabinets. Goesling Decl. ¶ 180; *see also* JX-1059.

1133. Both MCC cabinets are resting on a four-inch raised concrete pad without further methods of attachment. Goesling Decl. ¶ 180; *see also* JX-1055.

1134. 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. Goesling Decl. ¶ 180; *see also* JX-1065.

1135. GM has previously relocated similar electrical distribution equipment for reuse. Goesling Decl. ¶ 181.

1136. 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. Goesling Decl. ¶ 181.

1137. GM has transferred assets associated with approximately 60 asset entries similar to the Paint Mix and Circulation Electrical System to another facility between 2009 and 2015. PX-0022C -- Asset #5-0001; Goesling Decl. ¶ 181.

1138. Defendants' expert's testimony that the "array of electrical components" that were moved were all attributable to "some kind of catastrophic event" was not credible. Topping Test. 917:8-918:14. Defendants offered no evidence to support the claim that catastrophic events caused the relocation of similar assets. Further, Mr. Topping's testimony that the similar electrical components that were moved were fixtures where they were initially located, were moved by GM, and then regained their fixture status when reinstalled at a new facility likewise lacks credibility. Topping Test. 915:8-916:14.

1139. In addition, these types of assets are frequently bought and sold on the secondary market, as this equipment can be used in virtually any industrial setting. Goesling Decl. ¶ 181; *see also* PX-0348 (Similar Asset Auction Lots) (identifying 64 GM electrical distribution lot items offered for sale by Maynards and Hilco, 63 of which were sold).

1140. Mr. Goesling's Retirement Analysis shows that GM retired assets associated with 125 asset entries similar to the Paint Mix and Circulation Electrical System between 2004 and 2009 with a total installed cost of $7 million. PX-0020. The weighted average age upon retirement for this group of asset entries is 22 years – eight years shorter than the Defendants' estimated useful life of 30 years. Topping Decl. ¶ 113.

1141. GM classified Representative Asset No. 5 as personal property for purposes of tax classification. Goesling Decl. ¶ 178; *see also* PX-0231.

1142. Representative Asset No. 5 is not a fixture. Goesling Decl. ¶ 178.

b. Paint Dip Conveyor – ELPO Oven IMC (Representative Asset No. 6)

1143. Representative Asset No. 6, Paint Dip Conveyor – ELPO Oven IMC, is a conveyor system that carries vehicle bodies through the Electro-coat Paint-curing Operation, or ELPO, process. JPTO Stipulated Facts ¶ 79.[10]

1144. Representative Asset No. 6 spans all three operating levels of the paint shop and transports vehicle bodies through the ELPO system's curing ovens. JPTO Stipulated Facts ¶ 79.

1145. Representative Asset No. 6 was put into service in November 2006 and had an installed cost of $1,107,185. JPTO Stipulated Facts ¶ 79.

1146. The components of the Paint Dip Conveyor – ELPO Oven IMC include approximately 1,500 feet of conveyor track, load and unload stations, two main electric drives, and standalone control panels. Goesling Decl. ¶ 182.

1147. The conveyor track is constructed in modular sections of three to twenty feet in length, connected by eight nut and bolt fasteners. Goesling Decl. ¶ 185; *see also* Topping Test. 989:24-990:5; 990:20-23; JX-1067.

1148. The modular nature of the conveyor would assist with the removal and transport of Representative Asset No. 6. Topping Test. 991:21-992:8.

1149. Because the conveyor track is located on the floor, removal is easier than for an overhead conveyor. Goesling Decl. ¶ 185.

[10] This conveyor is discussed separately from the remaining conveyors above because of its location in the Paint Shop. This conveyor, however, is addressed in Mr. Goesling's Conveyor System Chart. Goesling Decl. Ex. D.

1150. The conveyor track is supported by iron legs, spaced 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. Goesling Decl. ¶ 185; *see also* JX-1066.

1151. The load and unload stations are constructed and affixed in a similar manner. Goesling Decl. ¶ 185; *see also* JX-1068.

1152. The two main electric drives are constructed as skid mounted, self-contained units and are attached to the building floor with lag bolts. Goesling Decl. ¶ 185; *see also* JX-1081; JX-1073.

1153. 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. Goesling Decl. ¶ 185; *see also* JX-1069.

1154. All utility connections utilize loose cabling and quick disconnect fittings for easy separation. Goesling Decl. ¶ 185; *see also* JX-1074.

1155. GM has previously relocated at least one paint shop conveyor for reuse. Topping Test. 993:8-19.

1156. Specifically, in 2008, GM relocated a paint shop conveyor from a plant in Oklahoma City, Oklahoma after the plant was hit by a tornado, rebuilt, and then idled because the entire plant was making a car that no one wanted to buy. Topping Test. 991:8-992:19. Despite the impression Mr. Topping tried to create with his testimony, the record is clear that the conveyor was relocated because there was no longer demand for the car being made in the Oklahoma plant – not because of the tornado that preceded the shift in consumer demand for the car. Topping Test. 991:8-992:19. 993:8-994:19.

1157. GM classified Representative Asset No. 6 as personal property for purposes of tax classification. Goesling Decl. ¶ 184; *see also* PX-0231.

1158. Representative Asset No. 6 is not a fixture. Goesling Decl. ¶ 184.

c. Paint Top Coat Automation Software (Representative Asset No. 7)

1159. Representative Asset No. 7, Paint Top Coat Automation Software, is software that creates a user interface that allows users to monitor the paint spray application equipment. Topping Test. 932:15-934:13.

1160. While a user can control certain spray parameters (air pressures, bell speeds, voltages, fluid deliveries) with the Paint Top Coat Automation Software, the software does not operate the spray equipment. Each piece of spray equipment has its own software loaded onto it. Topping Test. 932:15-934:23.

1161. Rather, Representative Asset No. 7 allows for Access to data to monitor, but not to operate, the paint assets. Topping Test. 932:15-934:13.

1162. If the Paint Top Coat Automation Software were to malfunction, the spray equipment would continue to run. Topping Test. 952:12-17; 954:5-14.

1163. Representative Asset No. 7 was put into service in November 2006 and had an installed cost of $200,000. JPTO Stipulated Facts ¶ 80.

1164. The Paint Top Coat Automation Software does not have a physical presence—it is an intangible asset that "exists" within a computer data storage device and can be transferred to any other compatible computer device without damage to the realty or software. Goesling Decl. ¶¶ 186, 189.

1165. Mr. Topping's testimony that the software – which has no physical presence – is "constructively attached" to the equipment "just by the very fact that it's so important to the very operation of the zone" with which it interacts, is not credible. Topping Test. 936:9-24.

1166. Mr. Topping concedes that the Paint Top Coat Automation Software could be loaded onto another computer and perform the same function, and also concedes that the computer on which the software could be loaded would not be a fixture. Topping Test. 975:16-977:21.

1167. GM classified Representative Asset No. 7 as personal property for purposes of tax classification. Goesling Decl. ¶ 188; *see also* PX-0231.

1168. Representative Asset No. 7 is not a fixture. Goesling Decl. ¶ 188. Defendants' classification of the software as a fixture because it "adds value to the utility" of the paint shop bells (discussed below) is not credible. Topping Test. 975:16-977:21.

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

1169. Representative Asset No. 9, Paint TC2 CC Bell Zone, is a set of paint applicator machines or "Bells" mounted overhead or installed through the walls of one of the spray booths in the paint shop. JPTO Stipulated Facts ¶ 82.

1170. The Bells apply a clear coating to the sides, front, top, and back of a vehicle body as one of the final steps in the paint process. JPTO Stipulated Facts ¶ 82.

1171. Representative Asset No. 9 was put into service in November 2006 and had an installed cost of $2,805,703. JPTO Stipulated Facts ¶ 82.

1172. 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 and are secured to the building floor by four lag bolts. Goesling Decl. ¶ 190; *see also* JX-1098.

1173. Although the side application machines are installed through the paint booth walls, this is part of the operational design rather than an indication of permanence. Goesling Decl. ¶ 193.

1174. 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. Goesling Decl. ¶ 190.

1175. 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. Goesling Decl. ¶ 190.

1176. 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. Goesling Decl. ¶ 190.

1177. 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. Goesling Decl. ¶ 190; *see also* JX-1082.

1178. The data and control wiring is equipped with quick disconnect fittings for easy separation. Goesling Decl. ¶ 190.

1179. 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. Goesling Decl. ¶ 194.

1180. 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. Goesling Decl. ¶ 194.

1181. Less than one year after installation of the Paint TC2 CC Bell Zone applicators, 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. Goesling Decl. ¶ 194; *see also* PX-0155.

1182. Although both of these examples involve the Paint TC1 CC Bell Zone, not the Paint TC2 CC Bell Zone, the similar nature and purpose of the two zones makes it implausible that GM would have a different intent for the two assets. Goesling Decl. ¶ 194.

1183. GM has previously moved 179 similar assets, including 160 aqua bell applicators that were moved from Moraine to Lordstown following the closing of the Moraine facility. *See* PX-0022C -- Asset #9-0001; Goesling Decl. ¶ 195; Topping Test. 927:4-928:3.

1184. The other 19 similar assets that were identified as having been moved within GM facilities were paint shop robots. Topping Test. 928:4-20. Eight of the 19 robots were removed from GM's Waynesville assembly plant because new equipment was being installed in Waynesville to accommodate the production of the Escalade – a very large vehicle. Topping Test. 928:4-20.

1185. Assets associated with twelve asset entries related to paint shop robots were transferred from Arlington and Orion assembly plants to GM's Lansing Delta Township Assembly, Fort Wayne, and Bowling Green facilities. PX-0022C--Asset #9-0001(rows 6113 through 7473). GM's Orion and Arlington facilities are operating assembly plants, thus these assets were removed from and re-installed within operating facilities. The total installed cost of these paint robot asset entries is approximately $13 million and several of the entries specify quantities of either two or eight robots within a single asset entry. PX-0022C -- Asset #9-0001(rows 7462 – 7473).

1186. There is also a secondary market for similar painting robots and bells. Sofikitis Dep. 241:4-15; Levy Dep. 24:11-12; Goesling Decl. ¶ 195.

1187. GM classified Representative Asset No. 9 as personal property for purposes of tax classification. Goesling Decl. ¶ 192; *see also* PX-0231.

1188. Representative Asset No. 9 is not a fixture. Goesling Decl. ¶ 192.

6. The Representative Assets Not on A Production Line Are Not Fixtures

1189. In addition to the Opticell (Representative Asset 10), the CUC (Representative Asset No. 11), the Aluminum Machining System (Representative Asset No. 23), the Emissions Systems (Representative Asset Nos. 27 & 38), the Courtyard Enclosure (Representative Asset No. 37) and the Danly Tryout Press (Representative Asset No. 31), all of which are discussed in other sections of the Proposed Findings of Fact, the remaining Representative Assets that are not on production lines are not fixtures.

1190. Production assets physically interact with the product as it moves through the production process. These non-production assets assist the process but are not part of the line itself. For example, the Danly Tryout Press exclusively tests dies before the dies go into the production presses. Miller Test. 1126:4-24. Thus, although the Danly Tryout Press and the other non-production assets support the production process, they are not part of the production line. *See* Miller Test. 1126:25-1127:4.

a. General Assembly End of Line Paint Spot Reprocess System Paint Mix Room (Representative Asset No. 8)

1191. Representative Asset No. 8, General Assembly End of Line Paint Spot Reprocess System Paint Mix Room, is a self-contained paint mixing room located inside the general assembly area. JPTO Stipulated Facts ¶ 81.

1192. Representative Asset No. 8 is used as a vented enclosure to mix small batches of paint for minor paint repairs to vehicle bodies at the end of the final assembly line. JPTO Stipulated Facts ¶ 81.

1193. Representative Asset No. 8 was put into service in November 2006 and had an installed cost of $815,150. JPTO Stipulated Facts ¶ 81.

1194. The General Assembly End of Line Paint Spot Reprocess System Paint Mix Room is a self-contained fireproof box constructed from steel panels that are fastened together with nuts and bolts. Topping Test. 998:14-999:3; *see also* Goesling Decl. ¶ 102; *see also* JX-1087.

1195. The General Assembly End of Line Paint Spot Reprocess System Paint Mix Room is a "very simple" manual mix room that is required in order to mix paint and store solvents in the general assembly area of the plant. Topping Test. 996:13-997:14.

1196. The General Assembly End of Line Paint Spot Reprocess System Paint Mix Room is constructed of galvanized steel panels fastened together with nuts and bolts and attached to the floor with lag bolts. Goesling Decl. ¶ 105; *see also* JX-1089. This paint mix room is standard and was purchased by GM from a catalogue. Topping Test. 999:9-12.

1197. There are various utilities connected to the General Assembly End of Line Paint Spot Reprocess System 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. Goesling Decl. ¶ 105; *see also* JX-1088.

1198. Representative Asset No. 8 is a smaller, more portable paint mix room compared to the more permanent paint mix rooms located in the paint shop, which are designed with walls

and ventilation systems integrated into the building structure that would likely be considered fixtures. Goesling Decl. ¶ 106.

1199. If the General Assembly End of Line Paint Spot Reprocess System Paint Mix Room were removed, paint would have to be mixed in the paint shop. Topping Test. 947:10-16.

1200. GM has previously relocated one similar paint mix room showing that movement is possible without damage and that this type of asset can be redeployed. *See* PX-0022C --Asset #8-0001; Goesling Decl. ¶ 107.

1201. GM could likely remove Representative Asset No. 8 over the course of a weekend. Topping Test. 1000:6-9.

1202. GM classified Representative Asset No. 8 as personal property for purposes of tax classification. Goesling Decl. ¶ 104; *see also* PX-0231.

1203. Representative Asset No. 8 is not a fixture. Goesling Decl. ¶ 104.

b. Body Shop Weld Bus Ducts (Representative Asset No. 13)

1204. Representative Asset No. 13, Body Shop Weld Bus Ducts, consists of the overhead electric power distribution weld bus ducts for the welding operations in the body shop. JPTO Stipulated Facts ¶ 86.

1205. The weld bus ducts deliver electrical power to body shop equipment, such as robot-mounted weld guns and other weld equipment. JPTO Stipulated Facts ¶ 86.

1206. The asset was put into service in July 2006 and had an installed cost of $3,993,837. JPTO Stipulated Facts ¶ 86.

1207. 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. Goesling Decl. ¶¶ 157, 161; Stevens Test. 185:5-17.

1208. The majority of the BS Weld Bus Duct is attached to the building roof trusses with threaded rod and I-beam clamps. JX-1181; JX-1182; Goesling Decl. ¶ 161; Stevens Test. 185:5-17.

1209. Representative Asset No. 13 is made up of approximately 10,000 feet of bus ducts. Stevens Test. 182:18-25.

1210. Notwithstanding its length, Defendants' expert estimates that removal would take approximately a month and cost roughly $150,000. Stevens Test. 326:8-21.

1211. Bus ducts provide an alternative to the wire-in-conduit distribution method, which is more permanent and difficult to reconfigure. Goesling Decl. ¶ 160.

1212. Over $1,000,000 of electrical bus duct was removed from Pontiac East and Grand Rapids and moved to Flint and Parma between 2009 and 2015. PX-0022C -- Asset #13-0001 (Transfer Analysis); Goesling Decl. ¶ 162.

1213. Similarly, there is an active secondary market for weld bus ducts. PX-0350 (Reviewed Asset Auction Lots) & PX-0348 (Similar Asset Auction Lots); Goesling Decl. ¶ 162.

1214. Retirement data shows that GM retired 201 asset entries similar to the BS Weld Bus Duct between 2004 and 2009 with a total installed cost of $28 million. PX-0020. The weighted average age upon retirement for this group of asset entries is 20 years. On average these asset entries similar to the BS Weld Bus Duct were retired more than a decade before reaching the 30 year expected useful life expressed by Defendants.

1215. There are companies such as BD Electrical Worldwide Supply, Reelectric Supply, and H&H Buying & Selling, Inc. that specialize in buying and reselling electrical bus duct. Goesling Decl. ¶ 162.

1216. GM categorized the BS Weld Bus Duct as real property for tax classification purposes. Goesling Decl. ¶ 159; *see also* PX-0231. As discussed above, this is one of the assets for which Mr. Goesling's classification is different from GM's tax classification. Goesling Decl. ¶ 163.

1217. Unlike the majority of assets for which GM is consistent in its classification, GM has inconsistently classified bus ducts for tax purposes. Goesling Decl. ¶ 163

1218. Mr. Fulcher explained at his deposition that this is because it depends on whether the electrical was installed as part of specific processing equipment, in which case the tax classification would be personal, or to serve the building more generally. Fulcher Dep. 36:21-22; 37:2-11.

1219. The weld bus ducts that are Representative Asset No. 13, however, are configured and intended to serve GM's specific manufacturing processes. Goesling Decl. ¶ 163; Stevens Test. 327:25-329:2.

1220. When GM sells closed facilities, it first removes the bus weld ducts. *See* PX-0022 (Transfer Analysis); Goesling Decl. ¶ 163.

1221. Both Hilco and Maynards have sold bus ducts for both reuse and scrap. Levy Dep. 158:13-16; Sofikitis Dep. 239:19-24.

1222. It is "easy" for Hilco to sell bus ducts. Levy Dep. 158:17-20.

1223. Removal is simple and does not harm the building or the asset. Goesling ¶ 159.

1224. When weld bus ducts serve the facility, they are considered fixtures; when they serve specific equipment, they are considered personal property. Sofikitis Dep. 240:9-12.

1225. Representative Asset No. 13 is not a fixture. Goesling Decl. ¶ 159.

c. Body Shop Coordinate Measuring Machine Full Body Machine – LY90 (Representative Asset No. 19)

1226. Representative Asset No. 19, Body Shop Coordinate Measuring Machine Full Body Machine – LY90, which is located at Lansing Delta Township Assembly, was a Full Body Coordinate Measuring Machine, or a CMM. JPTO Stipulated Facts ¶ 92.

1227. Representative Asset No. 19 was used to take precise measurements of auto bodies manufactured in the body shop for quality purposes. JPTO Stipulated Facts ¶ 92.

1228. Representative Asset No. 19 was put into service in November 2006 and had an installed cost of $354,000. JPTO Stipulated Facts ¶ 92. It was removed in 2015. JPTO Stipulated Facts ¶ 92.

1229. A second, similar coordinate measuring machine still remains at the plant and was inspected during the site inspections. Goesling Decl. ¶ 164. New GM also provided photographs and a calibration report for the BS CMM. See PX-0295 (Photos of assets, including representative asset #19); PX-0227 (Metris USA, Inc. LY90 asset documentation, Lansing Michigan); JX-0030 (Picture of Asset 19, BS CMM Full Body Machine - LY90); *see also* Goesling Decl. ¶ 164.

1230. 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. Goesling Decl. ¶ 165.

1231. According to New GM personnel, the pit was demolished and filled in so that all floor space is currently level with the surrounding building floor. Goesling Decl. ¶ 165. Except for the new concrete floor, there was no evidence of damage due to removal of the BS CMM. Goesling Decl. ¶ 165; *see also* JX-1284. Although the pit was left behind when the asset was removed, the pit was capitalized and treated as a separate asset by GM. Goesling Decl. ¶ 168.

No new asset was installed in the area from which Representative Asset No. 19 was removed. Goesling Test. 3132:7-11.

1232. GM assigned Representative Asset No. 19 a 13-year depreciable life when it was installed in November 2006, but the asset was removed halfway through its assigned useful life because technology developments had eliminated the need for the BS CMM. Goesling Decl. ¶ 168; *see also* Stevens Test. 334:8-14.

1233. Offline inspection equipment, such as Representative Asset No. 19, is being replaced by robots, similar to the OptiCell Measuring System (Representative Asset No. 10), that are capable of performing quality control without taking the vehicle bodies off the assembly line. Goesling Decl. ¶ 168.

1234. There were approximately 30 similar assets (some smaller than the subject asset) that were relocated by GM between 2009 and 2015, including an LK twin column coordinate measuring machine with a total original cost of approximately $1.1 million that was transferred from GM's Moraine Assembly plant to GM's Detroit Hamtramck Assembly plant. PX-0022X0022C -- Asset #19-0001(rows 9960 – 9964); Goesling Decl. ¶ 169.

1235. There is a secondary market for similar assets. The Maynards/Hilco auction data identifies 60 CMM lot items that were sold, including 6 dual arm cantilever type coordinate measuring machines. PX-0348B – Asset 19-00020001 and 0002, rows 375, 376, 377, 389, and 396; Goesling Decl. ¶ 169.

1236. Mr. Sofikitis from Maynards testified at his deposition that CMM's are "very liquid assets" because "everyone can use them." Sofikitis Dep. 225:12-21. Mr. Sofikitis contrasted CMMs with "specific test equipment that's . . . dedicated and configured for a specific

application." In contrast to the highly liquid CMMs, Mr. Sofikitis indicated that the other, more specific test equipment was more difficult to sell. Sofikitis Dep. 225:12-21.

1237. Mr. Goesling's Retirement Analysis shows that GM retired 184 asset entries similar to the BS CMM between 2004 and 2009 with a total installed cost of $34 million. PX-0020. The weighted average age upon retirement for this group of asset entries is 14 years – more than ten years less than Defendants' estimated useful life of 25 years. Stevens Decl. ¶ 315. Representative Asset No. 19 was removed after 9 years. Stevens Test. 335:23-336:6.

1238. GM classified Representative Asset No. 19 as personal property for purposes of its tax filings in Michigan. Goesling Decl. ¶ 167; *see also* PX-0231.

1239. Representative Asset No. 19 is not a fixture. Goesling Decl. ¶ 167.

7. Representative Asset Numbers 1, 14, 15, 18 and 34 Are Not Fixtures

1240. Five assets are not easily grouped together into another broader category: The OP-150 Select, Check Place Shims Auto Station (Representative Asset No. 1); Leak Test Base Machine Qty = 1 (Representative Asset No. 14); General Assembly Tire/Wheel: Soap; Mount and Inflate (Representative Asset No. 15); Vertical Adjusting Carrier (VAC) Sys – Carriers (Qty 87) (Representative Asset No. 18); and Build Line w/ Foundation (Representative Asset No. 34). All five are discussed individually below.

a. OP-150 Select, Check Place Shims Auto Station (Representative Asset No. 1)

1241. Representative Asset No. 1, the OP-150 Select, Check Place Shims Auto Station, which is located at Warren Transmission, is a shim select and placement machine. JPTO Stipulated Facts ¶ 74.

1242. Representative Asset No. 1 measures transmission housings to ensure they conform to design tolerances and selects and installs a thin piece of metal, or "shim," with the specific thickness needed to adjust for any detected intolerance. JPTO Stipulated Facts ¶ 74.

1243. Representative Asset No. 1 was put into service in June 2006 and had an installed cost of $467,741. JPTO Stipulated Facts ¶ 74.

1244. The OP-150 Select, Check Place Shims Auto Station consists of an automatic placement station, a shim dispenser with approximately 26 storage magazines, and a control panel with a human machine interface. Goesling Decl. ¶ 266. 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. Goesling Decl. ¶ 266.

1245. The components of the OP-150 Select, Check Place Shims Auto Station are mounted on height adjustable base plates, which are attached to the building floor with lag bolts. Goesling Decl. ¶ 270; *see also* JX-1005. The machine is also attached to the pallet conveyor with Allen bolts, which are easily removable. Goesling Decl. ¶ 270; *see also* JX-1004.

1246. 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. Goesling Decl. ¶ 270; *see also* JX-1004.

1247. Removal of the OP-150 Select, Check Place Shims Auto Station would be relatively straightforward: The lag bolts would have to be removed, the utilities disconnected, and the components disassembled for loading and handling. Goesling Decl. ¶ 271.

1248. GM has previously relocated 42 similar assets for use at other facilities; the majority of these line items were part of the powertrain programs that were transferred from

GM's Tonawanda facility to Flint Engine South, and GM's Willow Run to Toledo plant, respectively. PX-0022C--Asset #1-0001; Goesling Decl. ¶ 271.

1249. The Shim Placement Machine is specially designed for the specific transmissions being produced; thus it is likely that any change in transmission design (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. Goesling Decl. ¶ 271.

1250. For example, a machine similar to the OP-150 Select was installed in the Romulus plant as part of a V6 assembly line model year change. Deeds Test. 560:17-562:13. In order to install the automated station at Romulus, changes had to be made to an existing conveyor, which is similar to Representative Asset No. 35, the Button up and Test Conveyor System. Deeds Test. 562:14-564:8. Specifically, two sections of the conveyor had to be unbolted, one of the sections of the conveyor had to be rotated out so that the automated station could be installed, then the conveyor section was rotated back in and bolted back in place. Deeds Test. 562:18-563:9.

1251. In addition, there is a secondary market for the sale of similar assembly station machines. Goesling Decl. ¶ 271; PX-0348B - Asset 01-0001 & -0002 (showing sales by Maynards/Hilco of 15 lot items of assembly equipment used in the production of vehicle transmissions at GM's Willow Run powertrain facility).

1252. GM classified the Shim Select and Placement Machine as personal property for purposes of its tax filings in Michigan. Goesling Decl. ¶ 269; *see also* PX-0231.

1253. Representative Asset No. 1 is not a fixture. Goesling Decl. ¶ 269.

b. Leak Test Base Machine Qty = 1 (Representative Asset No. 14)

1254. Representative Asset No. 14, Leak Test Base Machine Qty = 1, which is located at Warren Transmission, is a leak test machine that tests for fluid leaks in transmission housings

after they have been manufactured and before they are sent to the transmission assembly line. JPTO Stipulated Facts ¶ 87.

1255. Representative Asset No. 14 was put in service in July 2007 and had an installed cost of $1,254,458. JPTO Stipulated Facts ¶ 87.

1256. 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). Goesling Decl. ¶ 272.

1257. Each leak test stand 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. Goesling Decl. ¶ 275; *see also* JX-1195.

1258. 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. Goesling Decl. ¶ 275; *see also* JX-1189; JX-1190.

1259. The electrical connections within the Leak Test System are made through flexible conduit with a large, quick disconnect fitting that releases with a single metal clasp. Goesling Decl. ¶ 275. 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. Goesling Decl. ¶ 275; Deeds Test. 615:16-616:4.

1260. The three control cabinets, which have multiple top-mounted eye-bolts to facilitate lifting and movement, are connected to the floor with a few lag bolts, and are connected to utilities with quick disconnect fittings. Goesling Decl. ¶ 275; *see also* JX-1188.

1261. The pallet transfer 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. Goesling Decl. ¶ 275.

1262. GM has relocated assets that are similar and perform a similar function. See PX-0022C-- Asset #14-0001 (showing 22 asset line items similar to the Leak Test System that were transferred from one GM plant to another between 2009 and 2015); Goesling Decl. ¶ 276.

1263. Similar leak test systems are traded on the secondhand market. PX-0348 (Similar Asset Auction Lots) (showing the sale of 10 GM leak test lot items, at least 5 of which were multi-station leak test systems).

1264. GM classified Representative Asset No. 14 as personal property for purposes of its tax filings in Michigan. Goesling Decl. ¶ 274; *see also* PX-0231.

1265. Representative Asset No. 14 is not a fixture. Goesling Decl. ¶ 274.

c. General Assembly Tire/Wheel: Soap; Mount and Inflate (Representative Asset No. 15)

1266. Representative Asset No. 15, General Assembly Tire/Wheel: Soap; Mount and Inflate, which is located at Lansing Delta Township Assembly, is a tire and wheel assembly system that assembles tires and wheels into finished wheel and tire assemblies by applying soap to lubricate the tires and wheels, mounting the tires to the wheels, and inflating the tires. JPTO Stipulated Facts ¶ 88.

1267. Representative Asset No. 15 was put into service in November 2006 and had an installed cost of $1,897,124. JPTO Stipulated Facts ¶ 88.

1268. The various stations that comprise Representative Asset No. 15 are attached to the floor with lag bolts: The mounting station (JX-1211); the tire inflation station (JX-1207; JX-1208); and the soaping station (JX-1214; JX-1213). Goesling Decl. ¶ 111. Many of the stations

were designed with lift points on the top portion of each station to facilitate relocation. Goesling Decl. ¶ 111; *see, e.g.*, JX-1212.

1269. Representative Asset No. 15 also contains a conveyor system, which moves the wheels between each station. Goesling Decl. ¶ 108; *see also* JX-1216. 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. Goesling Decl. ¶ 111; *see also* JX-1210. The reason the conveyor system is so long is because GM made a late decision to in-source the tire and wheel assembly process in Lansing Delta Township Assembly and the equipment was then installed a significant distance from the final assembly line. Stevens Test. 160:24-161:16. Similar to the stations, the conveyor system mounts are then attached to the floor with lag bolts. Goesling Decl. ¶ 111; *see also* JX-1209.

1270. The utilities and data connections to the components of the Wheel Assembly Machine allow for quick disconnection and easy reconfiguration. Goesling Decl. ¶ 111. Similarly, electrical and data cabling are fed to many of the stations through loose wiring in overhead metal cable trays. Goesling Decl. ¶ 111.

1271. The General Assembly Tire/Wheel: Soap; Mount and Inflate is a patented machine. Goesling Decl. ¶ 112; PX-0153; PX-0376. The patent application that described the machine as comprised of modules that are "removably connected to one another" and states that:

> The present invention provides an assembly line for mounting tires to wheels and includes a plurality of modules that are removably connected to one another. An endless conveyor member is supported for movement by the plurality of modules and can move wheels and tires between work stations.
>
> * * * *
>
> 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.

PX-0153-0007; *see also* Goesling Decl. ¶ 112.

1272. The patent confirms that one of this asset's main features is its removably connected modules. Goesling Decl. ¶ 112; PX-0153.

1273. GM has previously relocated three similar assets for reuse at other GM facilities. In the time period between 2010 and 2015, GM transferred a $2.2 million "Mount and Inflate Line" from the Spring Hill, TN assembly plant to GM's Orion, MI assembly plant for re-use. PX-0022C -- Asset #15-0001(row 4673). Both assembly plants are still in operation today. Goesling Test. 3063:22-3064:13. Additionally, in 2010 GM transferred a similar $2 million "Build Mount & Inflate Line" from the Pontiac, MI (East) assembly plant to GM's Fort Wayne, IN assembly plant due to the restructuring. This line was later retired and removed from the Fort Wayne, IN assembly plant prior to reaching 10 years of age. PX-0022C -- Asset #15-0001(row 671) (shown disposed by 2015 as there is no location in column 'A').

1274. There is also a secondary market for similar assets. Maynards/Hilco sold 9 similar lot items from GM's Pontiac, MI assembly plant and Indianapolis, IN stamping. PX-0348B - Asset 15-0001 (rows 22279 through 22283). One "Burke E. Porter Tire Soap, Mount and Inflate Machine" was included among the 9 similar lot items sold at auction. PX-0348B - Asset 15-0001 (rows 22279 through 22283); Goesling Decl. ¶ 113. This auctioned tire soap, mount and inflate machine was similar in configuration to Asset No. 15, having a single soaper, dual mounters, and dual inflator stations.

1275. Mr. Goesling's Retirement Analysis revealed over 243 similar tire assembly asset entries that were retired before GM's bankruptcy in the five year period between January 2004 and May 2009. PX-0020. The weighted average age of the 243 similar asset entries at the date

of retirement was 11 years, nearly half of the Defendants' expected normal useful life of 20 years. Stevens Decl. ¶ 315. Based on the asset descriptions and installed cost, this included 7 individual complete wheel assembly machines with a total installed cost of approximately $10 million. PX-0020 (the 7 complete wheel assembly machines are contained in Asset ID's TJV841105, TJT066192, CJ100X5560, CJY215850000, FB4521518FA, FB4521519FA, TJV8040801). 4 out of the 7 wheel assembly machines were taken out of service in 2004 and 2006, when the assets were 8 years old or less. PX-0020 (Asset ID CJ100X5560 was 7.7 years old at retirement; Asset ID CJY215850000 was 7 years old at retirement; and Asset IDs FB4521518FA & FB4521519FA were 8 years old at retirement).

1276. GM classified Representative Asset No. 15 as personal property for purposes of its tax filings in Michigan. Goesling Decl. ¶ 110; *see also* PX-0231.

1277. Representative Asset No. 15 is not a fixture. Goesling Decl. ¶ 110.

d. General Assembly Conveyor: Vertical Adjusting Carrier (VAC) Sys – Carriers (Qty 87) (Representative Asset No. 18)

1278. Representative Asset No. 18 is a set of 87 vertical adjusting carriers that travel along an overhead rail, which is not part of the asset. JPTO Stipulated Facts ¶ 91.

1279. The vertical adjusting carriers are not permanently attached to the building. Goesling Decl. ¶ 118.

1280. Instead, the carriers' wheels ride along the top of the rail and are connected to it by gravity. Stevens Test. 165:18-167:23; Goesling Decl. ¶ 115.

1281. The rail for the Vertical Adjusting Carriers is also not directly attached to the building; rather, the rail is attached to white steel that is in turn bolted to the building. Stevens Test. 165:18-167:23; Goesling Decl. ¶ 118.

1282. The white steel is connected to the roof structure with bolts. Stevens Test. 165:18-167:23.

1283. Although very heavy and large, the carriers can be removed by detaching a rail section and taking the carrier off the rail. Goesling Decl. ¶ 119.

1284. If GM decides to build an entirely different family of vehicles at Lansing Delta Township Assembly, the carriers would have to be replaced as the carriers can only support vehicles with certain dimensions. Stevens Test. 359:5-361:15; Goesling Decl. ¶ 120.

1285. Defendants assert that the white steel should be included as part of the 87 vertical adjusting carriers, Stevens Test. 165:18-167:23, but they have provided no evidence to support this assertion. There is no indication in the eFAST description that the asset includes anything other than the carriers. PX-02190.

1286. GM classifies this asset as personal property for tax purposes. Goesling Decl. ¶ 117; PX-0231.

1287. Representative Asset No. 18 is not a fixture. Goesling Decl. ¶ 117.

e. Build Line w/Foundation (Representative Asset No. 34)

1288. Representative Asset No. 34, Build Line W/ Foundation, was an assembly line used for producing four-speed transmissions. JPTO Stipulated Facts ¶ 107.

1289. The build line with foundation was put into service in December 1983 and had an installed cost of $3,580,522. JPTO Stipulated Facts ¶ 107.

1290. After the four-speed transmission line stopped manufacturing transmissions, the assembly line was removed and the foundation was filled in. JPTO Stipulated Facts ¶ 107; Goesling Decl. ¶ 260.

1291. Representative Asset No. 34 ceased operation prior to June 30, 2009, and was disassembled and removed from the facility prior to the May 2016 plant inspection. Goesling Decl. ¶ 260.

1292. Representative Asset No. 34 was one of four similar assembly lines located in the same building at Warren Transmission that have since been removed. Goesling Decl. ¶ 260; PX-0219 (showing three additional eFAST entries for "Build Line w/ Foundation" at Warren Transmission).

1293. Defendants concede that the Build Line w/ Foundation was removed approximately 27 years after installation, before the end of its useful life according to Mr. Deeds' 35-year useful life estimate. Deeds Decl. ¶ 190 (removed after 27 years); Deeds Decl. ¶ 214 (estimating 35-year useful life for this asset).

1294. The pit holding Representative Asset No. 34 was filled in after removal and the area remains empty, without any evidence of the prior installation. JX-1518; JX-1515; Goesling Decl. ¶ 264.

1295. The area is ready for reuse by GM as needed. JX-1522 (video of Representative Asset No. 34); Goesling Decl. ¶ 264.

1296. The removal of Representative No. 34 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. Goesling Decl. ¶ 265.

1297. Despite the size of the line and difficulty and effort required for removal, GM decided to remove all of the equipment and prepare the former 4-Speed assembly area of the building for future use. Goesling Decl. ¶ 265.

1298. Deeds contends that the area is not completely healed because it can only be reused for storage and not for manufacturing or machining operations. Deeds Test. 470:9-18.

1299. However, Deeds acknowledges that the limitation on reuse is solely because GM elected to pour a 4-inch floor for cost reasons. Because GM did not have future plans to install manufacturing or machining equipment, GM did not spend the additional money to pour a 12-inch floor. Deeds Test. 471:19-472:14.

1300. Although the asset listing in eFAST refers to this asset as "Build Line w[ith] foundation," the pit/foundation was separately capitalized under Asset ID NIT219381A, with the description "Build Line Pit." PX-0219 (eFAST data 2009); Goesling Decl. ¶ 261; Deeds Decl. ¶¶ 189, 196 (conceding that the pit is in fact a separate line item in eFAST).

1301. The Build Line Pit has an in-service date a year before the Build Line w/ Foundation was placed in service (column P in eFAST), and was assigned its own installed cost of $479,846 (column T in eFAST). PX-0219 (eFAST data 2009); Goesling Decl. ¶ 261.

1302. GM has a practice of capitalizing pits separately. Goesling Decl. ¶ 261.

1303. For example, the Pits and Trenches that make up Representative Asset No. 2 are capitalized separately from the conveyors installed in the pits. PX-0231 (listing Asset ID 100017544 - GA PITS & TRENCHES (Asset #2) separately from the skillet conveyor that is located in the pit.).

1304. Representative Asset No. 34 was classified by GM as personal property for tax purposes. Goesling Decl. ¶ 263; PX-0231.

1305. The Build Line with Foundation, Representative Asset No. 34, is not a fixture. Goesling Decl. ¶ 263.

8. Assets Comprised of Ordinary Building Materials Are Not Fixtures

1306. The parties agree that ordinary building materials are not fixtures. *See, e.g.*, JPTO ¶ 116.

1307. There are two assets—the Courtyard Enclosure (Representative Asset No. 37) and the Central Utilities Complex (Representative Asset No. 11)—as to which the parties agree that at least a portion of the asset constitutes ordinary building material and is thus not a fixture.

a. Courtyard Enclosure (Representative Asset No. 37)

1308. Representative Asset No. 37, Courtyard Enclosure, located at Warren Transmission, is an enclosure that is currently being used for parts storage. JPTO Stipulated Facts ¶ 110.

1309. The Courtyard Enclosure is a building extension that enclosed vacant space between buildings at Warren Transmission. Goesling Decl. ¶ 242; Deeds Decl. ¶ 202.

1310. The asset was put into service in December 1982 and had an installed cost of $8,384,325. JPTO ¶ 110.

1311. Construction 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, and the addition of structural steel framing, a steel truss roof structure with metal panel decking, fluorescent lighting, heating and ventilation ductwork, and sprinkler piping. JX-1556; JX-1558; Goesling Decl. ¶ 242; Deeds Decl. ¶ 202.

1312. The additions to the building to create the Courtyard Enclosure are clearly all ordinary building materials. Deeds Decl. ¶ 9; JPTO Stipulated Facts ¶ 15 (stating that Defendants assert that "certain non-building components of the asset are fixtures").

1313. Mr. Deeds' assertion that there are additional unobserved and undocumented components of Representative Asset No. 37 that are fixtures and that were removed in 2012-2013 is not credible. Deeds Test. 713:12-714:9; Deeds Decl. ¶ 201.

1314. New GM has never identified any additional components as being part of the asset. Goesling Decl. ¶ 242; Deeds Test. 716:2-716:8.

1315. New GM classified the entire asset as real property on its Michigan tax forms. Goesling Decl. ¶ 244; PX-0231.

1316. The eFAST ledger, which describes the asset as a "Courtyard Enclosure," does not reference any additional components as part of the line item. Goesling Decl. ¶ 245; PX-0219 (Asset ID NITW0S11026A).

1317. In addition, when Mr. Deeds was a GM employee and conducted a capital asset audit in 2010 of the components of the Courtyard Enclosure, Mr. Deeds did not include the dock levelers, the dock doors, or any of the other additional components that he now asserts were part of the asset. Deeds Test. 714:10-715:15.

1318. Mr. Deeds has no documentation or evidence to support his assertion that these additional components are part of the Courtyard Enclosure. Deeds Test. 715:16-716:8.

1319. The Courtyard Enclosure, Representative Asset No. 37, is ordinary building material and is thus not a fixture. Goesling Decl. ¶ 245; Deeds Decl. ¶ 9 (admitting that the majority of the asset is building material and thus not a fixture).

b. Building Components of Lansing Delta Township Assembly Utility Services (Representative Asset No. 11)

1320. The Lansing Delta Township Assembly Utility Services building consists of a single story structure with an interior area of approximately 64,000 square feet. JX-1135 (showing the outside of the building behind several large tanks); Goesling Decl. ¶ 198.

1321. The CUC building is a steel frame and wall panel structure with a metal roof built upon a concrete slab and foundation and contains approximately eight bay doors and several standard exterior doors. JX-1155; Goesling Decl. ¶ 198.

1322. Certain rooms are separated from the main interior space by cinder block partition walls. Goesling Decl. ¶ 198.

1323. The CUC building also includes various utilities common to most industrial real estate. JX-1118; JX-1123; Goesling Decl. ¶ 198.

1324. These common utilities include heating and ventilation systems; a sprinkler system for fire protection; underground utility piping for natural gas, water, and sewer; an underground storm water piping system; a sanitary waste piping system; a lighting system including interior lighting, outdoor lighting, exit lights, and emergency lighting; a fire alarm system; a security system; voice and data communication systems; and an electrical power distribution system. Goesling Decl. ¶ 199.

1325. The parties agree that this portion of the CUC consists of ordinary building material. JPTO Stipulated Facts ¶ 116; Goesling Decl. ¶ 200. The component assets contained within the CUC, which include both fixtures and non-fixtures are discusses below at paragraphs 1372 through 1375.

9. Certain of the Representative Assets, or Portions Thereof, Are Fixtures

1326. Plaintiff acknowledges that certain of the assets, or portions thereof, had permanent methods of construction, such as cast in place concrete, and were physically integrated into the building in such a way that does not allow them to operate or remain intact when separated from the building.

1327. The parties agree that two such Representative Assets – Pits and Trenches (Representative Asset No. 2) and Paint Building Lines – Process Waste ELPO (Representative Asset No. 4) – are fixtures. JPTO Stipulated Facts ¶¶ 114, 115.

1328. Representative Asset Nos. 2 and 4 were both classified by GM as real property for purposes of tax classification. PX-0231. There is no secondary market for Pits and Trenches (Representative Asset No. 2), and, with the exception of the pumps, there is no secondary market for the Paint Building Lines – Process Waste ELPO (Representative Asset No. 4). Goesling Decl. ¶¶ 100, 172. Such assets are not transferred between GM facilities for reuse. Goesling Decl. ¶¶ 100, 172.

1329. Plaintiff also acknowledges that components of two of the other Representative Assets – the Aluminum Machining System (Representative Asset No. 23) and the CUC (Representative Asset No. 11) – are fixtures. JPTO Stipulated Facts ¶¶ 117, 118. Specifically, the parties agree that the pits, trenches, and piping that are components of the Aluminum Machining System are fixtures. JPTO Stipulated Facts ¶ 117. The parties also agree that the following components of the CUC are fixtures: (a) the utility piping in the CUC; (b) the hard electrical conduit in the CUC; (c) the air handling units; (d) a chilled water holding tank; (e) three batch wastewater holding tanks; and (f) a sludge holding tank. JPTO Stipulated Facts ¶ 118.

1330. Each of these assets is discussed in more detail below.

a. General Assembly Pits & Trenches (Representative Asset No. 2)

1331. The particular pits and trenches capitalized in Representative Asset No. 2 include those constructed for three different conveyance systems, including the final assembly line skillet

conveyor (Representative Asset No. 21, discussed above). Goesling Decl. ¶ 98; *see also* JX-1304.

1332. Representative Asset No. 2 was put into service in July 2006 and had an installed cost of $2,307,597. JPTO Stipulated Facts ¶ 74.

1333. 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. Goesling Decl. ¶ 98.

1334. Representative Asset No. 2 is constructed by excavating a particular area, building forms in the shape required for the pit, and then pouring a concrete structure. Goesling Decl. ¶ 98.

1335. 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. Goesling Decl. ¶ 101.

1336. Embedding the asset directly into the building eliminates all ability to remove the asset. Goesling Decl. ¶ 101. 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. Goesling Decl. ¶ 101. Any attempt to "remove" the pit would destroy the pit's cast-in-place concrete and result in significant damage to the building floor. Goesling Decl. ¶ 101.

b. Paint Building Lines – Process Waste ELPO (Representative Asset No. 4)

1337. Representative Asset No. 4, Paint Building Lines – Process Waste ELPO, is the waste processing system for the Electro-coat Paint Operation, or ELPO system. JPTO Stipulated Facts ¶ 77.

1338. 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. Goesling Decl. ¶ 170

1339. Representative Asset No. 4 consists of a system of trenches, piping, and pumps that carries liquid waste from the ELPO process to the waste treatment facility at the Central Utilities Complex. JPTO Stipulated Facts ¶ 77.

1340. Representative Asset No. 4 was put into service in April 2006 and had an installed cost of $935, 780. JPTO Stipulated Facts ¶ 77.

1341. The trenches of the ELPO Waste Lines are constructed of cast-in-place concrete with the top opening covered by steel grating. Goesling Decl. ¶ 173; *see also* JX-1617; JX-1039.

1342. The trenches run below floor level for approximately 150 feet before draining into a concrete sump pit. Goesling Decl. ¶ 173; *see also* JX-1046.

1343. Pipe connects the sump pit to two pumps, which transport the waste from the sump pit to the waste treatment building. Goesling Decl. ¶ 173; *see also* JX-1616.

1344. 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. Goesling Decl. ¶ 173; *see also* JX-1040; JX-1041.

1345. 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. Goesling Decl. ¶ 174.

1346. The pumps are mounted on a skid that is bolted to the floor and could be removed without damage to the realty or the asset, however, the pumps likely comprise less than 10% of the original cost of the asset and make up a relatively small portion of the entire asset. Goesling Decl. ¶ 175.

1347. The parties agree that Representative Asset No. 4 is a fixture. JPTO Stipulated Facts ¶ 115.

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

1348. Representative Asset No. 23, the Aluminum Machining System, which is located at Warren Transmission, is a coolant filtration system for machining assets that is connected to Computer Numerically Controlled, or "CNC" machines. JPTO Stipulated Facts ¶ 96.

1349. Representative Asset No. 23 includes the piping that circulates clean, temperature controlled coolant to the CNC machines and also removes metal chips generated during the CNC milling process from the coolant so the coolant can be recirculated to the CNC machining centers. JPTO Stipulated Facts ¶ 96.

1350. Representative Asset No. 23 was put into service in December 2007 and had an installed cost of $1,050,540. JPTO Stipulated Facts ¶ 96.

1351. The components of the Aluminum Machining System include two filtration units, a polish filter unit, a heat exchanger, a chip conveying system, piping and a control panel. Goesling Decl. ¶ 283.

1352. Plaintiff agrees with Defendants that the pits, trenches, and the piping that are components of Representative Asset No. 23 are fixtures.

1353. These portions of the asset were installed permanently. Goesling Decl. ¶ 291.

1354. The trenches, which are integrated into the floor slab, would be destroyed as part of removal and would leave extensive unlined holes, constituting damage to the building. Goesling Decl. ¶ 291.

1355. The long runs of large diameter piping also would likely be destroyed during removal. Goesling Decl. ¶ 291.

1356. The majority of the asset, however, is a removable and relatively impermanently attached piece of equipment.

1357. The two main filtration units, made of welded steel and measuring approximately 15'x60'x12', are essentially large steel tanks, with travelling filter belts and chip conveying equipment installed inside. Goesling Decl. ¶ 284.

1358. The main filtration units are attached to the building floor with angle iron clips and lag bolts in several locations around the perimeter of the units. Goesling Decl. ¶ 284; *see also* JX-1321.

1359. The polish filtration unit is essentially a smaller version of the two main filtration units, measuring approximately 6x30x10 feet. JX-1333; Goesling Decl. ¶ 285.

1360. Drainage trenches have been installed in the floor surrounding the filtration units to collect water and coolant spillage. Goesling Decl. ¶ 284; *see also* JX-1333.

1361. 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. JX-1325; JX-1326 (visible openings for forklift truck); Goesling Decl. ¶ 286.

1362. 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. JX-1327; Goesling Decl. ¶ 286.

1363. The control panel is resting on the building floor, and is not attached by bolts or any other method. JX-1323; Goesling Decl. ¶ 287.

1364. 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 Aluminum Machining System by loose cabling in enclosed cable trays and, in certain places, utilizes quick disconnect fittings. JX-1323; Goesling Decl. ¶ 287.

1365. These are the majority of the components of the Aluminum Machining System, and they can be removed without damage to the assets or the realty. Goesling Decl. ¶ 290.

1366. Specifically, GM has moved at least three similar assets from the Willow Run plant that were capitalized for $2.8 million, $1.9 million, and $3 million, comparable to the installed cost of Representative Asset No. 23. PX-0022C--Asset #23-0001(rows 149, 992, and 2077, the rows containing the main asset entry).

1367. One of the similar assets was installed in 2007 for a cost of $2.8 million only to be removed and relocated 3 years later as of 2010. PX-0022C--Asset #23-0001 (rows 149).

1368. In addition, there is a secondary market for these assets. PX-0348B (showing the sale of 21 coolant filtration units, many of which were only two to six years old).

1369. Finally, GM classified this asset as personal property for purposes of tax filings in Michigan. Goesling Decl. ¶ 290.

1370. Accordingly, although this asset is a more difficult determination than other assets because of the small portion of it that is permanently attached to the realty, there is no evidence that GM intended to make this asset a permanent part of the realty and a hybrid conclusion is appropriate here. Goesling Decl. ¶ 291.

1371. Representative Asset No. 23 is predominantly personal property (the two filtration units, a polish filter unit, a heat exchanger, a chip conveying system, and a control panel) but a portion of it is a fixture (the pits, trenches, and piping). Goesling Decl. ¶ 289.

d. Non-Building Components of Lansing Delta Township Assembly Utility Services (Representative Asset No. 11)

1372. Representative Asset No. 11, Lansing Delta Township Assembly Utility Services, includes the building itself (discussed above in paragraphs 1320-1325), as well as the utility assets inside the building, including piping for various fluids and compressed air, various pumps, electrical power distribution equipment, air handling units, air compressors, a chilled water system, a hot water system, a water treatment system, and a waste water treatment system. Goesling Decl. ¶ 196.

1373. The asset was put into service in April 2006 and had an installed cost of $73,997,467.

1374. Because of the composite nature of this asset, which includes many different components that do not allow for a uniform conclusion, each of the components must be analyzed separately. Goesling Decl. ¶ 196.

1375. As discussed above in paragraph 1325, both parties acknowledge that portions of the asset are ordinary building materials, while other portions are not.

1376. The following is a chart of the individual components of the CUC asset and their respective classifications:

Classification	Component	Description
Personal property	**Pumps**	The assets are mounted on a skid that is bolted to a 4-inch-thick pad. JX-1116. Goesling Decl. ¶ 205. Electrical power is delivered to the Pumps by flexible cabling or wire in metal conduit. Goesling Decl. ¶ 205.

		Many of the larger capacity Pumps have top mounted eye bolts serving as lift points to aid in installation and removal. Goesling Decl. ¶ 205. GM has transferred 7 pump systems similar to the pumps used within the CUC and range in cost from $12k to $48k. PX-0022C - Asset #11-0001 (rows 2026, 9190, 9192, 9193, 9197, 9199, and 9201). One of the transferred pumps is described as a, "Pumping Skid for tank farm," and was transferred from GM's Fredericksburg powertrain plant to the Hamtramck assembly facility. PX-0022C - Asset #11-0001 (row 2026). Though this skid mounted pump was first employed in the tank farm of a powertrain facility, GM was able to repurpose the asset within a vehicle assembly plant.
Personal property	**Compressed Air System**	The asset includes four air compressors and four air dryers that generate compressed air for GM's production needs at Lansing Delta Township. Goesling Decl. ¶ 215. The compressors are bolted to a four-inch concrete pad. JX-1119; Goesling Decl. ¶ 217. Two of the compressors and all of the air dryers are mounted on skids which contain lift points at each corner. JX-1145; Goesling Decl. ¶ 217. Two of the air compressors were relocated by GM from GM's Lansing Grand River utilities building. Goesling Decl. ¶ 217; Stevens Test. 22-364:8. Further, GM transferred 3 asset entries similar to the CUC air compressors and dryers with installation costs of $106k, $106k, and $140k. PX-0022C - Asset #11-0001 (rows 1210, 1213, and 1214). These three air compressors and air dryers were transferred as of 2015 from GM's Fredricksburg powertrain facility to GM's Hamtramck assembly plant. Additionally, there is an active secondary market for similar air compressors and dryers. Goesling Decl. ¶ 218. Maynards/Hilco sold three auction lots comprised of 15 air compressors and 5 air dryers from the Moraine and Pontiac facilities in 2010 for a total of $80k. PX-0348B - Asset 11(a)-0003 (rows 11928, 11929, and 11930).
Personal property	**Hot Water Boiler**	The asset consists of three natural gas fired boilers that produce hot water for process use in the paint building, not for use in the building generally. JX-1156; Goesling Decl. ¶ 223.

		The boilers are each mounted on a steel skid that is secured to a four-inch-thick concrete pad with lag bolts. JX-1156; Goesling Decl. ¶ 225. Each boiler has several lifting points for both installation and removal. Goesling Decl. ¶ 225. Incoming electrical power is delivered through loose cabling contained in reconfigurable metal cable trays and wire in conduit. Goesling Decl. ¶ 225. Skid mounted boilers of similar capacity are regularly rented to businesses for temporary use due to their ease of movability. Goesling Decl. ¶ 225.
Personal property	**Water Treatment System**	The asset is comprised of two reverse osmosis units, a zeolite resin water softening system, a HMI control panel, and two 60,000 gallon fiberglass tanks. JX-1120; JX-1135; JX-1122; Goesling Decl. ¶ 226. The water treatment system provides filtered and softened water for use in the painting process, not the building generally. Goesling Decl. ¶ 226. The reverse osmosis units and water softening system are both skid-mounted and the skids are bolted to a four-inch thick concrete pad. JX-1122; Goesling Decl. ¶ 228. Several lift points are welded to the top to facilitate installation and removal. JX-1122; Goesling Decl. ¶ 228. Electrical and data cabling are fed to the reverse osmosis systems through flexible wiring in reconfigurable cable trays. Goesling Decl. ¶ 228. The HMI control panel is bolted to the floor and has two top-mounted eye bolts which serve as lift points. JX-1154; JX-1121; Goesling Decl. ¶ 228. The water holding tanks were a slightly closer decision because of their size (approximately 12'x30'), but the tanks appear to have been prefabricated and thus engineered to endure transportation in their complete form. Goesling Decl. ¶ 229.
Part fixture/part personal property	**Electrical Power Distribution**	The asset consists of motor control cabinets, switchgear, and circuit breakers that are personal property and wiring that is a fixture. JX-1041; Goesling Decl. ¶ 208. Other than the wiring, the components of the asset are bolted to the CUC building structure or to the floor. Goesling Decl. ¶ 210. GM has transferred assets associated with 29 asset entries related to electrical infrastructure equipment similar to the electrical infrastructure assets within the CUC with installed costs ranging from $5k to over $1 million. PX-0348B - Asset 11(b)-0001 & -0002 (rows 2683-4207,4734, 4934, 5137, 5424, 5511, 7345-7349, 7409-9152, 9188, 9189, 9385, 10420-10503). For example, GM relocated three substation asset entries each with an installed cost of $180k from its Doraville assembly plant to

		its Bedford powertrain facility. PX-0022C - Asset #11-0001 (row 7345, 7346, and 7347). Maynards/Hilco auctioned numerous lots of electrical infrastructure equipment comparable to the type of electrical infrastructure equipment within the CUC. PX-0348B - Asset 05 & 11-0001 to 0002. These types of assets include switchgear, transformers, circuit breakers, and safety switches. The wiring to the asset, however, is in rigid metal conduit and would be destroyed upon removal. JX-1041; Goesling Decl. ¶ 211. Accordingly, this portion of the asset is a fixture.
Part fixture/part personal property	**Chilled Water System**	The asset consists of five electric motor driven centrifugal chillers (personal property) and a cooling tower and a 3.3 million gallon welded steel tank (fixtures). Goesling Decl. ¶ 219. The system supplies cold water exclusively for use in the manufacturing operations at the Lansing Delta Township facility. Goesling Decl. ¶ 219. The chillers simply rest upon a four-inch-thick concrete pad without any attachment. Goesling Decl. ¶ 221. Electrical power and data cabling is fed to the chillers via loose cable contained in reconfigurable cable trays and the chillers have several lift points. JX-1146; Goesling Decl. ¶ 221. A secondary market exists for centrifugal water chillers similar in capacity to the chillers in the CUC, demonstrating that removal can be accomplished with minimal damage to the chiller itself. Goesling Decl. ¶ 221. Maynards/Hilco sold 2 chillers out of GM's Moraine facility for $71k. PX-0348B - Asset 11(a)-0003 (row 11927). The chilled water tank, however, is a fixture because it is very large—having a capacity of 3.3 million gallons—and although only attached via gravity, its welded steel construction means it would be destroyed during removal. Goesling Decl. ¶ 222. Similarly, the cooling tower was likely field-erected and would be destroyed during removal. Goesling Decl. ¶ 222.
Part fixture/part personal property	**Wastewater Treatment System**	The asset is primarily comprised of two filter presses, two flocculation tanks, a mezzanine structure, two parallel plate clarifiers, a sludge conditioning tank, and two vertical ELPO waste tanks (personal property) and three batch wastewater holding tanks and a sludge holding tank (fixtures). Goesling Decl. ¶ 230. The wastewater treatment system treats liquid industrial waste from the Lansing Delta Township facility. Goesling Decl. ¶ 230. The two filter presses are lag bolted to the floor and have an active secondary market. JX-1131; JX-1130; Goesling Decl. ¶ 232.

		The flocculation tanks are affixed to a six-inch-thick concrete footing with lag bolts and each tank has several lift points welded to the top portion of the asset. Goesling Decl. ¶ 233. The flocculation tanks can be removed without damage to them or the building. Goesling Decl. ¶ 233. As with all of the mezzanines used by GM, the mezzanine consists of sections bolted together and then bolted to the building and other pieces of equipment. JX-1132; Goesling Decl. ¶ 234. Similarly, the structural supports for the mezzanine are connected together with nuts and bolts. JX-1115; Goesling Decl. ¶ 234. The two plate clarifiers are affixed to concrete pads with lag bolts and they each have lift points on top. JX-1133; JX-1115; Goesling Decl. ¶ 235. The two vertical ELPO waste tanks are large, but are attached to a concrete foundation with lag bolts. JX-1113. The lift points welded to the top of each tank indicate that they were shop fabricated, and then delivered and installed with a crane and that they can be removed without damage. Goesling Decl. ¶ 237. The sludge conditioning tank is attached with lag bolts to an eight-inch-thick concrete footing and has lift points welded to the top portion to facilitate movement. Goesling Decl. ¶ 238. Similar to the flocculation tanks, the size of the sludge conditioning tank allows for it to be removed without damage. JX-1124; Goesling Decl. ¶ 238. The three batch wastewater tanks, however, are very large (25'x30') field fabricated, welded steel tanks. JX-1151; Goesling Decl. ¶ 236. Although only attached by gravity, the size, weight, and method of construction of these tanks suggests that GM intended to permanently attach them to the real estate. Goesling Decl. ¶ 236. The sludge holding tank is 14 feet in diameter by 14 feet in height and would be impossible to remove without damage to either the asset or the building. JX-1125; Goesling Decl. ¶ 239.
Fixture	**Piping**	The asset includes all piping within the CUC building until five feet outside the CUC building. Goesling Decl. ¶ 204. The Piping carries compressed air, exhaust gases, and fluids throughout the CUC building and to the Lansing Delta Township facility. Goesling Decl. ¶ 204. The asset would be destroyed on removal. Goesling Decl. ¶ 204.
Fixture	**43 Air Handling Units ("AHU")**	The asset could not be inspected but its location on the roof suggests that removal would leave a hole in the roof. Goesling Decl. ¶ 214. Removal would also likely damage the material used for installation of a typical AHU, such as sheet metal flanges and flashing along with any ductwork that is included in this asset. Goesling Decl. ¶ 214.

XIV. PLAINTIFF'S VALUATION OF THE 40 REPRESENTATIVE ASSETS

A. Liquidation Value Is the Appropriate Standard for Valuing the 40 Representative Assets

1377. The 40 Representative Assets should be valued at liquidation value in the hands of Old GM as of the Valuation Date.

1378. At trial, Plaintiff's economics and valuation expert, Professor Daniel R. Fischel, testified that liquidation is the appropriate standard of value to apply for valuing the 40 Representative Assets—not a going concern standard.

1379. As discussed in more detail below, he testified that because the terms of the 363 Sale do not reflect the market value of those assets, the 363 Sale, which incorporates a massive Government subsidy, cannot form the basis for valuing the Representative Assets. Fischel Decl. ¶ 67.

1380. Plaintiff's appraisal expert, Mr. Goesling, then testified that he conducted an appraisal employing the liquidation value standard, and that the orderly liquidation value in exchange ("**OLV**") premise of value, specifically, is the appropriate premise of value to apply for the Representative Assets from an appraisal perspective. *See, e.g.,* Goesling Test. 3149:21-3150:8.

1381. Applying OLV, Mr. Goesling appraised the Representative Assets to have a value of $12,164,900.[11]

[11] The sum of Mr. Goesling's values is not a particularly meaningful value because it is the sum of all of the Representative Assets, whether or not they are included in the Surviving Collateral and because there is no statistically meaningful relationship between the sum of the values of the Representative Assets and the sum of all of the assets in dispute.

1. Professor Fischel Is Highly Qualified to Opine on the Proper Standard for Valuing the Representative Assets

1382. Plaintiff's economics and valuation expert, Professor Fischel, is highly qualified to provide an expert opinion on the standard of value that should be used to value the 40 Representative Assets and the Collateral.

1383. Professor Fischel has had a dual professional career both as an academic and as a consultant and an expert witness. Fischel Test. 2551:18-2551:20.

1384. He is currently the Lee and Brenner Professor of Law and Business, now emeritus, at the University of Chicago Law School. Fischel Test. 2551:21-2551:24.

1385. Before that he had numerous other academic appointments at the University of Chicago, including an appointment at the University of Chicago Graduate School of Business, as the director of the law and economics program at the university for many years, and as dean of the law school for a number of years. Fischel Test. 2552:2-2552:9.

1386. Professor Fischel has had faculty appointments at Northwestern University, and an appointment at the Kellogg School of Management at Northwestern University. Fischel Test. 2552:9-2552:12.

1387. His academic areas of expertise have primarily been in the area of corporate finance and the economics of financial markets. Fischel Test. 2552:18-2552:21.

1388. He has written and taught courses on these subjects, including advanced courses. Fischel Test. 2552:21-2552:24.

1389. He has written or coauthored several books and approximately 50 articles, which have been cited hundreds of times by courts at all levels, including by the United States Supreme Court. Fischel Test. 2552:13-2552:17.

1390. Professor Fischel is currently the president of the consulting firm Compass Lexecon, which is an international firm specializing in the application of economics to primarily legal and regulatory disputes. Fischel Test. 2552:25-2553:08.

1391. In addition to being head of the entire firm, he has himself had a very active career as a consultant and an expert witness. Fischel Test. 2553:9-2553:12.

1392. He has been qualified as an expert witness in the areas of corporate finance, valuation, regulation of financial markets and the economics of financial markets. Fischel Test. 2553:14-2553:18.

1393. He has acted as a consultant and advisor to many governmental entities. Fischel Test. 2553:19-2553:24.

1394. For example, he has been an expert witness for the United States Department of Justice many times on economic and valuation issues. Fischel Test. 2553:24-2554:3.

1395. He has been a consultant to and frequent invited speaker for the Securities and Exchange Commission. Fischel Test. 2554:4-2554:6.

1396. He has been a consultant or an expert for the major stock exchanges and financial exchanges in securities and commodities and futures markets. Fischel Test. 2554:7-2554:10.

1397. He has worked as either a consultant or an expert witness for the Federal Housing Administration, the Department of Labor, and many other state and local governmental entities. Fischel Test. 2554:11-2554:16.

1398. He has been a frequent lecturer, speaker, and panelist to various governmental entities or on various subjects relating to his expertise. Fischel Test. 2554:16-2554:19.

2. The Government-Sponsored 363 Sale Does Not Provide an Appropriate Basis for Valuing the Assets of Old GM

1399. If the terms of the 363 Sale reflected the market value of Old GM, then those terms might form a reasonable basis for determining the value of the Representative Assets (to the extent that the collateral was acquired by New GM). Fischel Decl. ¶ 67.

1400. However, available evidence indicates that the 363 Sale does not reflect the market value of Old GM's assets. Fischel Decl. ¶ 67.

1401. A standard definition of "market value" in economics is "the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion." Fischel Decl. ¶ 68; PX-0139-0008 (International Valuation Standards Council, "International Valuation Standards 104: Bases of Value Exposure Draft," April 7, 2016, Section 30.1); *see also,* PX-0145-0013 (International Valuation Standards Council, "International Valuation Standards 2013: Framework and Requirements," ¶ 29).

1402. This definition further 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." Fischel Decl. ¶ 68; PX-0139-0008 (International Valuation Standards Council, "International Valuation Standards 104: Bases of Value Exposure Draft," April 7, 2016, Section 30.2 (a)); *see also,* PX-0145-0013 (International Valuation Standards Council, "International Valuation Standards 2013: Framework and Requirements," ¶ 30 (a)).

1403. Available evidence indicates that the terms of the Government's interventions, including the 363 Sale, were motivated by factors that would not be relevant to a typical market participant, such as the macroeconomic and political impacts of allowing Old GM to fail. Fischel Decl. ¶ 69.

1404. As discussed above, Government officials directly involved in negotiating Treasury's interventions, including the 363 Sale, were clear about this fact in contemporaneous statements. *Supra* ¶¶ 204-12; Fischel Decl. ¶ 70.

1405. Retrospective Government reports regarding Treasury's interventions come to similar conclusions. *Supra* ¶¶ 213-16; Fischel Decl. ¶ 76.

1406. These statements are consistent with the fact that the value of the assets Treasury received as a consequence of the 363 Sale was far less than the value of the financing provided. *Supra* ¶¶ 217; Fischel Decl. ¶ 80.

1407. Exhibit E below reports these calculations and demonstrates that while Treasury provided close to $50 billion in financing, it received common equity, preferred equity, and notes in New GM that had a combined value of only approximately $22 billion. Fischel Decl. ¶ 81.

Exhibit E: U.S. Treasury Transaction Value

Prior to 363 Sale Date		**After 363 Sale Date[1]**	
U.S. Treasury Paid:		*U.S. Treasury Received:*	
Financing Type	Value	Financing Type	Value
U.S. Treasury Loan	$19,760,624,198	Common Equity Stake[2,3]	$12,080,097,460
DIP Facility[4]	$30,100,000,000	Preferred Equity Stake[2]	$1,741,000,000
		New GM & Old GM Notes[4]	$8,058,293,690
Total	$49,860,624,198		$21,879,391,150

Notes:

1. The equity consideration received by the U.S. Treasury in the 363 Sale was valued by General Motors on December 31, 2009.
2. The fair value of common equity of General Motors Company received by the U.S. Treasury is computed as the product of the per share fair value of common equity in JX-0009 (General Motors Company Form 10-K, dated December 31, 2009, p. 105) and the shares attributable to the U.S. Treasury as disclosed in PX-0126 (General Motors Company Form 8-K, dated July 10, 2009, p. 23).
3. The preferred equity value received by the U.S. Treasury is a fair value estimate provided by JX-0009 (General Motors Company Form 10-K, dated December 31, 2009, p. 105) and may include Canada's shares. The calculation of common and preferred equity in the same Form 10-K excludes the shares attributable to VEBA.
4. $985,805,085 of the U.S. Treasury contribution's to the DIP Facility went to Old GM as a debt obligation to wind down old liabilities.
5. GMAC Inc., formerly GMAC LLC, also received funding from U.S. Treasury under TARP. Those funds are excluded from this analysis.

Sources: PX-0126 (General Motors Company Form 8-K, dated July 10, 2009, p. 23), PX-0130 (TARP Transaction Report Automotive Industry Financing Program, for period ending September 30, 2009, p. 18), JX-0009 (General Motors Company Form 10-K, dated December 31, 2009, p. 105).

1408. This $22 billion figure reflects the value of *New GM*, and therefore, is not relevant in determining the value of Old GM's assets. Fischel Decl. ¶ 81.

1409. In addition this figure reflects the value of New GM as of a date later than the Valuation Date of June 30, 2009. Fischel Decl. ¶ 81.

1410. The 363 Sale also contained several nonmonetary concessions that would not have been considered by a commercial entity. Fischel Decl. ¶ 82.

1411. First, New GM was required to make an offer of employment to all of Old GM's non-unionized employees and unionized employees represented by the UAW. Fischel Decl. ¶ 82; *In re Gen. Motors Corp.*, 407 B.R. at 483.

1412. Second, New GM was required to negotiate a new collective bargaining agreement, which would convert at least half of the obligation Old GM had to the UAW to equity. Fischel Decl. ¶ 82; PX-0137-0004 (Bankr. Pro. Dkt. No. 37, Statement of the United States of America Upon the Commencement of General Motors Corporation's Chapter 11 Case ¶ 7); *In re Gen. Motors Corp.*, 407 B.R. at 478.

1413. Third, New GM was required to make future contributions to the New Employees' Beneficiary Association Trust to provide retiree health and welfare benefits to former UAW employees and their spouses. Fischel Decl. ¶ 82; *In re Gen. Motors Corp.*, 407 B.R. at 484.

1414. As discussed above, factors besides those typically considered by a commercial entity—to maximize profits—were key to Treasury's decision to finance the 363 Sale. Fischel Decl. ¶ 83.

1415. As set forth above, statements by Government officials close to Treasury's interventions, including Mr. Rattner, Mr. Goolsbee, and Mr. Krueger, indicate that they never expected the Government to see a full return of its investments. *Supra* ¶¶ 223-27; Fischel Decl. ¶ 84.

1416. Hence, the 363 Sale does not represent the market value of Old GM and its assets as of June 30, 2009 and therefore does not serve as a reasonable market-based measure for valuing the Representative Assets. Fischel Decl. ¶ 87.

3. When Firm Failure Is Almost Certain, Liquidation Is the Appropriate Standard Of Value

1417. Absent a market-based measure of value for a firm, there are two primary valuation standards that are commonly employed when estimating the value of a firm: Value as a going concern and value in liquidation. Fischel Decl. ¶ 88.

1418. These standards differ primarily in the assumed status of the firm (*i.e.*, whether the firm will continue to operate and generate cash flows or cease operations and sell assets). Fischel Decl. ¶ 88; *see, e.g.,* JX-0028-0004 to 0005 (Shannon P. Pratt and Alina V. Niculita, *Valuing a Business*, 5th Edition (McGraw-Hill Education, 2008), pp. 47-48).

1419. Under a going concern valuation standard, a firm's assets are assumed to remain in continued use as a cash-flow generating assemblage of assets. Fischel Decl. ¶ 89; JX-0028-0004 (Shannon P. Pratt and Alina V. Niculita, *Valuing a Business*, 5th Edition (McGraw-Hill Education, 2008), p. 47).

1420. Under this standard, the value of the firm, and its component assets, is estimated based on the present value of the firm's expected future cash-flows. Fischel Decl. ¶ 89; JX-0028-0008 (Shannon P. Pratt and Alina V. Niculita, *Valuing a Business*, 5th Edition (McGraw-Hill Education, 2008), pp. 276).

1421. The going concern valuation standard is therefore only applicable when a firm is economically viable and therefore can remain in operation without a non-market subsidy as was paid in this case. Fischel Decl. ¶ 90.

1422. Under this standard, the value of a given asset owned by a firm can be estimated based on the asset's marginal cash-flow contribution to the firm's total cash-flows. Fischel Decl. ¶ 90.

1423. In other words, the value of an asset is a function of the asset's contribution to the value of the firm as a whole. Fischel Decl. ¶ 90.

1424. Alternatively, the liquidation standard assumes a firm will cease operations and the firm's assets will be liquidated and sold individually or in groups. Fischel Decl. ¶ 91.

1425. Under the liquidation standard, since there are insufficient cash-flows to support the operations of the firm, the value of the firm is estimated based on the prices one would expect to receive for the firm's assets as part of a disposition of those assets on a piecemeal basis through the secondary markets. Fischel Decl. ¶ 91; *See, e.g.,* JX-0028-0004 to 0005 (Shannon P. Pratt and Alina V. Niculita, *Valuing a Business*, 5th Edition (McGraw-Hill Education, 2008), pp. 47-48); JX-0027-0002 (Jerald E. Pinto, *et al.*, *Equity Asset Valuation,* 3rd Edition (Wiley, 2015), p. 4).

1426. Under the liquidation standard, the value of a given asset owned by the firm can be estimated based on the price obtainable for the asset in the secondary market. Fischel Decl. ¶ 92.

1427. When estimating value under a liquidation standard, costs associated with the liquidation of the assets must be accounted for. Fischel Decl. ¶ 92.

1428. Oftentimes, some assets such as machinery and equipment or buildings, may have little to no liquidation value, since the cost to dismantle and remove may be greater than any value realizable in disposition. Fischel Decl. ¶ 92.

1429. In these cases, the costs associated with the liquidation of such assets would detract from the value of the business or property to which they are attached. Fischel Decl. ¶ 92; PX-0135-0007 to 0008 (Shannon P. Pratt, "Defining Standards of Value," *Valuation* 34, no. 2 (1989): 4-12, pp. 10-11).

1430. For economically viable firms likely to remain a going concern with assets expected to remain in continued use, valuations can be conducted using either a going concern standard or a liquidation standard, with the higher of the two representing the value of the firm. Fischel Decl. ¶ 93; PX-0139-0010, 0014 (International Valuation Standards Council,

"International Valuation Standards 104: Bases of Value Exposure Draft," April 7, 2016, Section 30.3, 150.2-150.4).

1431. For these firms, the cash-flow based value generated by the firm's assets operating together often results in an estimated going concern value that is greater than liquidation value (although a persistently unprofitable business may be worth more in liquidation). Fischel Decl. ¶ 93; JX-0027-0002 (Jerald E. Pinto, *et al.*, *Equity Asset Valuation,* 3rd Edition (Wiley, 2015), p. 4).

1432. However, in situations where ongoing operations of a firm will almost certainly fail absent a subsidy, as was paid in this case, a going concern standard is inappropriate, given that (absent a subsidy) the firm would be unable to maintain operations and generate cash flows. Fischel Decl. ¶ 94.

1433. In these cases, a liquidation standard of value is the appropriate standard to be applied. Fischel Decl. ¶ 94; PX-0309-0003 to 0005 (David Laro and Shannon P. Pratt, *Business Valuation and Federal Taxes: Procedure, Law, and Perspective*, 2nd Edition (Wiley, 2011), pp. 216, 243-244).

1434. For these reasons, the liquidation standard is the appropriate standard to apply in valuing the Representative Assets. Fischel Decl. ¶ 95.

B. Orderly Liquidation Value in Exchange Is the Correct Premise of Value

1435. In addition to rendering an opinion as to the classification of each of the Representative Assets as fixture or non-fixture, Plaintiff's expert, Mr. Goesling, also provided an expert opinion of the value of 39 of the 40 Representative Assets as of the Valuation Date. Goesling Decl. ¶ 370. (By stipulation, a valuation of the CB91 robot, Representative Asset 39, is not being offered by the parties. *See, e.g.,* Goesling Test. 3147:20-3148:9.)

1436. Mr. Goesling prepared his appraisal of the Representative Assets in conformance with the relevant sections of the current Uniform Standards of Professional Appraisal Practice ("**USPAP**") of the Appraisal Foundation and the Principles of Appraisal Practice and Code of Ethics of the American Society of Appraisers. Goesling Decl. ¶ 371.

1437. The Competency Rule of USPAP mandates that, as a prerequisite for each assignment performed by an appraiser under USPAP, the appraiser must: (i) have the experience and ability to properly identify the valuation problem to be addressed; (ii) possess the knowledge and experience to complete the assignment competently; and (iii) have the ability to recognize and comply with the laws and regulations that apply to the specific valuation assignment. Goesling Decl. ¶ 372.

1438. Prior to performing his appraisal of the Representative Assets, Mr. Goesling analyzed the USPAP Competency Rule and, based on his experience and qualifications set forth above, determined that he was competent to perform the assignment. Goesling Decl. ¶ 372.

1439. Mr. Goesling appraised the Representative Assets regardless of whether or not he classified the asset as a fixture. Goesling Decl. ¶ 370.

1. Market Conditions on the Valuation Date

1440. To perform his appraisal, Mr. Goesling first considered the state of affairs of Old GM at the Valuation Date, as well as overall market conditions that impacted the values of automotive machinery and equipment as of the Valuation Date. Goesling Decl. ¶ 373.

1441. Among the factors that Mr. Goesling considered were that in June 2009, the United States was experiencing a large-scale financial crisis that threatened the country's financial system and the U.S. economy was in the worst condition it had been in for a very long time. Goesling Decl. ¶ 374.

1442. He examined the economic indicators that existed as of the Valuation Date and reviewed data about Gross Domestic Product, unemployment rates, the Industrial Production Index and U.S. light vehicle sales. Goesling Decl. ¶ 374.

1443. He also considered that as of the Valuation Date, much like the U.S. economy as a whole, the U.S. auto manufacturing industry was in deep trouble and had been for some time, and noted that there were several significant existing and emerging trends that impacted the vehicle manufacturing industry, including: (1) increased competition from foreign-owned automakers; (2) the passage of new legislation requiring stricter average fuel economy standards, stricter safety standards, and tighter emissions standards, meaning that the OEMs were forced to invest capital in new technologies which allowed the OEMs to comply with these increasingly stringent regulations; (3) increased cost of raw materials, leading to increased pressures on the OEMs' profits; and (4) tightened credit markets, meaning that restricted borrowing was preventing potential customers from buying new cars and light trucks in the U.S. and throughout the world. Goesling Decl. ¶ 375.

1444. He considered that Old GM had recorded significant losses prior to the Valuation Date and that General Motors' 2008 10-K filing with the SEC stated that due to goodwill impairments in 2008, it no longer had any goodwill on its balance sheet as of the end of 2008. Goesling Decl. ¶¶ 376-77.

1445. He noted that Old GM's 10-K for the year ended December 31, 2008 stated: "Our significant recent operating losses and negative cash flows, negative working capital, stockholders' deficit and the uncertainty of UST approval of the Viability Plan, the UST funding of the Viability Plan and successful execution of our Viability Plan, among other factors, raise substantial doubt as to our ability to continue as a going concern." Goesling Decl. ¶ 377; DX-

0017-0150 (Form 10-K Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 For the year ended December 31, 2008 General Motors Corporation, at 147).

1446. He also considered the Government's rejection of Old GM's viability plan in March 2008. Goesling Decl. ¶ 378.

1447. He further considered that the Government bailout of Old GM included approximately $30 billion of DIP Financing. Goesling Decl. ¶ 380.

1448. He concluded that as of the Valuation Date, the U.S. economy was in dire straits and without the U.S. government's intervention, two of the former Big Three automakers—Old GM and Chrysler—would likely have been dissolved. Goesling Decl. ¶ 382.

2. Determining The Appropriate Premise of Value

1449. With that context in mind, Mr. Goesling proceeded with his appraisal.

1450. His initial step was to determine the appropriate premise of value to use. Goesling Decl. ¶ 383.

1451. Consideration of the highest and best use of an asset (or group of assets) dictates the appropriate premise of value to apply in valuing the property. Goesling Decl. ¶ 383.

1452. Determining the highest and best use of the 40 Representative Assets included an analysis of the current use and alternative uses of the property, considering what is legally permissible, physically possible, financially feasible, and maximally productive; the highest and best use of the property is a use that meets all four of these criteria. Goesling Decl. ¶ 383; Goesling Test. 3151:2-3151:10.

1453. With regard to the Representative Assets, there were no legal issues that would prevent the assets from being used in automotive manufacturing operations and the past use of the assets by Old GM demonstrated that it was physically possible to use all of the

Representative Assets in automobile manufacturing operations as of June 30, 2009 (except perhaps for the Gas Cleaning System at Defiance). Goesling Decl. ¶ 384.

1454. Thus, the focus of the highest and best use analysis for Mr. Goesling's appraisal of the Representative Assets was whether as of the Valuation Date, continued use of the assets was financially feasible and maximally productive. Goesling Decl. ¶ 384.

1455. Generally speaking, value can be broadly classified into the two premises of value: Value in exchange and value in use. Goesling Decl. ¶ 385.

1456. Value in exchange represents the amount that could be realized from a sale of the asset as if removed from use and available on the open market, and is often determined by consideration of actual sales of similar assets. Goesling Decl. ¶ 385; Goesling Test. 3365:9-3365:23.

1457. On the other hand, appraising machinery and equipment under the in use premise requires adding the costs (direct and indirect) required to get the equipment installed in the plant and ready to operate to the market value of the asset. Goesling Decl. ¶ 385.

1458. By adding these additional costs, an appraiser converts the market price of the asset to the in-use value of the asset. Goesling Decl. ¶ 385; PX-0163-0082 (Machinery and Technical Specialties Committee of the American Society of Appraisers, *Valuing Machinery and Equipment: The Fundamentals of Appraising Machinery and Technical Assets*, 3d ed. (Washington, DC: American Society of Appraisers, 2011) (the "**ASA**") at 117).

1459. To value assets in continued use, the collective assemblage of the company's assets must have going-concern value and there must be an adequate return on investment to justify the continued use of the assets. Goesling Decl. ¶ 386.

1460. Otherwise, the continued use of the assets is not considered to be "financially feasible" or "maximally productive" under the highest and best use analysis: "[A] positive income stream indicates that the business enterprise is a going concern, with future benefits of ownership, but if the forecasted income stream is negative or zero, implying that the business is losing money, or at best breaking even, the assets must be valued under a premise of removal (net salvage) and, in theory, the assets should be deployed elsewhere to maximize their value." PX-0163-0135 (ASA at 135); Goesling Decl. ¶ 386.

1461. Mr. Goesling concluded that the assets did not meet the financially feasible and highest return portions of the continued use premise. Goesling Test. 3151:2-3151:19.

1462. In connection with his appraisal, Mr. Goesling was asked by counsel for Plaintiff to assume, consistent with Professor Fischel's conclusions, that absent a substantial Government subsidy, Old GM would have been unable to continue as a going concern. Goesling Decl. ¶ 387.

1463. As part of understanding why he was asked to make this assumption, Mr. Goesling independently reviewed the Expert Report of Daniel Fischel submitted in this case, which concluded, among other things, that there was "no basis to attribute any value related to Old GM's assets as part of a going concern" and, further "since there are insufficient cash-flows to support the operations of the firm, the value of the firm is estimated based on the prices one would expect to receive for the firm's assets as part of a disposition of those assets on a piecemeal basis through the secondary markets." Goesling Decl. ¶ 387.

1464. In addition, the assumption that Old GM did not have going concern value on the Valuation Date comported with Mr. Goesling's own understanding of the state of Old GM's business enterprise as of June 30, 2009, and the poor state of the automotive industry on the Valuation Date. Goesling Decl. ¶ 387.

1465. He determined that because Old GM's assets did not have value as part of a going concern as of the Valuation Date, value in exchange, which is based on the market prices that would be received from the sale of the assets on the secondary market, is the appropriate premise to use in a valuation of the Representative Assets. Goesling Decl. ¶ 387.

1466. After selecting value in exchange as the appropriate premise of value, Mr. Goesling then then had to determine the proper definition of value to apply: Fair Market Value, Orderly Liquidation Value, or Forced Liquidation Value. Goesling Decl. ¶ 388.

1467. The primary consideration in selecting the applicable definition of value is the amount of time available for the sale of the asset or assets. Goesling Decl. ¶ 388.

1468. Specifically, Fair Market Value, as defined in the M&E literature, 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 sell and both having reasonable knowledge of relevant facts." PX-0163-0011 (ASA at 11); Goesling Decl. ¶ 388.

1469. Orderly Liquidation Value is defined as: "[A]n opinion of 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 with a sense of immediacy on an as-is, where-is basis, as of a specific date." PX-0163-0526 (ASA at 526); Goesling Decl. ¶ 388.

1470. Finally, Forced Liquidation Value is appropriate in circumstances where a seller is forced to sell in a severely restricted timeframe, such as a quick sale auction occurring in 30 to 60 days. Goesling Decl. ¶ 388.

1471. Old GM plainly was under compulsion to sell its assets, Mr. Goesling concluded, and it was therefore unreasonable to contend that Old GM did not have any compulsion to sell

those assets given that it was in bankruptcy proceedings on the Valuation Date and was on a tight timeframe to complete a 363 Sale of most of its assets to avoid having to liquidate. Goesling Decl. ¶ 389; *see* Goesling Test. 3486:9-3487:16, 3489:3-3491:24.

1472. Under the OLV premise of value, the seller has a reasonable but limited amount of time to sell the assets. Goesling Decl. ¶ 390.

1473. Mr. Goesling assumed that Old GM would have between nine and eighteen months to dispose of the property. Goesling Decl. ¶ 390.

1474. Mr. Goesling determined that OLV was the most appropriate premise of value under the circumstances as of the Valuation Date. Goesling Decl. ¶ 390.

1475. Generally speaking, OLV is less than Fair Market Value because the concept behind Fair Market Value is that you can allow unlimited time for a sale to find the right buyer and maximize proceeds. Goesling Decl. ¶ 391.

1476. It is, however, possible for the value to be very close to fair market value, with the difference being that under the premise of orderly liquidation there is a limited period in which to sell. The seller is compelled to sell, although without the same sense of immediacy or urgency that is assumed in a forced liquidation. PX-0163-0110 to 0111 (ASA at 110-11); Goesling Decl. ¶ 391; Goesling Test. 3492:14-3493:14.

1477. Given how depressed the market for automotive machinery and equipment was at the end of June 2009, there was not a significant difference between buyers at the retail level and buyers at the wholesale level, thereby narrowing any potential gap between Fair Market Value and Orderly Liquidation Value. Goesling Decl. ¶ 391.

1478. Further, because of the dire state of the market, an extended period of time would have been required—perhaps several years—to maximize the proceeds of the sale of each of the Representative Assets. Goesling Decl. ¶ 391; Goesling Test. 3478:24-3479:20

1479. When you consider the significant holding costs and other costs that would have been associated with keeping the equipment for an extended period of time while waiting for the perfect buyer, it is likely that Fair Market Value would have yielded about the same values as Orderly Liquidation Value and, in some cases, Fair Market Value may even have been lower. Goesling Decl. ¶ 391; Goesling Test. 3493:20-3495:4.

1480. OLV is not a "fire sale" or foreclosure value of the assets, which would yield much lower values as a result of the associated time pressure of a sale. Goesling Decl. ¶ 392.

1481. There are usually two types of buyers of automotive assets: End users, who purchase the assets for their own use, and used machinery dealers or brokers, who purchase the assets in anticipation of future resale. Goesling Decl. ¶ 392.

1482. End users are more likely to pay a higher price for automotive assets than speculative dealers, who must take into consideration holding costs, including warehousing; any necessary repair or rebuild; marketing; and warranty expense. Goesling Decl. ¶ 392.

1483. The less time that a seller has to sell an asset, the more likely it is that the seller will be forced to sell to dealers or brokers at a lower price. Goesling Decl. ¶ 392.

1484. In the absence of either end users or used machinery dealers, certain assets (or portions thereof) may be sold for scrap. Goesling Decl. ¶ 392.

1485. Here, because he applied OLV, Mr. Goesling assumed that the buyers would be a mix of end users, speculative purchasers, and scrap dealers. Goesling Decl. ¶ 392.

1486. Had he used a Forced Liquidation Value premise, Mr. Goesling would have assumed a higher percentage of speculative purchasers and scrap dealers, resulting in lower values for the assets. Goesling Decl. ¶ 392.

1487. For purposes of his appraisal of the Representative Assets, OLV most closely approximated a market-based valuation of the Representative Assets. Goesling Decl. ¶ 393.

1488. Because his approach was market-based, the poor state of the economy as of the Valuation Date had a significant impact on the value of Old GM's assets. Goesling Decl. ¶ 393.

1489. Many manufacturers had curtailed production and/or closed plants and investment in capital equipment had slowed dramatically. Goesling Decl. ¶ 393.

1490. Liquidations of automotive machinery and equipment in early 2009 produced mixed results: Machinery that had experienced good demand and marketability in the past had become difficult to sell and equipment remained unsold due to an excessive amount of similar assets available in the marketplace, a lack of buyer interest, or unreasonable expectations on the seller's part regarding the value of the assets. Goesling Decl. ¶ 393.

3. Application of the Three Appraisal Techniques

1491. To determine the OLV of the Representative Assets, Mr. Goesling considered the potential applicability of the three standard appraisal techniques: The Income Approach, the Cost Approach, and the Market (or sales comparison) Approach. Goesling Decl. ¶ 395; Goesling Test. 3498:4-3498:9.

a. The Income Approach

1492. Although he considered the Income Approach, Mr. Goesling determined that it was not an appropriate way to value the Representative Assets because it is not possible to reliably allocate earning capacity when valuing individual assets. Goesling Decl. ¶ 396; Goesling Test. 3498:16-3498:25.

1493. Even when income or earnings for a business are known (or can be forecast), it is highly unlikely that some small portion of earnings can be reasonably attributed to an individual piece of machinery. Goesling Decl. ¶ 396.

1494. For that reason, the Income Approach is rarely used when valuing individual pieces of machinery. Goesling Decl. ¶ 396.

1495. Mr. Chrappa, Defendants' appraiser, also rejected this approach for the same reason. Chrappa Decl. ¶ 42; *see* Goesling Test. 3498:14-3498:15.

b. The Cost Approach

1496. In reaching his conclusions, Mr. Goesling applied the cost approach to each Representative Asset. Goesling Test. 3499:17-3499:19.

1497. To value the Representative Assets under the Cost Approach, Mr. Goesling first determined the replacement cost new ("**RCN**") of the assets using the historic cost trending method. Goesling Decl. ¶ 399.

1498. Under this method, a cost index, used to measure changes in prices over time, is applied to historical cost data to determine RCN. Goesling Decl. ¶ 399.

1499. The reliability of the results in using the historic cost trending method depends heavily on the quality of the historical cost information used. Goesling Decl. ¶ 399.

1500. In applying this method, he assumed that the costs and acquisition dates reported by Old GM in the eFAST system were accurate. Goesling Decl. ¶ 399.

1501. He considered other methods for estimating RCN, but ultimately did not use them in his analysis. Goesling Decl. ¶ 399.

1502. To calculate RCN, Mr. Goesling first segregated the Representative Assets into 15 different categories based on asset type, such as industrial furnaces, metal forming presses, cranes, etc. Goesling Decl. ¶ 400.

1503. The cost of each item was then increased to a current cost using price indices from the United States Department of Labor's Bureau of Labor Statistics. Goesling Decl. ¶ 400.

1504. Mr. Goesling determined a trend factor by dividing the price index for applicable class code for the base year (here, 2009 because that is the Valuation Date) by the price index for the year the asset was capitalized. Goesling Decl. ¶ 400.

1505. To the extent possible, he verified the accuracy of the trending analysis through discussions with industry equipment dealers, publicly available data, and recognized industry cost sources. Goesling Decl. ¶ 401.

1506. Finally, he compared the trended costs to the cost of assets newly acquired in 2009 to further test the accuracy of the trending process. Goesling Decl. ¶ 401.

1507. Since the Representative Assets were not brand new as of the Valuation Date, all forms of accrued depreciation—physical deterioration, functional obsolescence and economic obsolescence—then had to be deducted from the RCN. Goesling Decl. ¶ 402.

1508. Because his appraisal was a retrospective appraisal, Mr. Goesling made the extraordinary assumption (as defined by USPAP) that, unless informed otherwise and except for normal physical deterioration, the observed condition of the assets that were inspected in May and June 2016 was not materially different than the condition as of the Valuation Date. Goesling Decl. ¶ 373.

1509. The depreciation factors Mr. Goesling applied were derived from studies of actual retirements of similar assets, discussions with current manufacturers, and his experience with similar assets and the automotive industry more generally. Goesling Decl. ¶ 402.

1510. To estimate physical depreciation, Mr. Goesling considered the following information regarding the assets: Age of the asset as of the Valuation Date, current physical

condition, current utilization, operating history, maintenance history, and planned future utility. Goesling Decl. ¶ 403.

1511. This information was collected during the physical inspection of the assets and/or through discussions with New GM personnel knowledgeable about the Representative Assets. Goesling Decl. ¶ 403.

1512. For each of the 40 Representative Assets, Mr. Goesling was able to obtain information regarding the actual age of each asset through numerous sources, including, but not limited to, the eFAST asset listing, discussions with New GM personnel, and serial number research. Goesling Decl. ¶ 403.

1513. He also estimated the effective age of an asset based on a number of factors, including amount of use, regularity and extent of maintenance, and wear and tear. Goesling Decl. ¶ 403.

1514. The effective age for a given asset may be more than, less than, or equal to, the actual age of the asset. Goesling Decl. ¶ 403.

1515. In this case, except for the 100 ton furnace (Representative Asset No. 28), he did not have any factual information regarding the assets that caused him to estimate the effective ages of the assets as different from the chronological ages. Goesling Decl. ¶ 403.

1516. Next, Mr. Goesling estimated the remaining useful life of each asset by subtracting the effective age of each asset from his estimate of the normal useful life of the asset. Goesling Decl. ¶ 403.

1517. He then calculated one minus the remaining useful life divided by the normal useful life times one hundred to arrive at the percentage of physical deterioration for the assets. Goesling Decl. ¶ 403.

1518. One hundred minus the physical deterioration is called the "percentage good" of the asset. Goesling Decl. ¶ 403.

1519. Next, he considered the other two forms of depreciation: Functional and economic obsolescence. Goesling Decl. ¶ 404.

1520. Functional obsolescence is a loss in value attributable to the development of new technology that allows for more efficient or less costly replacement property. Goesling Decl. ¶ 404.

1521. Economic obsolescence accounts for any economic or external factors that may have impacted the value of the assets. Goesling Decl. ¶ 404; Goesling Test. 3504:19-3504:23.

1522. Signs of economic obsolescence can include: (i) reduced demand for a company's products; (ii) overcapacity in the industry; (iii) dislocation of raw material supplies; (iv) 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; (v) government regulations that require capital expenditures to be made, but offer no return on investment; and (vi) environmental considerations that require capital expenditures to be made, but offer no return on investment. Goesling Decl. ¶ 404.

1523. The research he conducted for the Market Approach indicated that as of the Valuation Date the market for manufacturing machinery was depressed, with little activity for many types of assets. Goesling Decl. ¶ 404. Thus, additional depreciation was applied to account for economic obsolescence due to general market conditions, Goesling Decl. ¶ 404; Goesling Test. 3506:7-3506:18, which he calculated by analyzing the difference between his value for replacement cost less depreciation (without consideration of market conditions) and comparing that value to the values arrived at using the market approach, Goesling Test. 3504:24-

3506:6. He determined that the difference in value between the two was indicative of economic obsolescence, since market sales should capture all of the extrinsic factors contributing to the obsolescence of a particular type of asset. Goesling Test. 3504:24-3506:6. This reconciliation was necessary to account properly for the loss in asset value due to economic obsolescence. Goesling Test. 3520:12-3522:16

1524. The economic obsolescence factor that he applied varied depending upon the type of asset, Goesling Test. 3522:17-3523:15, because even in the severely depressed mid-2009 market for automotive assets, some assets remained more in demand and thus maintained their value more than other assets. Mr. Goesling considered these distinctions among asset types to arrive at more precise, tailored economic obsolescence discounts. To account for these differences among asset types, Mr. Goesling's economic obsolescence adjustments varied from around 40% for robots to 95% for conveyors and other property for which there was a limited market or no secondary market as of June 2009. Goesling Test. 3524:2-16.

1525. Mr. Goesling did not apply economic obsolescence due to inutility because the valuation was conducted under a piecemeal sale basis, so inutility was not a consideration: The focus was instead on third party users and not on ongoing operations by New GM. Goesling Test. 3504:24-3506:6.

1526. The adjustment he made for obsolescence is based on discussions with equipment dealers, as well as a review and comparison of the values indicated under the Cost Approach (before obsolescence adjustments were made) to the value indicated by the Market Approach (discussed below). Goesling Decl. ¶ 405.

1527. For any assets for which he was unable to locate market comparable transactions, he examined transactions involving assets with similar characteristics, and made any necessary adjustments, in order to estimate the obsolescence factor for those assets. Goesling Decl. ¶ 405.

1528. The difference in the values determined by the Cost and Market Approaches was due to unmeasured functional and economic obsolescence since the market prices for similar assets reflects the effects of external factors on asset values, including the effects of advances in technology and external market factors. Goesling Decl. ¶ 405.

1529. Using market prices to quantify economic obsolescence makes intuitive sense given that one would expect the market price of an asset to capture and reflect all of the extrinsic factors that impact the value of the asset. Goesling Decl. ¶ 405.

1530. Thus, Mr. Goesling adjusted the Cost Approach value indications to account for the additional depreciation that caused those differences in value. Goesling Decl. ¶ 405.

1531. For each of the Representative Assets, he quantified deprecation due to physical deterioration and obsolescence (functional and economic), and deducted the total amount of depreciation from the RCN. Goesling Decl. ¶ 406.

1532. Finally, he deducted the loss in value of installation and the cost of deinstallation in arriving at his indication of value under the Cost Approach for each asset. Goesling Decl. ¶ 406.

1533. The adjustments for removal were based on estimates from knowledgeable industry experts, as well as his own experience with the installation and removal of similar assets. Goesling Decl. ¶ 406.

1534. The depreciated value of installation costs was also deducted. Goesling Decl. ¶ 406.

c. The Market Approach

1535. Unlike the Cost Approach, Mr. Goesling did not assess the Market Approach for each Representative Asset because he could not determine a market value for all of the Representative Assets. Goesling Test. 3499:20-3500:6.

1536. Mr. Goesling applied the Cost and Market Approaches, and ultimately determined that the Market Approach yielded the most accurate values and, where he had successfully applied the Market Approach for a Representative Asset, relied on the Market Approach. Goesling Decl. ¶ 397; Goesling Test. 3500:4-3500:14.

1537. The used equipment market is an established means of buying and selling equipment. The used market consists of used machinery dealers, auctions, and public and private sales, and is often (but not always) the most reliable method of determining certain types of value for certain types of value for certain types of properties. PX-0163-0093 (ASA at 93).

1538. Mr. Goesling endeavored to reach value conclusions that were supportable and representative of the automotive market as it was at the time, based on the best information available, and in cases where there had been little or no recent activity involving transactions of similar equipment capacity, he relied heavily on his experience, judgment, and opinion in reaching the value estimates. Goesling Decl. ¶ 398.

1539. Accordingly, the assigned value estimates for the Representative Assets are his best-informed opinion regarding the level of value at which a knowledgeable buyer would be motivated to purchase. Goesling Decl. ¶ 398.

1540. In developing his opinion of OLV using the Market Approach, he considered the following three techniques to estimate the value of the assets: (1) a direct match of a recent sale in the used market; (2) a comparable match, which determined value based on the analysis of similar used equipment sales; and (3) the percent to cost technique. Goesling Decl. ¶ 407.

1541. For the direct match and comparable match techniques, values of the Representative Assets were estimated based on market prices in actual transactions and on asking prices for similar assets. Goesling Decl. ¶ 408.

1542. After searching numerous sources and databases for sales or offerings of assets similar to the 40 Representative Assets, he selected the sales or offerings he deemed to be most comparable with the property being valued. Goesling Decl. ¶ 408, Ex. F.

1543. He then made adjustments to account for differences in factors such as time of sale, location, type, age, condition of the equipment and prospective use. Goesling Decl. ¶ 408.

1544. For the third technique, the percent to cost technique, Mr. Goesling analyzed the ratio of used sales prices to the RCN of the asset, derived by reviewing transactions in assets similar to the 40 Representative Assets in nature and age. Goesling Decl. ¶ 409.

1545. The relationships between age, selling price, and replacement cost were then analyzed to develop a percent to cost factor. Goesling Decl. ¶ 409.

1546. These percent to cost factors were then applied to the cost of similar assets for which only limited or no market data was available. Goesling Decl. ¶ 409.

1547. This procedure involves direct application of the percent to cost factor if the subject asset is of the same vintage and utility as the assets from which the factor was extracted. Goesling Decl. ¶ 409.

1548. If the subject asset is similar but a different age, the appropriate percent to cost factor is developed through a relationship analysis. Goesling Decl. ¶ 409.

1549. The percent to cost technique was used at least in part to estimate the market value of Representative Asset Nos. 1 (Shim Select and Placement Machine), 5 (Paint Mix and Circulation Electrical System), 11 (the Central Utilities Complex), 14 (the Leak Test System), 23

(Coolant Filtration System), 27 (Cupola No. 4 Emissions System), 34 (4 Speed Build Line), and 38 (the Gas Cleaning System). Goesling Decl. ¶ 409.

1550. Mr. Goesling applied all three techniques in applying the Market Approach. Goesling Decl. ¶ 410.

1551. In addition, in instances where there were no comparable sales of assets (or portions of assets), he considered whether there was any scrap value for the asset or a portion thereof. Goesling Decl. ¶ 410.

1552. Mr. Goesling obtained market data from *"Data Ref" Machinery & Equipment Pricing Guide*, by L & M Publications, and various new and used automobile machinery and equipment dealer websites. Goesling Decl. ¶ 410.

1553. In addition, Mr. Goesling estimated values based on contact with manufacturers' representatives, used machinery dealers, internal databases, discussions with other knowledgeable experts, and his experience with cost/value relationships. Goesling Decl. ¶ 410 Ex. A.

d. Reconciliation of Approaches

1554. To the extent possible, Mr. Goesling reconciled the values indicated by the Cost and Market Approaches into a single conclusion of value for each of the Representative Assets. Goesling Decl. ¶ 411.

1555. When both the Market and Cost approaches were applied, he placed all weight on the Market Approach indication of value. Goesling Decl. ¶ 411.

1556. The Market Approach provides a far more reliable indication of value as of the Valuation Date, as the adjustments can be more reliably calculated to develop an indication of value as compared to the Cost Approach. Goesling Decl. ¶ 411.

1557. However, as discussed above, he did not apply the Market Approach where he was unable to identify comparable sales transactions; in those circumstances, he relied on the Cost Approach and made necessary deductions to account for depreciation and obsolescence. Goesling Decl. ¶ 411.

1558. A chart summarizing the approaches to value and indicating which approach was ultimately applied is below. Goesling Decl. ¶ 412.

Summary of Mr. Goesling's OLV Analysis

Rep. Asset No.	Asset ID	Company Name (Location)	Asset Description	Cost Approach Value Indication [b]	Market Approach Value Indication [c]	Concluded Value	Concluded Approach
1	100006527	WARREN TRANSMISSION	OP-150 SELECT; CHECK PLACE SHIMS AUTO STATION	14,500	3,000	3,000	Market Approach
2	100017544	LANSING DELTA TOWNSHIP ASSEMBLY	GA PITS & TRENCHES	0	0	0	Cost Approach
3	100033438	WARREN TRANSMISSION	POWER ZONE ROLLER CONVEYOR AUTOMATION TCH MOD 3	23,000	3,000	3,000	Market Approach
4	100037892	LANSING DELTA TOWNSHIP ASSEMBLY	PAINT BLDG LINES - PROCESS WASTE ELPO	0	0	0	Cost Approach
5	100037940	LANSING DELTA TOWNSHIP ASSEMBLY	PAINT MIX & CIRCULATION - ELECTRICAL	105,150	152,000	152,000	Market Approach
6	100037954	LANSING DELTA TOWNSHIP ASSEMBLY	PAINT DIP CONVEYOR - ELPO OVEN IMC	25,035	7,000	7,000	Market Approach
7	100038004	LANSING DELTA TOWNSHIP ASSEMBLY	PAINT TC AUTOMATION SOFTWARE	0	0	0	Cost Approach
8	100038035	LANSING DELTA TOWNSHIP ASSEMBLY	GA EOL PAINT SPOT REPROCESS SYS PAINT MIX ROOM	82,500	0	82,500	Cost Approach
9	100038119	LANSING DELTA TOWNSHIP ASSEMBLY	PAINT TC2 CC BELL ZONE	263,400	0	263,400	Cost Approach
10	100041920	LANSING REGIONAL STAMPING	OPTICELL - ROBOTIC MEASUREMENT SYSTEM	73,000	0	73,000	Cost Approach
11	100045909	LANSING DELTA TOWNSHIP ASSEMBLY	LANSING DELTA TOWNSHIP ASSEMBLY UTILITY SERVICES	2,625,000	2,367,000	2,367,000	Market Approach
12	100048169	LANSING DELTA TOWNSHIP ASSEMBLY	BS ROBOT LAZN-150R1	30,100	25,000	25,000	Market Approach
13	100050513	LANSING DELTA TOWNSHIP ASSEMBLY	BS WELD BUS DUCTS	650,000	681,000	681,000	Market Approach
14	100053677	WARREN TRANSMISSION	LEAK TEST BASE MACHINE QTY = 1	43,750	9,000	9,000	Market Approach

Rep. Asset No.	Asset ID	Company Name (Location)	Asset Description	Cost Approach Value Indication [b]	Market Approach Value Indication [c]	Concluded Value	Concluded Approach
15	100060623	LANSING DELTA TOWNSHIP ASSEMBLY	GA T/W: SOAP; MOUNT AND INFLATE	63,050	59,000	59,000	Market Approach
16	100061079	LANSING DELTA TOWNSHIP ASSEMBLY	BS SKID CONVEYOR - LAZA	56,100	15,000	15,000	Market Approach
17	100061614	LANSING DELTA TOWNSHIP ASSEMBLY	BS P&F CONVEYOR - BODY SIDE INNER LH DEL	37,250	24,000	24,000	Market Approach
18	100062269	LANSING DELTA TOWNSHIP ASSEMBLY	GA CONVEYOR: VERTICAL ADJUSTING CARRIER (VAC) SYS - CARRIERS (QTY 87)	91,800	59,000	59,000	Market Approach
19	100064667	LANSING DELTA TOWNSHIP ASSEMBLY	BS CMM FULL BODY MACHINE - LY90	46,000	39,000	39,000	Market Approach
20	100065640	LANSING DELTA TOWNSHIP ASSEMBLY	GA CONVEYOR SUB-ASM RECEIVING (SAR): WTD1000 - WHEEL & TIRE DELIVERY	25,900	5,000	5,000	Market Approach
21	100066809	LANSING DELTA TOWNSHIP ASSEMBLY	GA CONVEYOR: SKILLET - FINAL - LEG 1	33,600	1,000	1,000	Market Approach
22	100069322	WARREN TRANSMISSION	FANUC M-710IB/70T ROBOT - ASSEMBLY	72,500	32,000	32,000	Market Approach
23	100070012	WARREN TRANSMISSION	ALUMINUM MACHINING SYSTEM	65,000	14,000	14,000	Market Approach
24	100071009	WARREN TRANSMISSION	LFS220 BASE SHAPING MACHINE-OP 20 TRANSFER DRIVE GEAR	160,000	224,000	224,000	Market Approach
25	100071022	WARREN TRANSMISSION	LIEBHERR HOBB MACHINE FROM ST. CATHARINES	180,000	244,000	244,000	Market Approach
26	100095344	DEFIANCE	CORE DELIVERY CONVEYOR SYSTEM CB116 & 122	6,750	1,000	1,000	Market Approach
27	100098085	DEFIANCE	EMISSIONS SYSTEM #4 CUPOLA	386,500	131,000	131,000	Market Approach
28	100099125	DEFIANCE	100 TON VERTICAL CHANNEL HOLDING FURNACE	44,200	8,000	8,000	Market Approach
29	BF2016822 01	GRAND RAPIDS	TRANSFER PRESS-GG-1	510,000	261,000	261,000	Market Approach

Rep. Asset No.	Asset ID	Company Name (Location)	Asset Description	Cost Approach Value Indication [b]	Market Approach Value Indication [c]	Concluded Value	Concluded Approach
30	BGI20163301	MANSFIELD STAMPING	TP-14 CS1-1 TRANSFER PRESS DANLY ET-2	710,000	800,000	800,000	Market Approach
31	BUY11820901	LANSING REGIONAL STAMPING	DANLY 4000 TON PRESS	540,000	276,000	276,000	Market Approach
32	BUYR503469FA	LANSING REGIONAL STAMPING	AA-11 SCHULER #1 AA CROSSBAR TRANSFER PRESS	3,925,000	3,675,000	3,675,000	Market Approach
33	BUYR503481FA	LANSING REGIONAL STAMPING	B3-5 TRANSFER PRESS SYSTEM INCL. DESTACKER AND EOL	3,250,000	2,400,000	2,400,000	Market Approach
34	NIT219381	WARREN TRANSMISSION	BUILD LINE W/FOUNDATION	17,500	45,000	45,000	Market Approach
35	NITC03340	WARREN TRANSMISSION	BUTTON UP AND TEST CONVEYOR SYSTEM	58,400	2,000	2,000	Market Approach
36	NITC03507	WARREN TRANSMISSION	HELICAL BROACHING EQUIPMENT	187,750	150,000	150,000	Market Approach
37	NITW0S11026A	WARREN TRANSMISSION	COURTYARD ENCLOSURE	0	0	0	Cost Approach
38	NJL2924414P	DEFIANCE	SYSTEM GAS CLEANING NO.4 CUPOLA	29,000	24,000	24,000	Market Approach
39	NJL2983009	DEFIANCE	CB 91 ROBOT	intentionally omitted			
40	NJL6084400	DEFIANCE	P & H 7 1/2 TON CHARGER CRANE 6E CUPOLA	25,000	10,000	10,000	Market Approach

C. Plaintiff's Alternative Valuation: Liquidation Value in Place

1559. As discussed in detail below, as an alternative to their modification of the KPMG values, Defendants advance a valuation approach for the 40 Representative Assets through their appraisal expert, Carl C. Chrappa.

1560. Under this approach, Mr. Chrappa appraised 38 of the 40 Representative Assets using the Fair Market Value in Continued Use ("**FMVICU**") with Assumed Earnings premise of value. Chrappa Decl. ¶ 44; Goesling Decl. ¶ 426.

1561. FMVICU with Assumed Earnings is defined as "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." PX-0163-0010 (ASA at 10).

1562. Mr. Chrappa's premise, methodologies and value conclusions are wrong and generally unreliable for the reasons discussed further herein. Goesling Decl. ¶ 426.

1563. Of particular relevance is that Mr. Chrappa's use of FMVICU with Assumed Earnings as the premise of value is inappropriate because it ignores the precarious financial condition of Old GM as of the Valuation Date and incorrectly applies "fair market value" in continued use even though Old GM had filed for bankruptcy and was clearly under compulsion to sell its assets. Goesling Decl. ¶ 428.

1564. Even if the Court determines that a valuation of the assets in place is appropriate for 38 of the Representative Assets, the proper premise of value in this case would be Liquidation Value in Place ("**LVIP**")—not FMVICU. Goesling Decl. ¶ 428.

1565. Therefore, entirely in response to Mr. Chrappa's flawed valuation of the Representative Assets on an in-use basis, Mr. Goesling was asked to perform an alternative

valuation in which he valued the Representative Assets using a LVIP premise of value. Goesling Decl. ¶ 429.

1566. Mr. Goesling did so even though he had concluded that OLV on a piecemeal basis yielded *higher* values than LVIP because there would be more buyers for the assets under a piecemeal basis than there would be under an in-place basis. Goesling Test. 3482:25-3484:4.

1567. LVIP is defined as "an opinion of the gross amount, expressed in terms of money, that typically could be realized from a properly advertised transaction, with the seller being compelled to sell, as of a specific date, for a failed, non-operating facility, assuming that the entire facility is sold intact." PX-0163-0011 (ASA at 11).

1568. In his alternative valuation, Mr. Goesling assumed that the assets would have been sold by Old GM to a typical market participant, with full knowledge of all relevant facts, and paying for the assets with cash (or conventional financing), as installed and ready for use in the plants where they were located as of June 30, 2009. Goesling Decl. ¶ 430.

1569. While Mr. Chrappa did not use or even consider in his valuation the sale price paid by New GM in connection with the 363 Sale (an implicit acknowledgement that the 363 Sale does not represent a market transaction), Mr. Goesling understood (as confirmed by Professor Fischel's testimony) that the 363 Sale involved highly unconventional Government financing, an unconventional Government buyer, and a seller under significant duress. Goesling Decl. ¶ 430.

1570. Accordingly, Mr. Goesling concluded that a competent appraiser would never consider the 363 Sale price as representative of fair market value. Goesling Decl. ¶ 430.

1571. Mr. Goesling's alternative valuation using the LVIP premise of value therefore indicates the amount a typical buyer would pay as of the Valuation Date to purchase the

Representative Assets in connection with a transaction to purchase all of the plants where the assets are located and assuming that the assets would be left in place at those plants. Goesling Decl. ¶ 430.

1572. Since, in reality, there were no market purchasers and there was no market for the purchase of the Representative Assets in place on the Valuation Date, Mr. Goesling considered his alternative valuation to be a purely hypothetical valuation because it used conditions that were contrary to what was known about the market for automotive assets as of the Valuation Date. Goesling Decl. ¶ 430.

1573. Despite his preparation of the alternative valuation, Mr. Goesling testified that he believes that the appropriate premise of value is OLV because it is more consistent with actual market conditions as of the Valuation Date. Goesling Decl. ¶ 430.

1. Application of the Three Appraisal Techniques for the Alternative Valuation

1574. Similar to the valuation that Mr. Goesling conducted under the OLV premise of value, in estimating LVIP he considered the potential applicability of the three standard appraisal techniques.

1575. He ultimately did not use the Income Approach for the same reason set forth above—the difficulty in determining the potential cash flow associated with the individual assets (or even with individual plants as a whole). Goesling Decl. ¶ 431.

1576. Thus, he again applied both the Cost and the Market Approaches and ultimately relied on the approach that he deemed to be most reliable for each Representative Asset. Goesling Decl. ¶ 431.

a. Application of Cost Approach

1577. Mr. Goesling's application of the Cost Approach for the alternative valuation involved the same basic steps he took for the OLV approach: Calculation of RCN using the historic cost trending method and then deducting for all forms of depreciation (physical depreciation and functional and economic obsolescence). Goesling Decl. ¶ 432.

1578. There were two key differences in his application of the Cost Approach under an LVIP "in-place" premise as compared to an OLV "in-exchange" premise. Goesling Decl. ¶ 432.

1579. First, when applying the Cost Approach to the in-exchange premise of value, he made a downward adjustment for the installation and removal of the asset, but for the in-place valuation, this adjustment was no longer necessary because the assets were to remain in place. Goesling Decl. ¶ 433.

1580. Second, because an in-place value is premised on a sale of an entire facility, while his calculations of physical depreciation for each asset remained the same, his calculation of functional and economic obsolescence employed a different approach. Goesling Decl. ¶ 434.

1581. As discussed above, his research indicated that, as of the Valuation Date, the market for manufacturing machinery was depressed, with little activity for many types of assets. Goesling Decl. ¶ 434.

1582. Therefore, in connection with his in-place valuation, it was necessary for Mr. Goesling to determine what market conditions indicated to be the appropriate obsolescence factor in connection with the sale of an entire, intact facility, as compared to the obsolescence factor appropriate to individual assets sold in exchange. Goesling Decl. ¶ 434.

1583. To estimate economic obsolescence for purposes of his alternative OLV in-place valuation, he considered sales of two former Old GM assembly plants located in Shreveport, Louisiana and Wilmington, Delaware. Goesling Decl. ¶ 435.

1584. These were instructive data points because both transactions involved market participants purchasing entire Old GM facilities with the manufacturing assets remaining in place. Goesling Decl. ¶ 435.

1585. In February 2013, the former Old GM Shreveport, Louisiana assembly plant equipment was purchased by Elio Motors for $26.0 million. Goesling Decl. ¶ 437.

1586. In the transaction with Elio, the real estate was sold separately from the personal property. PX-0297 (Purchase and Sale Agreement between RACER Trust and Elio Motors).

1587. The Shreveport plant was not acquired by New GM in the Section 363 sale; instead, it was retained by Old GM and leased to New GM for a 3-year term that expired in July 2012. Goesling Decl. ¶ 437.

1588. Most of the equipment remained in place, with the exception of most of the stamping plant equipment. Goesling Decl. ¶ 437.

1589. Elio Motors acquired the assets with the intention of using the plant to manufacture a low cost, three-wheeled vehicle. Goesling Decl. ¶ 437.

1590. As discussed above, in July 2010, Old GM's Wilmington, Delaware assembly plant was sold to Fisker Automotive, Inc. for $20.0 million. Goesling Decl. ¶ 438.

1591. The plant had been closed in late July, 2009, but the equipment remained intact and installed as it had been when it was in operation. Goesling Decl. ¶ 438.

1592. In the sale to Fisker Automotive, the real estate was sold separately from the personal property. PX-0333 (Closing Documents for Sale by Motors Liquidation Corporation to Fisker Automotive of Wilmington).

1593. Fisker intended to use the Wilmington plant to manufacture a hybrid gas/electric automobile, beginning in 2012. Goesling Decl. ¶ 438.

1594. To quantify depreciation in each of these transactions due to economic obsolescence, Mr. Goesling performed a Cost Approach analysis on all of the assets transferred in each of those transactions. Goesling Decl. ¶ 435.

1595. The first step in the analysis was to estimate RCN for each asset at those facilities using the historic cost trending method described above. Goesling Decl. ¶ 436.

1596. Next, Mr. Goesling assessed depreciation due to physical deterioration and functional obsolescence was deducted from each asset's RCN. Goesling Decl. ¶ 436.

1597. He then compared the aggregate RCN less physical deterioration and functional obsolescence for all of the assets at each facility to the respective selling price of each facility. Goesling Decl. ¶ 436.

1598. The difference between the aggregate RCN less physical deterioration and functional obsolescence, on the one hand, and the selling price, on the other, was due to economic obsolescence. Goesling Decl. ¶ 436.

1599. The economic obsolescence dollar amounts were then converted to a percentage of aggregate RCN less physical deterioration and functional obsolescence to derive an economic obsolescence factor to apply to the Cost Approach analysis of the 40 Representative Assets. Goesling Decl. ¶ 436.

1600. From his analysis of these two sales of Old GM plants with the manufacturing assets in place, Mr. Goesling determined that aggregate economic obsolescence ranged from 80% to 87% of RCN less depreciation. Goesling Decl. ¶ 439.

1601. However, since the two sales occurred one year and three-and-one-half years after the Valuation Date, respectively, when market conditions were generally considered to be better,

he made modest upward adjustments to the economic obsolescence penalties to account for the improvement in market conditions after the Valuation Date. Goesling Decl. ¶ 439.

1602. Specifically, Mr. Goesling adjusted up the Shreveport economic obsolescence factor from 80% to 85%, and adjusted up the Wilmington economic obsolescence from 87% to 90%. Goesling Decl. ¶ 439.

1603. He then checked this economic obsolescence factor on the asset level by looking at commonly traded assets valued by the Market Approach. Goesling Decl. ¶ 440.

1604. He made adjustments to account for differences in physical characteristics and conditions of sale. Goesling Decl. ¶ 440.

1605. He also adjusted the comparable sales to account for installation. Goesling Decl. ¶ 440.

1606. The in-place values determined by the Market Approach were then compared to the RCN less physical deterioration and functional obsolescence for those assets to estimate economic obsolescence. Goesling Decl. ¶ 440.

1607. From the individual asset analyses, a wider range of economic obsolescence was determined to be present (74% to 87%) than that indicated by the two complete plant sales (80% to 87%). Goesling Decl. ¶ 441.

1608. The range is attributable to several factors. Goesling Decl. ¶ 441.

1609. First, some of the assets are more desirable than others because they fulfill more universal functions, and so have more utility to more potential buyers. Goesling Decl. ¶ 441.

1610. Second, some of the assets were less desirable simply because they are older and are likely to need more maintenance, or are simply out of fashion. Goesling Decl. ¶ 441.

1611. Based on the plant sales and individual asset sales, Mr. Goesling developed a range of economic obsolescence factors to allow for application of economic obsolescence to the 40 Representative Assets on an individual basis. Goesling Decl. ¶ 441.

1612. The following table summarizes the economic obsolescence factors developed, and how they have been applied to the different assets as of the Valuation Date. Goesling Decl. ¶ 441.

Consideration	Indicated Obsolescence	Adjustment [a]	Adjusted Obsolescence
2013 Sale of GM Shreveport	80%	5%	85%
2010 Sale of GM Wilmington	87%	3%	90%
Certain of the 40 Representative Assets	74%	0%	74%
Concluded Range of Obsolescence		**70%** **to**	**95%**

Relevant asset and asset group examples of how the obsolescence range is intended to be applied.		
newer more desirable	→	*older and less desirable*
new transmission plant	→	*old foundry*
common and flexible use	→	*highly specialized application and use*

[a] Adjustments to Indicated Obsolescence are based on Exhibit E.35 (Sales Comparable Market Condition Adjustments) in Expert Witness Report of David K. Goesling, issued on November 23, 2016. Comparable sales during 2013 are estimated on average to have a sales price 25% greater than on June 30, 2009. Similarly, comparable sales during 2010 are estimated on average to have a sales price 10% greater than on June 30, 2009.

1613. In sum, when calculating LVIP the only difference in applying the Cost Approach under the two different premises of value was eliminating the deduction for installation and removal costs and the way in which economic obsolescence is calculated. Goesling Decl. ¶ 442.

b. Application of Market Approach

1614. Mr. Goesling's application of the Market Approach was very similar for both his in-exchange and in-place valuations: He considered and applied the same three techniques (direct match, comparable match, and percent to cost) to arrive at market values for the Representative Assets. Goesling Decl. ¶ 444.

1615. In general, for purposes of the in-use alternative valuation, he used the same market data (direct and comparable matches) for the Representative Assets that he used for the in-exchange valuation. Goesling Decl. ¶ 445.

1616. However, switching from an in-exchange premise of value to an in-place premise of value changed the relevance and applicability of some of the market data. Goesling Decl. ¶ 445.

1617. Specifically, for assets that cannot be sold in their entirety, but portions of which can be sold in the market, Mr. Goesling typically used the Market Approach to value the saleable portions of such assets for the in-exchange valuation. Goesling Decl. ¶ 445.

1618. However, using an in-use premise of value, he had to consider the asset in its entirety. Goesling Decl. ¶ 445.

1619. If there was no comparable market data for any of the assets in their entirety, he used the Cost Approach to assign a value to such assets under the LVIP premise. Goesling Decl. ¶ 445.

1620. In addition, under the in-exchange appraisal, he considered scrap value as part of the Market Approach for certain assets either in addition to the comparable sales, or in cases where comparable sales did not exist, which was not appropriate for the LVIP valuation. Goesling Decl. ¶ 445.

1621. Because there were fewer market comparables available to conduct the in-place valuation, by necessity, he applied the Market Approach less frequently than he did under in connection with his OLV valuation. Goesling Decl. ¶ 445.

1622. For any Representative Assets for which he used the Market Approach to estimate the value both under OLV and LVIP, the only difference in the calculation was a final, upward adjustment for removal and installation costs for LVIP. Goesling Decl. ¶ 446.

1623. This final adjustment is necessary because buyers in the market who purchase the assets "as is, where is" with the intention of moving them elsewhere will deduct estimated costs of removal and installation of the asset that they are purchasing from the market price they are willing to pay. Goesling Decl. ¶ 446.

1624. Since the LVIP valuation is meant to approximate a market price for the installed asset, this final adjustment brings the market price in line with an in-place value of the asset. Goesling Decl. ¶ 446.

c. Reconciliation of Cost and Market Approaches

1625. To the extent possible, Mr. Goesling reconciled the values indicated by the Cost and Market Approaches into a single conclusion of value for each Representative Asset. Goesling Decl. ¶ 449.

1626. When both approaches were applied, he placed all weight on the Market Approach indication of value because, as discussed above, the Market Approach provides a far more reliable indication of value as compared to the Cost Approach. Goesling Decl. ¶ 449.

1627. There are two significant differences in Mr. Goesling's reconciliation process when valuing assets in exchange as compared to in place. Goesling Decl. ¶ 450.

1628. First, for assets that are not removable, such as Pits and Trenches (Representative Asset No. 2), there would be no market—and therefore no value—for such assets under an in exchange premise. Goesling Decl. ¶ 450.

1629. However, such assets do have a value under an in-use premise of value, so he used the Cost Approach to assign a value to these assets. Goesling Decl. ¶ 450.

1630. Second, because he was unable to use the Market Approach for certain assets, he was forced to rely more heavily on the Cost Approach for his alternative valuation than for the OLV appraisal. Goesling Decl. ¶ 451.

1631. Specifically, the following Representative Assets that he valued using the Market Approach for the in-exchange valuation were valued using the Cost Approach for purposes of assigning a value under his alternative LVIP valuation: Representative Asset Nos. 1 (Shim Select and Placement Machine); 3 (Torque Converter Housing Conveyor System); 5 (Paint Mix and Circulation Electrical System); 6 (ELPO IMC System); 11 (Central Utilities Complex); 14 (Leak Test System); 16 (BS Skid Conveyor); 17 (B&S P&F Conveyor); 18 (Vertical Adjusting Carriers); 20 (Wheel & Tire Delivery Conveyor); 21 (Skillet Conveyor System); 23 (Aluminum Machining System); 26 (Core Delivery Conveyor System); 27 (Cupola No. 4 Emissions System); 28 (Ajax 100 Ton Holding Furnace); 34 (4 Speed Build Line); and 35 (Button Up and Test Conveyor). Goesling Decl. ¶ 451.

1632. The Cost Approach has important limitations, particularly in Mr. Goesling's secondary, hypothetical LVIP appraisal, because of the inaccuracies in deriving economic obsolescence for each individual asset based on the sale of the plant as a whole. Goesling Decl. ¶ 452.

1633. However, for many of the Representative Assets, because no comparable sales information could be located, Mr. Goesling did not have the option of considering two value indications, and had to exclusively rely on the Cost Approach. Goesling Decl. ¶ 452.

1634. A chart summarizing Mr. Goesling's approaches to value and indicating which approach was ultimately applied in his alternative LVIP valuation is below. Goesling Decl. ¶ 453.

Summary of Mr. Goesling's Liquidation Value In Place Analysis

Rep. Asset No.	Asset ID	Company Name (Location)	Asset Description	Cost Approach Value Indication	Market Approach Value Indication	Concluded Value	Concluded Approach
1	100006527	WARREN TRANSMISSION	OP-150 SELECT; CHECK PLACE SHIMS AUTO STATION	37,000		37,000	Cost Approach
2	100017544	LANSING DELTA TOWNSHIP ASSEMBLY	GA PITS & TRENCHES	231,000		231,000	Cost Approach
3	100033438	WARREN TRANSMISSION	POWER ZONE ROLLER CONVEYOR AUTOMATION TCH MOD 3	186,000		186,000	Cost Approach
4	100037892	LANSING DELTA TOWNSHIP ASSEMBLY	PAINT BLDG LINES - PROCESS WASTE ELPO	79,000		79,000	Cost Approach
5	100037940	LANSING DELTA TOWNSHIP ASSEMBLY	PAINT MIX & CIRCULATION - ELECTRICAL	352,500		352,500	Cost Approach
6	100037954	LANSING DELTA TOWNSHIP ASSEMBLY	PAINT DIP CONVEYOR - ELPO OVEN IMC	198,300		198,300	Cost Approach
7	100038004	LANSING DELTA TOWNSHIP ASSEMBLY	PAINT TC AUTOMATION SOFTWARE	10,000		10,000	Cost Approach
8	100038035	LANSING DELTA TOWNSHIP ASSEMBLY	GA EOL PAINT SPOT REPROCESS SYS PAINT MIX ROOM	170,000		170,000	Cost Approach
9	100038119	LANSING DELTA TOWNSHIP ASSEMBLY	PAINT TC2 CC BELL ZONE	550,000		550,000	Cost Approach
10	100041920	LANSING DELTA TOWNSHIP ASSEMBLY	OPTICELL - ROBOTIC MEASUREMENT SYSTEM	113,000		113,000	Cost Approach
11	100045909	LANSING DELTA TOWNSHIP ASSEMBLY	LANSING DELTA TOWNSHIP ASSEMBLY UTILITY SERVICES	10,212,000		10,212,000	Cost Approach
12	100048169	LANSING DELTA TOWNSHIP ASSEMBLY	BS ROBOT LAZN-150R1	19,000	29,000	29,000	Market Approach
13	100050513	LANSING DELTA TOWNSHIP ASSEMBLY	BS WELD BUS DUCTS	903,000	873,000	873,000	Market Approach
14	100053677	WARREN TRANSMISSION	LEAK TEST BASE MACHINE QTY = 1	165,000		165,000	Cost Approach

Rep. Asset No.	Asset ID	Company Name (Location)	Asset Description	Cost Approach Value Indication	Market Approach Value Indication	Concluded Value	Concluded Approach
15	100060623	LANSING DELTA TOWNSHIP ASSEMBLY	GA T/W: SOAP; MOUNT AND INFLATE	158,000	127,000	127,000	Market Approach
16	100061079	LANSING DELTA TOWNSHIP ASSEMBLY	BS SKID CONVEYOR - LAZA	446,000		446,000	Cost Approach
17	100061614	LANSING DELTA TOWNSHIP ASSEMBLY	BS P&F CONVEYOR - BODY SIDE INNER LH DEL	295,000		295,000	Cost Approach
18	100062269	LANSING DELTA TOWNSHIP ASSEMBLY	GA CONVEYOR: VERTICAL ADJUSTING CARRIER (VAC) SYS - CARRIERS (QTY 87)	551,000		551,000	Cost Approach
19	100064667	LANSING DELTA TOWNSHIP ASSEMBLY	BS CMM FULL BODY MACHINE - LY90	68,000	58,000	58,000	Market Approach
20	100065640	LANSING DELTA TOWNSHIP ASSEMBLY	GA CONVEYOR SUB-ASM RECEIVING (SAR): WTD1000 - WHEEL & TIRE DELIVERY	205,000		205,000	Cost Approach
21	100066809	LANSING DELTA TOWNSHIP ASSEMBLY	GA CONVEYOR: SKILLET - FINAL - LEG 1	264,000		264,000	Cost Approach
22	100069322	WARREN TRANSMISSION	FANUC M-710IB/70T ROBOT - ASSEMBLY	57,000	55,000	55,000	Market Approach
23	100070012	WARREN TRANSMISSION	ALUMINUM MACHINING SYSTEM	246,000		246,000	Cost Approach
24	100071009	WARREN TRANSMISSION	LFS220 BASE SHAPING MACHINE-OP 20 TRANSFER DRIVE GEAR	277,000	274,000	274,000	Market Approach
25	100071022	WARREN TRANSMISSION	LIEBHERR HOBB MACHINE FROM ST. CATHARINES	310,00	298,000	298,000	Market Approach
26	100095344	DEFIANCE	CORE DELIVERY CONVEYOR SYSTEM CB116 & 122	53,000		53,000	Cost Approach
27	100098085	DEFIANCE	EMISSIONS SYSTEM #4 CUPOLA	1,434,000		1,434,000	Cost Approach
28	100099125	DEFIANCE	100 TON VERTICAL CHANNEL HOLDING FURNACE	580,000		580,000	Cost Approach
29	BF2016822 01	GRAND RAPIDS	TRANSFER PRESS-GG-1	600,000	261,000	261,000	Market Approach

Rep. Asset No.	Asset ID	Company Name (Location)	Asset Description	Cost Approach Value Indication	Market Approach Value Indication	Concluded Value	Concluded Approach
30	BGI20163301	MANSFIELD STAMPING	TP-14 CS1-1 TRANSFER PRESS DANLY ET-2	334,000	800,000	800,000	Market Approach
31	BUY11820901	LANSING REGIONAL STAMPING	DANLY 4000 TON PRESS	253,000	356,000	356,000	Market Approach
32	BUYR503469FA	LANSING REGIONAL STAMPING	AA-11 SCHULER #1 AA CROSSBAR TRANSFER PRESS	4,603,000	5,016,000	5,016,000	Market Approach
33	BUYR503481FA	LANSING REGIONAL STAMPING	B3-5 TRANSFER PRESS SYSTEM INCL. DESTACKER AND EOL	3,823,000	3,285,000	3,285,000	Market Approach
34	NIT219381	WARREN TRANSMISSION	BUILD LINE W/FOUNDATION	70,000		70,000	Cost Approach
35	NITC03340	WARREN TRANSMISSION	BUTTON UP AND TEST CONVEYOR SYSTEM	228,000		228,000	Cost Approach
36	NITC03507	WARREN TRANSMISSION	HELICAL BROACHING EQUIPMENT	271,400	200,000	200,000	Market Approach
37	NITW0S11026A	WARREN TRANSMISSION	COURTYARD ENCLOSURE	612,100		612,100	Cost Approach
38	NJL2924414P	DEFIANCE	SYSTEM GAS CLEANING NO.4 CUPOLA	37,000	24,000	24,000	Market Approach
39	NJL2983009	DEFIANCE	CB 91 ROBOT	intentionally omitted			
40	NJL6084400	DEFIANCE	P & H 7 1/2 TON CHARGER CRANE 6E CUPOLA	38,000	40,000	40,000	Market Approach

XV. DEFENDANTS' VALUATION OF THE 40 REPRESENTATIVE ASSETS

A. The KPMG Report Is Not a Reliable Indicator of the Values of the Representative Assets in the Hands of Old GM as Of June 30, 2009

1635. At the trial on the 40 Representative Assets, Defendants' expert, Mr. Abdul Lakhani, opined that an interim calculation (referred to by Defendants as "**RCNLD**") in a certain valuation report prepared by KPMG for New GM's fresh-start accounting (the "**KPMG Report**") is the best indicator of value of the Representative Assets. *See* Lakhani Decl. ¶ 73.

1636. At the same time, Mr. Lakhani opined that KPMG committed serious errors in violation of GAAP and disagreed with or found improper numerous professional judgments made by KPMG that "downwardly biased" KPMG's conclusions of value. Lakhani Decl. ¶¶ 98-99; Lakhani Test. 1680:8-25, 1683:20-1681:5.

1637. Defendants engaged two other experts, Professor Glenn Hubbard and Ms. Maryann Keller, who opined that other aspects of the KPMG Report are unreliable and, ultimately, downwardly bias KPMG's conclusion of value. *See generally* Hubbard Decl.; Keller Decl.

1638. As explained by Plaintiff's rebuttal expert, Mr. Gordon Klein, the KPMG Report is not a reliable indicator of the value of the Representative Assets due to the scope and purpose of KPMG's valuation and specifically because the KPMG Report values the assets as of July 10, 2009 in the hands of New GM. *See generally* Klein Decl.

1639. Moreover, even if the KPMG Report were reliable, the RCNLD values proffered by Defendants are unreliable and imprecise values of individual assets because the values were derived using a variety of practical expedients. Klein Decl. ¶¶ 47, 85.

1640. Furthermore, the criticisms of KPMG proffered by Mr. Lakhani—including his contentions that KPMG violated GAAP—are unsupported and speculative. Klein Decl. § IX.

1641. Plaintiff's economics expert, Prof. Fischel, opines that Prof. Hubbard does not establish that his analysis of the equity value of New GM is relevant to a determination of the value of the Surviving Collateral, even if New GM is considered to be a going concern, and that Prof. Hubbard's opinion that the Government acted as a private investor in the 363 Sale is inconsistent with the evidence. Fischel Decl. ¶ 19.

1642. Finally, Ms. Keller's opinions that certain projections of New GM are "reasonable" and that KPMG's stated bases for applying a company specific risk premium are not credible and without a reliable methodology.

1. Mr. Lakhani is Not Qualified to Opine on the Valuation of the Representative Assets

1643. Mr. Lakhani was retained by counsel for JPMorgan and the Defendants Steering Committee to analyze the values of the property, plant, and equipment of New GM estimated by KPMG in connection with New GM's fresh-start accounting. Lakhani Decl. ¶ 7.

1644. Mr. Lakhani did not independently value the Representative Assets. Lakhani Test. 1641:17-19. His only assignment was to analyze KPMG's values. Lakhani Decl. ¶ 7; Lakhani Test. 1641:20-22.

1645. He is not a valuation expert. Lakhani Test. 1637:6-7.

1646. He does not hold any certifications or licenses in valuation. Lakhani Test. 1637:8-10.

1647. He is neither certified nor qualified to conduct an appraisal of land, machinery, or equipment. Lakhani Test. 1637:11-14, 1638:20-1639:15.

1648. He did not appraise any of the Representative Assets. Lakhani Test. 1641:3-5.

1649. In fact, Mr. Lakhani did not inspect any of the Representative Assets. Lakhani Test. 1641:6-11.

1650. Prior to this case, Mr. Lakhani has never testified as an expert and he does not have any publications. Lakhani Test. 1641:23-1642:9.

1651. His opinions are limited to analyzing what KPMG did and whether KPMG properly—or improperly—complied with GAAP. Lakhani Decl. ¶ 7; Lakhani Test. 1641:20-22.

2. Mr. Klein is Qualified and Credible

1652. Plaintiff's rebuttal expert, Mr. Gordon Klein, explained why Mr. Lakhani's opinion that the interim RCNLD values provides the best estimate of the value of the Representative Assets is not credible. *See generally* Klein Decl.

1653. Mr. Klein was retained by counsel for the Plaintiff as a rebuttal expert to respond to the opinions offered by Mr. Lakhani. Klein Test. 2686:14-16; Klein Decl. ¶ 7.

1654. Mr. Klein is qualified to give an opinion on the KPMG Report and, more specifically, why the values in the KPMG Report are not a reliable indicator of the value of the individual Representative Assets.

1655. Mr. Klein has taught fifteen different courses at UCLA and Loyola, including courses at UCLA's law school and UCLA's school of management. Klein Test. 2882:23-2883:18.

1656. Those courses include advanced corporate taxation, partnership taxation, advanced accounting, intermediate accounting, business plan development, small business management, and cost accounting. Klein Test. 2882:23-2883:18.

1657. He is the author of numerous books on the topics of taxation and accounting. Klein Test. 2882:23-2883:18.

1658. He has trained over 8,000 people to pass the California CPA exam. Klein Test. 2882:23-2883:18.

1659. He has conducted educational seminars for a number of business, including all four of the Big Four accounting firms. Klein Test. 2883:19-24.

1660. He has been qualified as an expert at the Delaware Supreme Court and the United States Tax Court, as well as various state courts, on topics including accounting and valuation. Klein Test. 2884:7-17.

3. The KPMG Report Is an Accounting Exercise that Values Assets in the Hands of New GM as of July 10, 2009

1661. After the sale of Old GM's assets to New GM was final, New GM prepared its balance sheet in accordance with fresh-start accounting. *See e.g.*, JX-0009-0043.

1662. As part of that accounting process, New GM engaged KPMG to estimate the fair value of New GM's total invested capital ("**TIC**") and certain assets, liability and equity interests as of July 10, 2009. DX-0141-0013.

1663. Specifically, New GM engaged KPMG as an advisor to "determine its opinion of the fair value of [TIC] and the Subject Assets, Liabilities and Equity Interests acquired from [Old GM] under Section 363(b) of the Bankruptcy Code." DX-0141-0013; *see* Klein Decl. ¶ 23.

1664. KPMG defined TIC in the context of its engagement as "the sum of the fair value of equity and fair value of debt of a business enterprise, whereby debt is inclusive of interest bearing liabilities, non-operating liabilities, capital lease obligations, pension and OPEB [Other Post-Employment Benefits." DX-0141-0058.

1665. KPMG's engagement therefore focused on allocating the "purchase price" for New GM based upon the credit bid of the Government and Export Development Canada, inclusive of the Government subsidy, made to purchase substantially all of Old GM's assets pursuant to the 363 Sale. Klein Decl. ¶¶ 45-47.

1666. KPMG determined these values as of July 10, 2009, with the understanding that New GM would incorporate certain of these values into its consolidated balance sheet as of July 10, 2009. DX-0141-0002 to 0004, 0013; Klein Decl. ¶ 30.

1667. KPMG's categorical valuations were similar to many of the category line items in New GM's consolidated balance sheet presented as of July 10, 2009. Klein Decl. ¶ 24; *see* JX-0010-0278 (General Motors Company, Form S-1, filed August 18, 2010, at F-20) and DX-0141-0003 (KPMG Rep. at iii).

1668. KPMG memorialized its conclusions in a 241-page report and 310 pages of schedules, collectively referred to as the KPMG Report. *See* DX-0141; Klein Decl. ¶ 13.

1669. The schedules to the KPMG Report contain the assumptions and methodologies supporting KPMG's opinions of fair value. DX-0141-0004.

1670. In addition to the KPMG Report, KPMG produced work papers containing the documentation that support its conclusions. DX-0141-0004.

1671. The KPMG Report begins with a three-page opinion letter addressed to Nicholas Cyprus, New GM's Controller and Chief Accounting Officer, and signed by KPMG. DX-0141-0002 to 0004; Klein Decl. ¶ 14.

1672. This letter expresses KPMG's "opinion of value" for the various assets, liabilities, and equity interests independently analyzed and sets forth its estimates of the fair value at the category-level. Klein Decl. ¶ 14.

1673. KPMG performed its analysis in accordance with Financial Accounting Standards Board's Accounting Standard Codifications ("**ASC**") "to assist [New] GM with meeting its financial reporting requirements" and expressly disclaimed any other use of its analysis. DX-0141-0002; Klein Decl. ¶ 23.

1674. KPMG valued the subject assets in the hands of New GM as a going concern as of July 10, 2009, inclusive of the Government subsidy. DX-0141-0002; Furey Test. 1383:11-1384:15; 1419:8-12; 1539:6-9; Lakhani Test. 1645:14-16.

1675. As reflected in the KPMG schedules, an infusion of over $20 billion in restricted cash from the Government was necessary to keep New GM solvent. DX-0141-0065, -0265.

1676. KPMG did not value the subject assets in the hands of Old GM. Furey Test. 1419:13-20; 1525:19-23.

1677. KPMG did not value the subject assets as of June 30, 2009. Furey Test. 1539:19-25.

1678. At the time KPMG valued the subject assets, the 363 Sale had been approved by the Bankruptcy Court and had closed. *See* JPTO Stipulated Facts ¶ 42; *In re Gen. Motors*, 407 B.R. at 463.

1679. Because it was valuing the assets in the hands of New GM after the 363 Sale, KPMG utilized a "value in use" premise of value, which presumes the continued utilization of the assets as a component of the business in connection with all other assets. DX-0141-0004.

1680. This premise of value "is not intendent to represent the amount that might be realized from piecemeal disposition of the assets . . . ." DX-0141-0004.

1681. KPMG did not utilize a "value in exchange" premise. Furey Test. 1383:11-1384:8.

1682. As the qualifiers expressed by KPMG suggest, the scope and breadth of KPMG's engagement were limited in several key respects. Klein Decl. ¶ 25.

1683. First, the KPMG Report is not applicable because the report valued New GM's assets based on facts existing as of July 10, 2009. Klein Decl. ¶ 31.

1684. The values of certain assets measured as of July 10, 2009, that were used in KPMG's analysis may have been substantially different on June 30, 2009, because uncertainties associated with contingencies existing as of June 30, 2009 may have been resolved as of July 10, 2009. Klein Decl. ¶ 31.

1685. For example, the 363 Sale had not yet been approved as of June 30, 2009, and there were pending objections to the 363 Sale that were to be considered by the Bankruptcy Court. JX-0008-0010 (Decision on Debtors' Motion for Approval of Sale of Assets at 10); *see also* Lakhani Test. 1645:21-1646:4. Certain assets had no value on June 30, 2009 but obtain value on July 10, 2009, such as deferred tax assets and brands. Klein Test. 2787:14-2788:7.

1686. Given the potential changes that may have occurred between June 30, 2009, and July 10, 2009, in the values of various assets, it is inappropriate to utilize the values ascertained as of July 10, 2009 by KPMG as meaningful measures of fair value as of June 30, 2009. Klein Decl. ¶ 32.

1687. Mr. Lakhani did not perform any independent analysis of whether the valuation approach applied by KPMG would have yielded identical or substantially similar asset values as of June 30, 2009. Lakhani Test. 1647:6-19; Klein Decl. ¶ 33.

1688. And that is because Mr. Lakhani contends that KPMG's interim RCNLD values would not have changed between June 30, 2009 and July 10, 2009. Lakhani Decl. ¶ 24.

1689. But Mr. Lakhani acknowledged that there may have been differences in the valuation of the business enterprise of New GM at the valuation date of June 30, 2009 as compared to July 10, 2009. Lakhani Test. 1645:7-1647:13.

1690. He further acknowledged that he did not analyze whether there were differences in the value of New GM's business as of July 10, 2009 and the value as of June 30, 2009. Lakhani Test. 1645:7-1647:13.

1691. He did not consider whether the value of New GM's debt would have been different as of June 30, 2009 as compared to July 10, 2009. Lakhani Test. 1647:14-19.

1692. He did not analyze whether the weighted average cost of debt versus equity would have been different on June 30, 2009 as compared to July 10, 2009. Lakhani Test. 1650:23-1651:3.

1693. Second, KPMG's report is also limited in scope because KPMG was retained to express its opinion of fair value for only "certain," but not all, of New GM's broad financial statement categories, which KPMG specifically identified as the "Subject Assets, Liabilities, and Equity Interests." DX-0141-0002; Klein Decl. ¶ 26.

1694. For example, KPMG did not independently value major categories, such as Accounts Receivable, Marketable Securities, or Bond Obligations, appearing in New GM's July 10, 2009 balance sheet filed with the SEC. Klein Decl. ¶ 26.

1695. Most notably, Goodwill was not a Subject Asset and, consequently, KPMG did not value Goodwill because it was outside the scope of its assignment. Furey Test. 1548:18-20; Klein Decl. ¶ 27; *see also* Lakhani Test. 1686:21-23.

1696. Third, KPMG was retained to "assist" New GM in an advisory capacity, not to serve as an auditor. DX-0141-0002; Furey Test. 1532:2-5; Klein Decl. ¶ 29.

1697. As such, in performing its assignment, KPMG relied on facts and estimates provided by New GM's management, including financial projections, utilization estimates, and historical data. DX-0141-0002; Klein Decl. ¶ 29.

1698. As KPMG stated in its report, "[KPMG] has accepted [management-provided data] as being complete and accurate in all material respects. [KPMG] has not audited, reviewed, or examined such information, and accordingly do not express an opinion or any form of assurance thereon." DX-0141-0002; *see also* Klein Decl. ¶ 29.

4. "RCNLD" Values Found On KPMG Supporting Work Papers Are Unreliable, Imprecise, and Do Not Provide the "Best Available" Measure of Fair Value for the Representative Assets

1699. The RCNLD calculation that Mr. Lakhani contends is the "best available" measure of value for the Representative Assets was an interim step in KPMG's valuation. Furey Test. 1554:2-10; *see also* Klein Decl. ¶ 115-16; Lakhani Test. 1671:12-18; Lakhani Decl. ¶ 73.

1700. KPMG did not conclude that RCNLD was the final concluded for New GM's Personal Property and Buildings & Improvements. Furey Test. 1554:2-10; Lakhani Test. 1671:12-18.

1701. Moreover, KPMG's RCNLD amounts do not provide a reliable estimate, nor were they ever intended to provide a reliable estimate, of the fair value of individual assets, including those that comprise the Representative Assets, because the values do not reflect fair market values and KPMG employed a variety of necessary practical expedients in calculating RCNLD. Klein Decl. ¶ 85.

a. KPMG'S Valuation of Personal Property and Building and Improvements

1702. Schedule 6.1 of the KPMG Report sets forth KPMG's fair value determinations for GMNA's fixed assets, including the "Property, Plant, & Equipment" category ("**PP&E**"). DX-0141-0366.

1703. Schedule 6.1 contains KPMG's fair values for eight major subcategories of PP&E, such as "Land," "Tooling," "Personal Property," and "Building Improvements," that

collectively sum to equal KPMG's opinion of fair value for GMNA's PP&E as of July 10, 2009. DX-0141-0366; Klein Decl. ¶ 18.

1704. KPMG's final fair value conclusions for each category and subcategory of GMNA's fixed assets are contained in the column labeled "Fair Value." DX-0141-0366.

1705. Thirty-four of the Representative Assets are constituent assets within the Personal Property and Building & Improvement subcategories. *See* DX-0151A; DX-0150A.

1706. KPMG never determined final fair values for individual assets within the Personal Property and Building & Improvements subcategories. Furey Test. 1356:6-10.

1707. Rather, it determined concluded opinions of final fair values for asset categories, including PP&E, which subsumes within it Personal Property and Building & Improvement subcategories. DX-0141-0126 to -0129.

1708. With respect to the subcategory Personal Property, KPMG primarily relied on the cost approach to estimate a fair value. DX-0141-0126 to -0129; Klein Decl. ¶ 63.

1709. This approach assumes that a rational investor will pay no more for an asset than the amount for which a given asset can be replaced with an asset with similar utility using current material and labor rates. DX-0141-0126.

1710. ASC 820 makes clear that four elements are necessary in applying the cost approach to personal property, stating that "the cost approach is applied by tak[ing] into account the condition of the machine and the environment in which it operates, including physical wear and tear (that is, physical deterioration), improvements in technology (that is, functional obsolescence) and conditions external to the machine such as a decline in the market demand for similar machines (that is, economic obsolescence), and installation costs." JX-0020-0278 (ASC 820-10-55-37); Klein Decl. ¶ 64.

1711. Thus, KPMG applied the cost approach by determining an initial starting, or "replacement cost," and then factored physical, functional, and economic obsolescence into the "replacement cost" component. DX-0141-0127; Klein Decl. ¶ 64.

1712. KPMG subdivided economic obsolescence into two components: Economic obsolescence due to below-capacity asset utilization and TIC-Based Economic Obsolescence due to the low earnings power of assets. *See* DX-0141-0133, -0142; Klein Decl. ¶ 64.

1713. Mr. Klein described the equation in KPMG's worksheet that expresses the fair value of New GM's Personal Property as having the following six elements: Replacement cost, physical depreciation adjustment, functional obsolescence adjustment, capacity utilization adjustment, TIC-based economic obsolescence adjustment, and fair value. Klein Decl. ¶ 64

1714. In DX-0151A, the column marked "Final RCNLD Pre EO" is an interim subtotal that encompasses the first four of these six terms, but excludes the TIC-Based Economic Obsolescence Adjustment. DX-0151A-0002; Klein Decl. ¶ 65.

1715. Mr. Lakhani refers to this "Final RCNLD Pre EO" as "RCNLD." Lakhani Decl. ¶ 71.

b. KPMG's Initial Replacement Costs Calculations are Imprecise and Unreliable

1716. KPMG applied two methods to calculate initial replacement costs for Personal Property: The indirect method, based on the Cost of Reproduction New, and the direct method, based on Replacement Cost New. DX-0141-0127; Klein Decl. ¶ 67.

1717. The method utilized depended on whether KPMG received facility-wide replacement cost estimates from New GM's management, which were used under the RCN method only. DX-0141-0128 to -0129; Klein Decl. ¶ 68.

1718. Under the indirect method, KPMG applied the cost method based on an estimate of the current cost of reproducing a new replica of an asset using the same or closely similar materials to those that originally were used. DX-0141-0127; Klein Decl. ¶ 69.

1719. For assets valued using the indirect method, KPMG started with the asset's actual historical installed cost. DX-0141-0128; Klein Decl. ¶ 69.

1720. This historical cost was then adjusted by asset category-specific trend factors. DX-0141-0128; Klein Decl. ¶ 69.

1721. These trend factors were intended to account for category-specific changes in the current cost of reproducing a replica of the assets. Furey Test. 1382:18-1383:10; Klein Decl. ¶ 69.

1722. Thus, under this method, KPMG arrived at values intended to estimate the cost of replicating existing assets. Furey Test. 1382:18-1383:10; DX-0141-0127 to -0128; Klein Decl. ¶ 69.

1723. Under the direct method, KPMG did not start with an asset's actual historical installed cost. DX-0141-0128; Furey Test. 1531:4-8; Klein Decl. ¶ 70.

1724. Instead, it started with broad, facility or line-wide replacement cost estimates that were provided to KPMG by New GM. DX-0141-0128; Furey Test. 1531:4-8; Klein Decl. ¶ 70.

1725. KPMG relied on these management-provided estimates and accepted that the amounts provided accurately reflected replacement costs. DX-0141-0002, -0128; Klein Decl. ¶ 71.

1726. KPMG compared the estimates to their reproduction cost estimates, but otherwise did not test or compare the estimates for reasonableness. DX-0153-0002.

1727. KPMG did not audit the direct replacement cost estimates. Furey Test. 1532:2-5.

1728. Moreover, these estimates constituted gross estimates for an entire production line or facility as a whole. DX-0141-0128; Klein Decl. ¶ 71.

1729. They did not provide estimates on an individual asset-by-asset basis. Furey Test. 1530:12-22; DX-0141-0128; Klein Decl. ¶ 71.

1730. Under ASC 820, fair value must be measured at replacement cost and the cost approach must reflect "the amount that currently would be required to replace the service capacity of an asset." Klein Decl. ¶ 86; JX-0020-0215 (ASC 820-10-20-Glossary-Cost Approach) (emphasis added).

1731. There is no evidence of the methodology used by New GM management or what standard was employed, or sufficient evidence to conclude that they complied with GAAP. Klein Decl. ¶ 87; Klein Test. 2762:17-2763:2.

1732. Overall, there is not enough information to conclude whether these estimates are in line with the Financial Accounting Standards Board's directive that information be complete, unbiased, and free from error. Klein Decl. ¶ 87.[12]

1733. These management-provided aggregate estimates of replacement values were then prorated to individual assets on a formula-based approach. DX-0141-0131; Klein Decl. ¶ 70.

1734. The formula compared each asset's trend-adjusted historical cost to the total trend-adjusted historical costs of all such assets, as calculated under the indirect method. DX-0141-0131; Klein Decl. ¶ 70.

[12] While Defendants submitted the declaration of Mr. Jay Ewing in support of the replacement costs estimates, Mr. Ewing (i) only has personal knowledge concerning New GM's assembly facilities and (ii) does not describe the methodology utilized by New GM to calculate replacement cost even at New GM's assembly facilities. Ewing Decl. ¶¶ 14-17.

1735. Thus, the values assigned to each individual asset merely reflected a formulaic proration of management-provided amounts of replacement cost, not a careful determination of any individual asset's replacement cost. Klein Decl. ¶ 70.

1736. Furthermore, by prorating the RCN values based on reproduction cost fractions, a substantial risk of error is introduced into the valuation process. Klein Decl. ¶ 74.

1737. Neither KPMG nor New GM's management attempted to ascertain the actual replacement cost of specific assets on an individualized basis. *See* Furey Test. 1531:13-14; Klein Decl. ¶ 71.

1738. GAAP and ASC 820 favor the use of replacement costs at the individual-asset level in determining value. Klein Decl. ¶ 76.

1739. Mr. Klein calculated that the direct method was used to value approximately 42% of the GMNA Personal Property assets and, of the 40 Representative Assets, the direct method was used to value 23 of them. Klein Decl. ¶ 70; *see* DX-0151A-0002; PX-0263; PX-0264; *see also* DX-0141-0127; PX-0260-0098 to 0099(KPMG-GM0000994-995).

c. KPMG Did Not Apply Individualized Adjustments for Functional Obsolescence and Economic Obsolescence

1740. After determining replacement costs in its supplemental working papers, KPMG reduced the replacement costs to reflect the pro rata portion of an asset's expected useful life that had expired. DX-0141-0131 to -0132; Klein Decl. ¶ 77.

1741. KPMG called this the "age-life" method, which is commonly referred to in the accounting process as straight-line depreciation. DX-0141-0131; Klein Decl. ¶ 77.

1742. Then, KPMG considered applying reductions to asset values based on functional obsolescence. DX-0141-0132; Klein Decl. ¶ 78.

1743. ASC 820 attributes functional obsolescence to "improvements in technology," and the KPMG Report more fully defines it as "the loss in value caused by inefficiencies or inadequacies of the asset itself related to such factors as technological advancement, super adequacies, excess capital costs, and excess operating costs." Klein Decl. ¶ 78; DX-0141-0127.

1744. KPMG's contemplation is reflected by the "Functional Obsolescence" column that appears on supplemental worksheet DX-0151A and by KPMG's statement in the KPMG Report that it performed roughly 15 site visits in the U.S. and Canada to determine functional obsolescence. DX-0151A-0002; DX-0141-0125 & -0132 to -0133; Klein Decl. ¶ 78.

1745. As part of KPMG's site visits, KPMG reviewed what KPMG considered to be the largest investment line items with New GM to identify any major functional obsolescence issues. But that procedure was only implemented for locations that KPMG visited, *i.e.*, eleven plants in the U.S. Furey Test. 1534:14-19.

1746. KPMG did not conduct any tests of functional obsolescence as part of its engagement to reach an independent conclusion as to the correct functional obsolescence to apply to an individual asset. Furey Test. 1533:21-1534:5.

1747. KPMG only applied a functional obsolescence deduction to assets at New GM's Tonawanda facility. Furey Test. 1537:16-1538:19.

1748. KPMG did not apply a functional obsolescence adjustment to any of the Representative Assets; it therefore did not observe even a single dollar of "loss in value caused by inefficiencies or inadequacies . . . due to technological advancement" among the Representative Assets or any GMNA asset other than those located at one plant. Klein Decl. ¶¶ 78, 89.

1749. KPMG did not visit New GM's facility in Defiance, Ohio or its manufacturing facility in Warren, Michigan. Furey Test. 1533:3-12; DX-0141-0125.

1750. KPMG could not have assessed the functional obsolescence for the Representative Assets that existed in the facilities it did not visit. Klein Decl. ¶ 91.

1751. For the plants that KPMG did visit, they typically spent only one day inspecting the plant, and sometimes visited two sites in one day. Furey Test. 1533:18-20; Klein Decl. ¶ 90; DX-0141-0106.

1752. Given that GMNA had approximately 385,000 items of Personal Property and KPMG's site visits also focused on examining other categories of assets such as a tooling and buildings, the approximate amount of time that KPMG spent determining the functional obsolescence of individual Personal Property assets could only be minimal. Klein Decl. ¶ 91; DX-0141-0107.

1753. Indeed, KPMG stated in its report that "the site inspections did not include a detailed physical verification of the assets. KPMG did not confirm the completeness and accuracy of the [New GM's fixed asset ledgers] of the inspected facilities." DX-0141-0126.

1754. Next, KPMG determined economic obsolescence, which KPMG defined as:

> The loss in value of a property caused by factors external to the property such as economics of the industry; availability of financing; loss of material and/or labor sources; passage of new legislation; changes in ordinances; increased cost of raw material, labor, or utilities; reduced demand for the product; increased competition; inflation or high interest rates; or similar factors.

DX-0141-0108; Klein Decl. ¶ 79.

1755. KPMG subdivided its application of economic obsolescence into two distinct parts, which it labels as "Economic Obsolescence- Capacity Utilization" and "Economic Obsolescence-Total Invested Capital" (or the TIC-Based Economic Obsolescence Adjustment). DX-0141-0138, -0142; Klein Decl. ¶ 80.

1756. This calculation reflected a capacity-based measure that KPMG labeled "Inutility Penalty." DX-0141-0109; Klein Decl. ¶ 81.

1757. The Economic Obsolescence-Capacity Utilization is one of the substantive adjustments reflected in DX-0151A, as seen in the column labeled "RCNLD with Utility Penalty." DX-0151A; Klein Decl. ¶ 81.

1758. This amount was determined based on data provided by the New GM's Global Manufacturing Strategies & Planning Group. DX-0141-0133; DX-0156-0001; Klein Decl. ¶ 81.

1759. KPMG stated that this data combined historical and expected utilization rates spanning the period 2008-2010 and presented utilization rates for each of GMNA's 30 Computer Aided Facility Management groups. DX-0141-0109, -0133; PX-0266; Klein Decl. ¶ 81.

1760. New GM did not provide KPMG with capacity utilization rates asset-by-asset for an assembly line. Furey Test. 1531:18-21.

1761. New GM did not provide KPMG with asset-by-asset capacity utilization numbers for powertrain lines. Furey Test. 1531:22-25

1762. Thus, the New GM management-provided data reflected facility-based utilization rates, not individual asset utilization rates. Klein Decl. ¶ 81.

1763. Moreover, this data, at least in part, reflected New GM management's subjective estimates of its forecasted production levels and facility utilization. Klein Decl. ¶ 81.

1764. KPMG then applied these facility-based Inutility Penalties across-the-board to all assets located at a particular facility, irrespective of the degree to which a particular asset located within that facility was actually being utilized or the actual characteristics or condition of the asset. Furey Test. 1443:12-24; DX-0141-0131; Klein Decl. ¶ 93, 82.

1765. After the application of the economic obsolescence capacity utilization penalty, KPMG reached the point in its calculation referred to in its working spreadsheet as "RCNLD Pre EO," and referred to by Mr. Lakhani as RCNLD. DX-0151A-0002; Lakhani Decl. ¶ 71.

1766. Following the interim RCNLD step in its process, KPMG calculated the other component of its economic obsolescence factor. DX-0141-0142.

1767. Consistent with GAAP, KPMG made adjustments for TIC-based economic obsolescence. DX-0141-0142; Klein Decl. ¶ 83.

1768. As described by KPMG, "economic obsolescence due to the earnings power of the business was then estimated based upon a business enterprise valuation performed for the region. If the TIC analysis did not support the fixed asset valuation then an economic penalty was applied." DX-0141-0109.

1769. KPMG explained further that this TIC-based adjustment was necessary to account for economic obsolescence related to New GM's Personal Property and B&I assets:

> In theory, an economic overlay of the value of the aggregate assets of an entity can be compared to the underlying asset values on its balance sheet. The economic overlay compares the TIC to the aggregated value of the business unit's net working capital, tangible and identifiable intangible assets. To the extent that the TIC is less than the value of all of a business unit's assets, then it is appropriate to apply a factor for economic obsolescence to certain assets.

DX-0141-0142.

1770. KPMG further provided that the TIC-based Economic Obsolescence factor was necessary to bring the value of the firm's assets in line with the market:

> It is important to note, as discussed prior, that in applying economic obsolescence due to the earnings power of the business, the individual assets cannot be valued at less than what they could be sold for on an individual basis in the open market. The underlying theory is that, if the overall business is worth less than the sum of what the assets could be sold for individually, the owner would maximize the value of the assets by selling the individual assets rather than continue to operate as a going concern.

DX-0141-0116.

1771. Mr. Furey further explained that the professional literature and KPMG's own internal guidelines acknowledge the application of TIC-Based Economic Obsolescence Adjustment. Furey Test. 1520:18-1521:19.

1772. Moreover, under GAAP and ASC 820, KPMG was required to apply the TIC-Based economic obsolescence. Klein Test. 2869:22-2870:13; JX-0020-0278 (ASC 820-10-55-38A).

1773. With respect to Personal Property and Building and Improvements, KPMG applied a 55% reduction to the assets, as evidenced in the columns of the chart labeled "EO." DX-0151A-0002

1774. At this point KPMG had determined a "Final Concluded Value" for individual assets and under normal circumstances, the above process would have concluded KPMG's analysis. DX-0151A-0002; Klein Decl. ¶ 56.

1775. However, after completing the above analysis, KPMG learned facts that led it to conclude that GMNA's TIC was higher than it first thought. PX-0261-0014-15; Klein Decl. ¶ 56.

1776. As a result, KPMG applied a corrective adjustment to its TIC-Based Economic Obsolescence Adjustment. PX-0261-0014 to 0015.

1777. KPMG referred to these adjustments as the "Balance Sheet Adjustments." *See e.g.*, DX-0141-0146, -0366.

1778. KPMG applied the Balance Sheet Adjustments only at the asset category level. DX-0141-0366.

1779. KPMG stated that the Balance Sheet Adjustments "have been allocated to the PP&E asset categories on a summary level based on a pro-rata allocation of RCNLD." DX-0141-0366.

1780. KPMG never pushed down the Balance Sheet Adjustments to individual assets. Furey Test. 1552:5-9.

1781. The Balance Sheet Adjustments raised GMNA's final fair values of three categories of PP&E by a total of $1.5 billion. DX-0141-0366; Klein Decl. ¶ 56.

1782. KPMG's decision to only apply "summary-level" "Balance Sheet Adjustments" corroborates the idea that KPMG's principal task was to determine aggregate "Subject Asset" balance sheet values, not to determine individual-level asset values. Klein Decl. ¶ 58; Klein Test. 2872:20-2875:13.

1783. While this approach was appropriate under GAAP, it overcorrected certain PP&E subcategories by applying the entire correction to them and under-corrected other subcategories by leaving them entirely unchanged, creating distortions at the subcategory and individual-asset level. Klein Decl. ¶ 59.

1784. The fact that KPMG's corrective adjustments resulted in "Subject Asset" PP&E values being reported accurately, but left individual asset-by-asset and subcategory-by-subcategory values distorted and inaccurate, provides further confirmation that determining individual asset values was a peripheral task for KPMG. Klein Decl. ¶ 59; Klein Test. 2715:15-2717:15.

1785. This $1.5 billion corrective adjustment was not reflected in the asset-by-asset analysis in KPMG's spreadsheets that Mr. Lakhani contends contain the "best available" measures of fair value. *See* DX-0151A-0002; Klein Decl. ¶ 60.

1786. Furthermore, the manner in which KPMG applied these corrective adjustments demonstrates the unreliability of KPMG's interim calculations for purposes of valuing individual assets. Klein Decl. ¶ 56; Klein Test. 2872:20-2875:13.

1787. When KPMG initially applied the TIC-based adjustment to arrive at fair asset values, it adjusted six of New GM's PP&E subcategories downward, including Buildings & Improvements, Leasehold Improvements, Personal Property, Tooling, Spare Parts (>$10k USD), and Entities Carried at NBV. DX-0141-0142; Klein Decl. ¶ 57.

1788. When KPMG had to apply the $1.5 billion of corrective adjustments, one would have expected KPMG to revise each of these respective categories values in a proportionately equal manner. Klein Decl. ¶ 57.

1789. But instead of applying the Balance Sheet Adjustments to the same six categories, KPMG spread the entire $1.5 billion positive adjustment over only the three largest of the affected PP&E subcategories, Buildings & Improvements, Personal Property, and Tooling. DX-0141-0366; Klein Decl. ¶ 57.

1790. Mr. Klein illustrates the Balance Sheet Adjustments as follows: Schedule 6.1 is highlighted below to show KPMG's application of the TIC-Based Economic Obsolescence Adjustment to the six PP&E categories (highlighted in yellow and green) and KPMG's subsequent application of the summary "Balance Sheet Adjustment" to the three PP&E categories (highlighted in green):

General Motors Company
Fresh Start Valuation of General Motors Company — **Schedule 6.1**
Fixed Assets Analysis for General Motors Company Subsidiaries—North America
As of July 10, 2009
(USD thousands)

TIC
EO

Asset Category	Original Cost	Net Book Value	RCNLD [1]	Individual Asset Fair Value [11]		Balance Sheet Adjustments [10]		Fair Value [10]	Remaining Useful Life (years) [2]
GMNA - Region Total									
Land	492,076.8	492,073.9	901,152.2	901,152.2		-		901,152.2	N/A
Buildings and Improvements	10,590,085.7	5,301,196.5	4,311,683.6	1,952,614.2	+	446,878.6	=	2,399,492.8	11.6
Leasehold Improvements	124,433.2	43,771.4	39,166.3	16,143.5		-		16,143.5	2.4
Personal Property	25,808,289.2	8,363,070.5	6,448,910.0	3,040,240.8	+	668,388.6	=	3,708,629.4	8.9
Tooling	16,546,481.5	6,731,645.9	4,337,596.3	2,291,521.8		400,932.8		2,692,454.6	
Tooling	16,012,972.7	6,198,137.1	3,868,377.7	1,822,303.2	+	400,932.8	=	2,223,236.0	
Pre-SOP and Post-EOP	533,508.8	533,508.8	469,218.7	469,218.7		-		469,218.7	
Construction Work in Progress [3]	794,746.2	678,853.6	678,853.6	678,853.6		-		678,853.6	
Entities Carried at NBV [4]	-	82,895.0	82,895.0	39,045.7		-		39,045.7	
Spare Parts	572,800.0	362,110.0	376,158.0	357,627.7		-		357,627.7	
NBV > USD 10K	114,560.0	35,034.2	35,034.2	16,503.9		-		16,503.9	
NBV < USD 10K	458,240.0	327,075.8	327,075.8	327,075.8		-		327,075.8	
DMAX Spare Parts [9]	-	-	14,048.0	14,048.0		-		14,048.0	
June 30 Manual Entries	-	(286,839.0)	-	-		-		-	
June 30 Reconciling Adjustments [5]	(101,898.0)	280,139.3	-	-		-		-	
OldCo Added for Reconciliation Purposes	-	985,239.4	-	-		-		-	
Changes due to Pontiac North	(101,898.0)	(24,253.0)	-	-		-		-	
Adjustments due to CWIP and Spare Parts	-	(285,014.1)	-	-		-		-	
Changes in Entities Carried at NBV between June 30 and July 10	-	340,893.2	-	-		-		-	
Adjustments from eTBR to GEARS as of June 30	-	(756,716.1)	-	-		-		-	
Top Level Adjustments	-	651,406.9	-	-		-		-	
Unreconciled Variance [6]	-	(8,549.3)	-	-		-		-	
Subtotal June 30 Balance	**54,827,014.6**	**22,691,884.8**	**17,176,417.0**	**9,277,199.6**		**1,516,200.0**		**10,793,399.6**	
July 1-July 10 Adjustments	83,772.8	(197,426.8)	30,784.3	30,784.3		-		30,784.3	
GEARS Activity [7]	83,772.8	(101,217.0)	30,784.3	30,784.3		-		30,784.3	
Land	8,341.0	8,341.0	-	-		-		-	
Leasehold Improvements	(11,433.5)	(3,079.3)	-	-		-		-	
Buildings & Improvements	2,100.3	(19,889.3)	-	-		-		-	
Personal Property	(143,376.1)	(271,155.4)	-	-		-		-	
Capital Leases	(7,959.5)	(7,959.5)	-	-		-		-	
CWIP	120,944.9	120,944.9	-	-		-		-	
Sale Leaseback	-	-	-	-		-		-	
Tooling	115,155.8	99,680.6	30,784.3	30,784.3		-		30,784.3	
Impairment	-	(28,100.0)	-	-		-		-	
MLC adjustment [8]	-	(116,899.0)	-	-		-		-	
Change in 2070B (not included in GEARS above)	-	(3,563.4)	-	-		-		-	
Change in NAO HQ base org 00150 (not included in GEARS above)	-	24,252.6	-	-		-		-	
Unreconciled Variance [6]	-	516.5	-	-		-		-	
Total July 10	**54,910,787.4**	**22,494,954.5**	**17,207,201.2**	**9,307,983.9**		**1,516,200.0**		**10,824,183.9**	
CAMI (Provided by PwC)				517,000.0				517,000.0	
Total July 10 (Including CAMI)				**9,824,983.9**				**11,341,183.9**	

Notes:

[1] RCNLD represents replacement cost new less physical depreciation and obsolescence prior to the application of economic obsolescence attributable to the business enterprise value.
[2] Remaining useful life estimates represent averages per asset class provided for guidance purposes only and are not to be considered as accounting advice. Accordingly, implementation of the remaining useful life estimates or modifications to the remaining useful life estimates should be at the discretion of the Management and its auditor.
[3] Original cost and net book value for construction work in progress were provided by Management as of July 10, 2009 per pre-FSA balance sheet less spare parts adjustments.
[4] For entities without fixed asset listings, Management provided net book value as of July 10, 2009.
[5] Includes reconciliation adjustments as of June 30, 2009 from eTBR to GEARS, changes in NBV for CWIP and entities carried at NBV between June 30, 2009 and July 10, 2009, and OldCo adjustments, including Pontiac North.
[6] Unreconciled variance between individual fixed asset subledgers and June 30, 2009 eTBR trial balance.
[7] Net GEARS activity between June 30, 2009 and July 10, 2009 for property, plant, and equipment.
[8] Adjustment to account for the remaining NBV for MLC assets at July 10, 2009.
[9] Due to an accounting policy change adjustment, $14,048,004 of expense materials in account number 240074200, related to DMAX spare parts have been reclassified from inventory to property, plant, and equipment. Book value included on inventory schedule 5.1 in expense materials and relates to footnote 12.
[10] Subsequent to the determination of our detailed individual asset fair value opinion for the tangible assets, several fair value balance sheet adjustments were identified that result in either an increase or decrease in the implied economic obsolescence related to the Property, Plant & Equipment at the regional level. The adjustments have been allocated to the PPSE asset categories on a summary level based on a pro-rata allocation of RCNLD.
[11] Individual asset fair value was calculated using the fixed asset ledger records, and fair value was recorded on an asset by asset basis.

Any tax advice in this communication is not intended or written by KPMG to be used, and cannot be used, by a client or any other person or entity for the purpose of (i) avoiding penalties that may be imposed on a taxpayer or (ii) promoting, marketing, or recommending to another party any matters addressed herein.

04/05/2010

Klein Decl. ¶ 61.

d. KPMG's Application of the Cost Approach to Buildings & Improvements is Imprecise

1791. KPMG also applied a cost approach to value Buildings & Improvements, another subcategory of PP&E. DX-0141-0111 to 0012; Klein Decl. ¶ 84.

1792. In valuing certain improvements, KPMG applied a rudimentary, "rule of thumb" approach, not a careful or reliable methodology. DX-0141-0112; Klein Decl. ¶¶ 84, 94.

1793. To arrive at the estimated RCN value of a particular improvement to a building, KPMG arbitrarily added 10% of the building's replacement cost to account for any additional

improvements beyond the major adjustments in the valuation sourcebook. DX-0141-0112; Klein Decl. ¶ 84.

1794. KPMG applied this approach without assessing the nature of whether the improvements made to any particular building were extensive or nominal in value, or somewhere in between. DX-0141-0112; Klein Decl. ¶ 84.

1795. KPMG's unsubstantiated "rule of thumb" estimates to add an additional 10% of the buildings replacement cost when estimating the RCN of a site were arbitrary and were determined without any examination whatsoever or whether the improvements made to any particular building were extensive, nominal, or somewhere in between. Klein Decl. ¶ 95.

1796. It is clear from KPMG's description that its approach was a practical expedient that did not, and was not meant to, determine the value of individual building improvements with meaningful precision. Klein Decl. ¶¶ 94-95.

1797. As Mr. Lakhani pointed out in his expert report, KPMG was unconcerned about whether dollar amounts assigned to GMNA's Land category instead should have been assigned to GMNA's Buildings & Improvements category, noting that a correcting adjustment, even if justified, would result in nothing more than a "shuffle of fair value among the subject assets of GMNA and [that] total concluded fair value would not change." Klein Decl. ¶ 96; Lakhani Decl. ¶ 93; Klein Test. 2752:6-2753:11.

5. The TIC-Based Economic Obsolescence Factor Was Necessary to KPMG's Valuation and GAAP Compliant

1798. Truncating KPMG's full analysis by eliminating the TIC-Based Economic Obsolescence Adjustment yields a valuation result that is incomplete, upwardly biased, and erroneous. Klein Decl. ¶ 97.

1799. As Mr. Furey and the KPMG Report make clear, the TIC-Based Economic Obsolescence Adjustment is necessary component of the valuation. Furey Test. 1353:18-1354:21; 1461:8-1462:22; DX-0141-0142.

1800. Mr. Furey testified that the TIC-Based Economic Obsolescence Adjustment is recognized as proper in the appraisal literature and in KPMG's internal manuals, and that it is commonly utilized. Furey Test. 1520:18-1521:19.

1801. Mr. Furey further testified that KPMG applied the TIC-Based Economic Obsolescence Adjustment in accordance with KPMG's internal guidelines on such adjustments. Furey Test. 1521:20-1522:4.

1802. The KPMG Report clearly explains that KPMG reduced the concluded fair values of certain New GM assets for "economic obsolescence due to the earnings power of the business," and that, when TIC is comparatively low, "it is appropriate to apply a factor for economic obsolescence to certain assets." DX-0141-0116, -0142; Klein Decl. ¶ 120.

1803. The KPMG Report notes that "the individual assets cannot be valued at less than what they could be sold for on an individual basis in the open market" and that an economic obsolescence adjustment is necessary to bring the valuation in line with the market. DX-0141-0116.

1804. The TIC-Based Economic Obsolescence Adjustment is the mathematical adjustment that caps the fair value of assets, at maximum, at an amount equal to their earnings power, as required by ASC 820. Klein Decl. ¶ 99.

1805. Without incorporating such an upper bound, company balance sheets might reflect net asset values far in excess of their earnings power. Klein Decl. ¶ 99.

1806. In the case of GMNA's PP&E, as Mr. Lakhani acknowledges, this overstatement would have been $6.4 billion. Klein Decl. ¶ 99; Lakhani Test. 1707:9-14.

1807. The importance of retaining TIC as an upper bound on asset values is especially important in the present case because KPMG used an integrated formula comprised of interconnected inputs and included practical expedients, including those previously discussed, tolerable because, in the end, total concluded fair values were constrained. Klein Decl. ¶¶ 96, 101.

1808. Moreover, the TIC-Based Economic Obsolescence Adjustment is both appropriate and essential under GAAP. Klein Decl. ¶ 104.

1809. ASC 820 notes that market participants would never pay more for a machine than "the amount that would be required currently to replace the service capacity of an asset (often referred to as current replacement cost)," or, in other words, "[f]rom the perspective of a market participant seller, the price that would be received for the asset is based on the cost to a market participant buyer to acquire or construct a substitute asset of comparable utility, adjusted for obsolescence." JX-0020-0265 (ASC 820-10-55-3D and ASC 820-10-55-3E); Klein Decl. ¶ 98.

1810. ASC 820 further states that, under the cost approach, if a machine is used at its highest and best use in connection with complementary assets, the price received for the sale of the machine "would not be more than either of the following: The cost that a market participant buyer would incur to acquire or construct a substitute machine of comparable utility; [or] *[t]he economic benefit that a market participant buyer would derive from use of the machine*." Klein Decl. ¶ 107; JX-0020-0279 (ASC 820-10-55-38A) (emphasis added).

1811. Thus, under GAAP, a valuation consultant computes replacement cost, compares it to the economic benefit that a market buyer would derive from use of the machine, and then

adjusts replacement cost downward if the economic benefit is the more restrictive constraint on fair value. Klein Decl. ¶ 106.

1812. This is exactly what KPMG did: For KPMG's assignment, the economic benefit that a market participant would derive from New GM's PP&E was TIC. As DX-0151A shows, for instance, KPMG listed numerical amounts for New GM's Personal Property in the "Final RCNLD Pre EO" column, compared it to the TIC attributable to these assets, and systematically adjusted the "Final RCNLD Pre EO" amounts downward based on the total invested capital. Klein Decl. ¶¶ 106, 108; DX-0151A-0002.

1813. KPMG's application of the TIC-Based Economic Obsolescence Adjustment was especially important in the present case because RCNLD amounts were generated from New GM's internal estimates and Old GM's historical fixed asset ledgers, not from market data, while the TIC-Based Economic Obsolescence Adjustment reflects what market participants would pay in an orderly market for a set of business assets. Klein Decl. ¶ 109.

1814. GAAP recommends that fair values reflect more than internal, entity-specific data. Klein Decl. ¶ 109; JX-0020-0205 to -0206 (ASC 820-10-05-1B).

1815. As ASC 820 states, "fair value is a market-based measurement, not an entity-specific measurement." JX-0020-0205 to -0206 (ASC 820-10-05-1B); Klein Decl. ¶ 109.

1816. Accordingly, without taking into account the market factors reflected in TIC, KPMG merely would have been using internal entity-specific data to arrive at a New GM-specific measure of value, which would not have be consistent with ASC 820 and GAAP. Klein Decl. ¶ 109.

6. If Mr. Lakhani is Correct in His Contention that KPMG Violated GAAP, New GM has Been Submitting False Financial Statements to the SEC Since 2009

1817. Mr. Lakhani contends that KPMG's New GM PP&E Final Concluded Value of $18.57 billion, after applying the TIC-Based Economic Obsolescence Adjustment, is not consistent with GAAP. Klein Decl. ¶ 110; *see* Lakhani Test. 1692:24-1693:12.

1818. New GM incorporated this amount into the S-1 registration statement that it filed with the SEC. JX-0010-0084 (General Motors Company, Form S-1, filed August 18, 2010, p. 79); Klein Decl. ¶ 111.

1819. As New GM's S-1 filing clearly recites, "[i]n connection with our application of fresh-start reporting, we recorded Property at its fair value of $18.5 billion at July 10, 2009." Klein Decl. ¶ 111; JX-0010-0084 (General Motors Company, Form S-1, filed August 18, 2010, p. 79).

1820. Mr. Lakhani, therefore, is implicitly contending that New GM filed a false registration statement with the SEC. Klein Decl. ¶ 111.

1821. Misstatements of long-lived asset values, such as for PP&E, potentially are especially serious because long-lived assets result in periodic depreciation expenses that may last for decades. Klein Decl. ¶ 112.

1822. If Mr. Lakhani were correct in his contention that that the KPMG Final Concluded Values reported by New GM for PP&E in its 2009 SEC filings were too low and that New GM instead should have reported higher PP&E values that approximated or equaled RCNLD, then New GM has repeatedly understated its Depreciation Expense on PP&E assets in subsequent financial statements, thereby overstating New GM's profitability. Klein Decl. ¶ 112.

1823. That is, by contending that KPMG's valuation of PP&E violated GAAP, Mr. Lakhani is effectively asserting that New GM filed false financial statements in 2009 and has continued to do so since. Klein Decl. ¶ 112.

7. Mr. Lakhani's Other Criticisms of KPMG Are Speculative and Unsupported

1824. Mr. Lakhani criticizes various accounting adjustments that KPMG made in computing TIC or allocating it among New GM's asset categories. *See* Lakhani Decl. § V.C; Klein Decl. ¶ 113.

a. Mr. Lakhani's Contention that KPMG's Application of the TIC-Based Economic Obsolescence Adjustment is "Akin" To "Negative Goodwill" and Violates GAAP is Not Credible

1825. One of Mr. Lakhani's contentions is that KPMG violated GAAP because the TIC-Based Economic Obsolescence Adjustment is "equivalent" or "akin" to "negative goodwill." Klein Decl. ¶ 114.

1826. To support his thesis that KPMG violated GAAP, Mr. Lakhani makes two related and incorrect contentions. Lakhani Decl. ¶ 83; Klein Decl. ¶ 114.

1827. First, Mr. Lakhani contends that "KPMG's estimated value of GMNA's total assets exceeded KPMG's estimated value of GMNA's liabilities and equity by $6.4 billion." Lakhani Decl. ¶ 83; Klein Decl. ¶ 115.

1828. But, this statement rests on the assumption that KPMG considered "RCNLD" asset amounts to be final fair value determinations. Klein Decl. ¶ 115.

1829. RCNLD was not KPMG's final fair value determination. Furey Test. 1554:2-10; Lakhani Test. 1671:12-18.

1830. As Mr. Furey and the KPMG Report make clear, RCNLD values are missing KPMG's application of economic obsolescence, a critical and necessary component of the valuation. Furey Test. 1353:18-1354:21; 1461:8-1462:22; DX-0141-0142.

1831. As both Schedule 6.1 and supplemental worksheets, including DX-0151A, show, KPMG considered RCNLD values to be interim subtotals that were to be converted in sequence into final values that, proceeding from left to right, would appear in later columns clearly marked "Fair Value" or "Final Concluded Value." DX-0141-0366; DX-0151A-0002; Klein Decl. ¶ 116.

1832. As the KPMG Report shows, RCNLD amounts never appear in the KPMG Report as final concluded values. Klein Decl. ¶ 116.

1833. Moreover, as Schedule 6.1 highlights, "RCNLD" appears in the middle of the schedule and is described by KPMG personnel in footnote 1 as an interim subtotal that "represents replacement cost new less physical depreciation and obsolescence *prior to* the application of economic obsolescence attributable to the business enterprise value." DX-0141-0366 (emphasis added); Klein Decl. ¶ 116.

1834. Thus, Mr. Lakhani's contention that RCNLD numbers were final conclusions of value is incorrect. Klein Decl. ¶ 116.

1835. Second, Mr. Lakhani's contention is predicated on "KPMG's application of fresh start accounting to GMNA." Klein Decl. ¶ 117.

1836. However, KPMG never "applied" fresh start accounting or the "fresh start accounting" rules found in ASC 852. Klein Decl. ¶ 117.

1837. KPMG was engaged to determine the fair value of "certain," but not all, of New GM's assets in accordance with ASC 820. DX-0141-0002; Klein Decl. ¶ 117.

1838. Thus, Mr. Lakhani's contention that KPMG's "application of fresh start accounting to GMNA" resulted in "the value of assets exceed[ing] the value of the liabilities and KPMG's calculation of equity" is not correct. Klein Decl. ¶ 117; *see* DX-0141-0002.

1839. Finally, Mr. Lakhani asserts that KPMG computed "negative goodwill," which Mr. Lakhani says is "akin" or "equivalent" to KPMG's TIC-Based Economic Obsolescence Adjustment. Lakhani Decl. ¶ 116; Klein Decl. ¶ 118.

1840. But the KPMG Report is clear and unequivocal about KPMG's rationale for adjusting preliminary replacement cost measures to take into account all forms of economic obsolescence, including those associated with the low earnings power of assets, referred to as TIC or business enterprise value. Klein Decl. ¶ 118; DX-0141-0126, -0133.

1841. Mr. Lakhani cites to the single use of "negative goodwill" in a single work paper, but the KPMG Report never mentions "negative goodwill," in words or substance and Mr. Furey expressly testified that KPMG did not conclude that "negative goodwill" or a "bargain purchase" existed and that this isolated reference was not meant to convey otherwise. Furey Test. 1548:21-1549:4; Klein Decl. ¶ 119; *see generally* DX-0141.

1842. "Negative goodwill" is not defined in GAAP and does not appear anywhere in the Accounting Standards Codification, which is the sole source of authoritative GAAP. Klein Decl. ¶ 119.

1843. The concept of "negative goodwill" last appeared in GAAP when a provision titled "APB 16" was in effect, as Mr. Lakhani acknowledged. Klein Decl. ¶ 119.

1844. APB 16 ceased to be authoritative in 2001 when it was superseded by pronouncement FAS 141 in 2001, which in turn was superseded by FAS 141(R) in 2007. Klein Decl. ¶ 119.

1845. FAS 141(R) was in turn superseded by ASC 805 in 2009. Klein Decl. ¶ 119.

1846. To the extent that some working professionals informally still use the term "negative goodwill," they do so as an imprecise shorthand expression for downward accounting adjustments. Klein Decl. ¶ 119.

1847. In sum, "negative goodwill" is a discredited concept and a relic of the past that KPMG undoubtedly knew exited GAAP long ago. Klein Decl. ¶ 119.

1848. In contrast, the term "economic obsolescence" is an authoritative term in modern-day GAAP that KPMG mentions frequently in the KPMG Report and that is recognized in the appraisal literature. Klein Decl. ¶ 120.

1849. KPMG unmistakably states that it was applying economic obsolescence due to New GM's assets having low earnings power, which was entirely proper. Klein Decl. ¶ 120.

1850. Mr. Lakhani further asserts in the alternative that if the TIC-Based Economic Obsolescence Adjustment was appropriate, under FAS 141, KPMG should have applied the TIC-based Adjustment on a pro rata basis to all of GM's non-financial assets. Lakhani Decl. ¶¶ 9, 15; Klein Decl. ¶ 121.

1851. But the KPMG Report explains that the TIC-Based Economic Obsolescence Adjustment was applied to those categories of PP&E valued "via the cost approach" – not those categories of assets valued via the market or income approach. DX-0141-0142-43.

1852. Indeed, KPMG explained that "the market approach inherently captures all forms of obsolescence, so no additional adjustments for economic obsolescence were applied." DX-0141-0143.

1853. On the other hand, the cost approach as it was employed by KPMG assumes that the value of the asset is supported by the business earnings. DX-0141-0142.

1854. KPMG explained:

> To the extent that the TIC is less than the value of all of a business unit's assets, then it is appropriate to apply a factor for economic obsolescence to certain assets. *In making this comparison, it is noted that the value of the underlying tangible assets is premised on the assumption that the earnings of a business unit support the stated value.* Thus, the primary reason that the value of the underlying assets may be greater than the estimated TIC is due to the fact that the returns of the business are not sufficient to satisfy the returns required on the underlying assets. As such, a market participant would pay less for these assets, recognizing that the prospective cash flow of the business does not warrant paying a higher price.

DX-0141-0142 (emphasis added).

1855. The overarching error in Mr. Lakhani's contention is that FAS 141 is an out-of-date provision that was revised and superseded in 2007 by FAS 141(R). Klein Decl. ¶ 122.

1856. Thus, Mr. Lakhani asserts that KPMG should have followed procedures in an accounting pronouncement that ceased to be authoritative well before the July 10, 2009 effective date of the KPMG Report. Klein Decl. ¶ 122.

1857. This is a substantive error, not a mere citation error, as the allocation mechanism suggested by Mr. Lakhani expressly was removed from the revised version of FAS 141 and replaced with an entirely different accounting treatment. Klein Decl. ¶ 122; DX-0171-0003 to 0007 (Statement of Financial Accounting Standards No. 141 (revised 2007) at i-v).

1858. In short, Mr. Lakhani contends that KPMG should have violated GAAP by applying a methodology that explicitly had been removed from GAAP. Klein Decl. ¶ 122.

1859. Mr. Lakhani supports his contention by stating that KPMG's valuation of intangible assets was more subjective and prone to error than KPMG's valuation of PP&E, and thus a more appropriate candidate for adjustment than PP&E. Klein Decl. ¶ 123.

1860. Mr. Lakhani then shows that a reallocation of the TIC-based adjustment to all of GMNA's nonfinancial assets, including assets such as Intangible Assets and Inventory, would

have decreased the TIC-Based Economic Obsolescence Adjustment applied to the PP&E categories. Lakhani Decl. ¶ 133; Klein Decl. ¶ 123.

1861. However, an asset valuation is an "appropriate candidate for adjustment" only if it is in error. Klein Decl. ¶ 123.

1862. Mr. Lakhani has not shown that any of KPMG's Intangible Asset or Inventory valuations were in error. Klein Decl. ¶ 123.

1863. Mr. Lakhani therefore has no basis to conclude that the values of KPMG's Intangible Assets or Inventory valuations required an adjustment. Klein Decl. ¶ 123.

b. Mr. Lakhani's Contention that KPMG and New GM Violated GAAP by Applying the TIC-based Adjustment at an Interim Step Is Unsupported

1864. Mr. Lakhani claims that, even if the TIC-Based Economic Obsolescence Adjustment was appropriate in concept, KPMG applied it in a methodologically unsound manner that incorrectly transferred reported value from PP&E to goodwill at an interim step in its analysis. Lakhani Decl. ¶ 116; Klein Decl. ¶ 124. Mr. Lakhani contends this was a violation of GAAP. Lakhani Test. 1692:17-1693:12.

1865. Mr. Lakhani contends that KPMG applied the TIC-Based Economic Obsolescence Adjustment at the wrong point in the process; it should have applied it after all assets were valued at their fresh-start accounting values. Lakhani Decl. ¶ 121.

1866. But Mr. Lakhani's assertions are factually inaccurate for the following reasons.

1867. KPMG was assigned to value assets at their "fair value" under ASC 820, not at values under fresh-start accounting ASC 852. DX-0141-0002-03; Klein Decl. ¶ 28.

1868. Under ASC 820, KPMG was required to consider and apply the TIC-Based Economic Obsolescence Adjustment to ensure that the value of the assets did not exceed the

economic value of the enterprise. Klein Test. 2869:22-2870:13; JX-0020-0279 (ASC 820-10-55-38A)

1869. For purposes of fresh-start accounting, most assets are reported at their "fair value" under ASC 820. Klein Decl. ¶ 28.

1870. But fresh-start accounting requires certain assets, including deferred tax assets, pensions, and OPEB, to be reported at values other than fair value.

1871. Mr. Lakhani admits that it was not KPMG's task to value those assets, or any assets, at any value other than their "fair value" under ASC 820. Lakhani Test. 1687:2-1690:16.

1872. KPMG expressly noted this limitation in its report. Specifically, with respect to its valuation of deferred tax assets (DTAs), KPMG explained:

> KPMG was engaged to discretely value GM's DTAs, which were included on the economic fair value balance sheet. Further evaluation of the fair value of the DTAs for U.S. GAAP balance sheet purposes, including assessment of any valuation allowances, was outside the scope of our analysis as Management has indicated that the DTA's will likely be reclassified to goodwill for U.S. GAAP purposes.

DX-0141-0206.

1873. With respect to pensions and OPEB, KPMG explained:

> KPMG was engaged to discretely value GM's pensions, OPEB . . . from an economic fair value perspective (not from a U.S. GAAP perspective) as of the Valuation Date. The difference between the economic fair value estimated by KPMG and the U.S. GAAP fair value that will be calculated by GM's actuaries will be subsequently addressed by GM, and is outside the scope of this report.

DX-0141-0221.

1874. Thus, KPMG could not have proceeded in the manner urged by Mr. Lakhani because KPMG was not assigned to value those assets at their GAAP values. Klein Decl. ¶ 117.

1875. Moreover, KPMG could not have improperly valued Goodwill because KPMG did not value Goodwill at all. Furey Test. 1548:18-20; Lakhani Test. 1686:21-23.

1876. KPMG was engaged to value only "certain" of New GM's assets and Goodwill was not designated as a Subject Asset. *See* DX-0141-0002 to 0003; Klein Decl. ¶ 28.

1877. Furthermore, the value ultimately reported by New GM as Goodwill has nothing to do with the values of PP&E. Klein Decl. ¶ 126.

1878. New GM ultimately reported Goodwill in its fresh-start balance sheet at approximately $30.5 billion. JX-0010-0084 (General Motors Company Form S-1, dated August 18, 2010, at 79); Klein Decl. ¶ 28.

1879. The full amount of this Goodwill is attributable to the difference between the fair value and GAAP values of those assets required to be reported at GAAP values. JX-0010-0314 (New GM S-1 at F-56).

1880. As New GM explained in its SEC filing: "We recorded Goodwill of $30.5 billion upon application of fresh-start reporting. If all identifiable assets and liabilities had been recorded at fair value upon application of fresh-start reporting, no goodwill would have resulted. . . ." JX-0010-0314 (New GM S-1 at F-56).

1881. And as Mr. Lakhani acknowledged, KPMG understood—and New GM always intended—that the amount arising from the difference between fair values and GAAP values of these assets would be recorded as Goodwill. Lakhani Test. 1690:3-16; DX-0141-0206 & -0221.

c. Mr. Lakhani's Contention that KPMG Violated GAAP by Misallocating Certain Technology-Related Revenues Is Speculative and Unsupported

1882. Mr. Lakhani also claims that the reallocation associated with Technology, Service and Tooling ("**TST**") that KPMG performed was a violation of GAAP and improper. Lakhani Decl. ¶¶ 100-07; Lakhani Test. 1709:13-1710:16; Klein Decl. ¶ 134.

1883. Mr. Lakhani acknowledges that KPMG made this determination based on conversations with New GM management and KPMG's own analysis of GMNA's cash flows. Lakhani Decl. ¶ 110; Lakhani Test. 1677:4-1678:15; Klein Decl. ¶ 134.

1884. However, Mr. Lakhani is only speculating that KPMG's determination was incorrect, as he concludes, without support, that the GMNA TIC was inappropriately biased downward because there was no separate revenue stream attributable to technology in GM's revenue projections. Klein Decl. ¶ 134.

1885. The KPMG Report expressly explains that the adjustment "was made to reallocate the value of the Technology from GMNA to TST, as TST is where Global Technology Operations, Inc. ('GTO') resides, yet the cash flow for the technology resided in the GMNA forecast . . . ." DX-0141-0065.

1886. The KPMG Report further explains that "GM centralized the global ownership of and the rights to automotive technology and know-how in a single legal entity named [GTO], a subsidiary in GM's North America region." DX-0141-0152.

1887. Mr. Lakhani admitted that KPMG understood that certain cash flows relating to technology that were giving rise to the value of GMNA did not belong in GMNA. Lakhani Test. 1678:7-11.

1888. And Mr. Lakhani further admitted that KPMG made the decision to reallocate those funds to the proper business unit (TST) based on information it from New GM management about the proper allocation of those funds. Lakhani Test. 1678:12-15.

1889. Under GAAP segment reporting, it was entirely appropriate for KPMG to rely on management to identify which New GM division is the economic owner of certain cash flows. Klein Decl. ¶ 135; Klein Test. 2809:11-2810:10.

1890. Mr. Lakhani offers no basis for readjusting GMNA's books to restore the full inclusion of these technology revenues to GMNA and omit them from New GM's TST business segment. Klein Decl. ¶ 136.

1891. And Mr. Lakhani's assertion contradicts what KPMG was told by New GM and is made without any support. Klein Decl. ¶ 135.

d. Mr. Lakhani's Contention that KPMG Misallocated Certain Corporate Expenses To GMNA is Unsupported and Speculative

1892. Mr. Lakhani states that KPMG allocated the value of all "Corporate" expenses to GMNA and questions the propriety of KPMG's allocation. Lakhani Decl. ¶¶ 109-10; Klein Decl. ¶ 128.

1893. Mr. Lakhani's core contention is that, on the advice of New GM's management, KPMG made adjustments to regional or operational business segments that inappropriately biased GMNA's financial results downward. Lakhani Decl. ¶¶ 109-10; Klein Decl. ¶ 128.

1894. According to the KPMG Report, "based on conversations with Management it was determined that GMNA is the economic owner of those expenses." DX-0141-110; Klein Decl. ¶ 128.

1895. Under GAAP, management is accorded wide latitude in determining the particular business segment that should report certain financial activities. Klein Decl. ¶ 129.

1896. Mr. Lakhani he has no basis to substitute the contemporaneous judgments made by KPMG in consultation with New GM's management with his contentions. Klein Decl. ¶ 129.

1897. There is no evidence that the determination by New GM's management that GMNA was the "economic owner" of these expenses was incorrect. Klein Decl. ¶ 130.

1898. Mr. Lakhani contends that these expenses should have been attributable to all regional New GM entities, not just to GMNA based on no specific evidence or knowledge. Klein Decl. ¶ 130.

1899. But Mr. Lakhani is speculating that GMNA was not the "economic owner" of these expenses and his speculation is directly controverted by KPMG itself in the KPMG Report. Klein Decl. ¶ 130.

1900. In addition, even if Mr. Lakhani could prove that these expenses merited reallocation, the method suggested by Mr. Lakhani for prorating these expenses among various New GM regions is arbitrary and lacks adequate justification. Klein Decl. ¶ 131.

1901. Mr. Lakhani states that these expenses should be distributed "pro rata," among four regional New GM entities, but Mr. Klein explains that he does not state the metrics, or so-called cost drivers, that should be used as the allocation bases for achieving this proration. Klein Decl. ¶ 131.

1902. Even if it is assumed that GMNA was not the economic owner of New GM's "Corporate" expenses—and there was no basis for such assumptions—Mr. Lakhani arbitrarily assumed that the incurrence of these expenses correlated with a single cost driver, "projected 2010 revenues," and that this cost behaved in a direct linear, or unit-variable, relationship with this cost driver. Klein Decl. ¶ 132.

1903. Because Mr. Lakhani does not identify the basis for this conclusion anywhere in his report, or indeed even identify the components of New GM's "Corporate" unallocated expenses in the first place, Mr. Klein further concludes that his allocation method is unsupported. Klein Decl. ¶ 133.

8. Prof. Hubbard's Opinions Should Be Accorded No Weight

a. Prof. Hubbard's Opinion Regarding the Imputed Common Equity Value of New GM Should Be Accorded No Weight

1904. Prof. Hubbard was retained by Defendants to opine on the "reasonableness of KPMG's estimate of the equity value" of GMNA. Hubbard Decl. ¶ 5.

1905. However, what Prof. Hubbard purports to estimate is the implied equity value of *New GM*. Hubbard Test. 2327:4-16.

1906. Prof. Hubbard declines to offer any independent view on the equity value of GMNA. Hubbard Test. 2323:10-2326:15.

1907. Nothing in Prof. Hubbard's testimony suggests how his estimated valuation of New GM might relate to the common equity value of GMNA or the value of the Representative Assets. Fischel Decl. ¶¶ 103-04.

1908. Prof. Hubbard opines only that if New GM's equity value were "biased downward," then GMNA's equity value would also be "likely similarly biased downward." Hubbard Decl. ¶ 72.

1909. Nothing in Prof. Hubbard's testimony addresses how the value of the relevant Representative Assets held by GMNA would or could be derived from the common equity value of New GM. *See* Fischel Decl. ¶¶ 103-04, 107.

1910. Prof. Hubbard suggests that his imputed equity valuation of New GM has implications for KPMG's valuation work, and in particular for KPMG's decision to apply an economic obsolescence adjustment—what Prof. Hubbard calls the "TIC adjustment"— to the PP&E of GMNA. Hubbard Decl. ¶¶ 8-9, 66-69, 72, 84-87, 176; *see also* Fischel Decl. ¶ 107.

1911. Prof. Hubbard's argument appears to be that had KPMG adopted a common equity value for New GM within his proposed valuation range of $33.4 billion to $40.1 billion—

rather than the $19.9 billion value obtained through KPMG's own DCF-based analysis—then KPMG would have seen no need to apply an economic obsolescence adjustment to *GMNA's* PP&E. Hubbard Decl. ¶¶ 8-9, 66-69, 72, 84-87, 176; *see also* Fischel Decl. ¶ 107.

1912. As Prof. Hubbard acknowledges, KPMG calculated TIC values for each of New GM's business units individually, on a unit-by-unit basis. Hubbard Decl. ¶ 57; Hubbard Test. 2335:3-20.

1913. KPMG applied its TIC-based economic obsolescence adjustment on an individual, unit-by-unit basis, based on the TIC values of the respective units, and the TIC-based economic obsolescence adjustment applied by KPMG to GMNA's PP&E was based on the TIC value of GMNA (and not determined by the common equity or TIC value of New GM). Hubbard Decl. ¶ 68; Hubbard Test. 2336:7-24; DX-0141-0142.

1914. New GM's common equity and TIC values were simply aggregate values, sums of the common equity values and TIC values, respectively, of New GM's business units. Hubbard Test. 2335:14-20.

1915. Prof. Hubbard testified that a DCF-based valuation of the sort conducted by KPMG was incommensurate with his own "purchase price-based valuation," that the methodologies could not be "strictly compared," and that there was "no basis in valuation principles or financial theory" to expect that the two methodologies would result in the same values. Hubbard Decl. ¶ 176; Hubbard Test. 2343:23-2344:16.

1916. In estimating the common equity of New GM, Prof. Hubbard rejects DCF methodology in favor of an approach that does not account for New GM's financial data or cash flows, and for which no supporting body of professional or academic literature exists. Hubbard Test. 2340:4-2341:12, 2343:16-2344:16. Prof. Hubbard relies on the following formula: *Value*

of 100 percent of New GM's Common Equity = ($39.7 billion - *P*) / 0.608. Hubbard Decl. ¶ 77. The variable *P* is an "estimate of the amount that the U.S. Treasury invested to achieve its public policy goals." Hubbard Decl. ¶ 77.

1917. Prof. Hubbard's approach uses two arithmetical operations. First starting with the amount "effectively paid" by Treasury to acquire its share of the common equity of New GM, Prof. Hubbard subtracts away the portion that, in his estimation, Treasury invested to "achieve its public policy goals," Hubbard Decl. ¶¶ 73, 77, purportedly leaving an "approximation of market value, without the subsidy." Hubbard Test. 2359:2-13; *see also* Fischel Decl. ¶ 98.

1918. Next, Prof. Hubbard divides this amount by the fraction of Treasury's share of the equity of New GM to arrive at U.S. Treasury's imputed valuation of 100% of New GM's common equity. Hubbard Decl. ¶¶ 73, 77, 84-85.

1919. By this computation, Prof. Hubbard infers that Treasury, "acting purely as a private investor," impliedly valued New GM's common equity at between $33.4 billion to $40.1 billion. Hubbard Decl. ¶¶ 9, 84-86; Hubbard Test. 2327:4-16, 2340:4-19 ("The calculation, once you have assumptions, is just basic math."), 2355:19-2360:4; *see also* Fischel Decl. ¶ 98.

1920. Prof. Hubbard acknowledges that the 363 Sale "purchase price" does not represent New GM's market value from the point of view of a private investor, because it includes a substantial non-commercial Government subsidy motivated by public policy concerns. Hubbard Decl. ¶¶ 73-76; Hubbard Test. 2347:11-20 ("[O]f course it has a subsidy."); *see also* Fischel Decl. ¶ 98.

1921. To determine how Treasury valued New GM "as a private investor," Prof. Hubbard must subtract away the public policy component of the transaction, leaving only the

amount that the Government expected to recoup. Hubbard Decl. ¶¶ 75-78, 85; *see also* Hubbard Test. 2362:11-24.

1922. Prof. Hubbard's calculation requires that a dollar figure be assigned to the amount that Treasury invested in New GM in order to achieve its "public policy goals." Hubbard Decl. ¶ 77.

1923. Prof. Hubbard concedes that "[n]either the U.S. Treasury nor any other government body" has ever provided a "precise estimate" of the amount that Treasury invested in New GM to achieve its public policy goals, nor is the subsidy dealt with in any body of professional or academic literature. Hubbard Decl. ¶ 78; Hubbard Test. 2340:4-2341:12.

1924. Prof. Hubbard relies on two isolated statements in the public record as sole support for his estimate of the amount invested by Treasury to achieve its public policy goals. Hubbard Decl. ¶¶ 78-80, 84; Hubbard Test. 2363:14-18, 2364:2-2366:5.

1925. The first statement is from testimony given by Ronald Bloom in connection with a Congressional Oversight Panel hearing held on July 27, 2009. Hubbard Decl. ¶ 79; JX-0021-0138.

1926. From Mr. Bloom's extensive testimony, Prof. Hubbard relies on a single sentence: "Less optimistic, and in Treasury's view more likely scenarios involve a reasonable probability of repayment of substantially all of the government funding for new GM and new Chrysler, and much lower recoveries for the initial loans." JX-0021-0138; Hubbard Decl. ¶ 79.

1927. This remark refers to no dollar amounts and does not distinguish between New GM and New Chrysler. JX-0021-0138.

1928. Based on this remark, Prof. Hubbard claims that Treasury anticipated no recovery at all on the initial $19.4 billion in TARP funding, but full recovery on all DIP financing

extended to New GM, yielding a total estimated subsidy cost of $19.4 billion. Hubbard Decl. ¶¶ 79, 84-85; Hubbard Test. 2365:3-2370:12.

1929. Mr. Bloom's statement does not provide a basis for concluding that Treasury had an expectation of recouping 100% of all of its DIP financing of New GM. *See* Fischel Decl. ¶ 115.

1930. Prof. Hubbard expressed reluctance to interpret the words of Government officials in other contexts. Hubbard Test. 2387:12-2388:17 ("I don't know what [Mr. Bloom] means by the word liquidation. . . ."); *see also* Hubbard Test. 2353:12-21 ("I can't be in the head of government officials."), 2375:21-2376:7 ("I can't possibly be in President Obama's head.").

1931. The second statement relied upon by Prof. Hubbard comes from a report issued by the Congressional Budget Office ("**CBO**") concerning TARP transactions through June 17, 2009. Hubbard Decl. ¶ 80; *see* DX-0273-0012.

1932. In this report, the CBO estimated a subsidy rate of 73 percent with respect to over $50 billion in financial assistance extended, in the form of loans and/or investments, to General Motors, Chrysler, GMAC and Chrysler Financial: "As of June 17, the Treasury had extended nearly $21 billion in loans to General Motors (GM) and $15.5 billion to Chrysler. It also provided assistance to the two financing arms formerly associated with those businesses: GMAC (formerly General Motors Acceptance Corporation) received $12.5 billion in exchange for preferred stock, and Chrysler Financial received $1.5 billion in exchange for debt obligations. . . . CBO has estimated a subsidy rate of 73 percent on those investments and loans . . ." DX-0273-0012; Hubbard Decl. ¶ 80.

1933. This statement makes no distinction between New GM and New Chrysler, or between their respective financing arms. DX-0273-0012.

1934. Prof. Hubbard assumes that the CBO's aggregate subsidy rate of 73 percent—encompassing various forms of financial assistance extended to various different entities—applies without adjustment to the $21 billion in loans extended to New GM. Hubbard Decl. ¶ 80; Hubbard Test. 2373:8-2374:21 ("I did assume that.").

1935. The CBO report does not include any computed subsidy rate for the DIP financing extended to New GM because that financial assistance was still pending as of the date of the report. DX-0273-0012 to 0013.

1936. Prof. Hubbard inferred that the CBO anticipated full recovery of all DIP financing extended to New GM, Hubbard ¶¶ 84-85, and assumed that if the CBO anticipated any recovery at all on the TARP funding extended to New GM and New Chrysler, then it must have anticipated full recovery on the more senior DIP financing. Hubbard Test. 2375:7-20.

1937. As a result, Prof. Hubbard infers that the CBO anticipated recovery of $5.7 billion in TARP assistance to General Motors and full recovery on its DIP financing, yielding a subsidy cost figure of $15.3 billion. Hubbard Decl. ¶¶ 80, 84-85.

1938. Prof. Hubbard contends that Treasury extended DIP financing to New GM "as a private investor would have done," with the expectation of (at least) a full return on its investment. Hubbard Decl. ¶¶ 79, 81-82; Hubbard Test. 2379:17-2380:23 ("[C]ommercial manner means that . . . the DIP would be repaid.").

1939. In coming to this conclusion, Prof. Hubbard relies on a statement of Mr. Bloom that the Auto Task Force was instructed by the White House to manage its "ownership stake in a hands-off, commercial manner." Hubbard Decl. ¶¶ 81-82; *see* JX-0021-0021.

1940. Prof. Hubbard fails to address the fact that no "private investor" would have invested in New GM expecting "essentially zero" rate of return, and without any regard for the

time value of money. Fischel Test. 2655:20-2657:19; Hubbard Decl. ¶ 84 n.124; Hubbard Test. 2384:14-17.

1941. Mr. Bloom emphasized that the Government had subsidized New GM only reluctantly, in order to avert a "devastating" and otherwise "almost certain liquidation" in the context of the "worst economic crisis in three-quarters of a century." JX-0021-0020, -0021.

1942. At trial, Prof. Hubbard admitted that the language he relied on from Mr. Bloom did not support his view that Treasury expected to be repaid in full. Hubbard Test. 2380:4-2383:11.

1943. Prof. Hubbard also testified on cross examination that Treasury's finding that New GM's revised business plan was "viable" itself "necessarily implies" that Treasury expected to be repaid in full on the DIP financing. Hubbard Test. 2380:4-2381:5; *see also* Hubbard Decl. ¶¶ 82-83.

1944. Prof. Hubbard offers no support for his reading of the term "viability," or for his view that, with respect to the DIP financing, the Government changed course entirely and "acted as if it were a private investor," with no regard for policy goals. Hubbard Decl. ¶ 79; Fischel Decl. ¶¶ 113-15.

1945. Prof. Hubbard's assertion that the Government acted as a private investor is contradicted by statements from Government officials who repeatedly confirmed that the Government had non-commercial motives for bailing out the auto industry and never expected a full return on investment. Fischel Decl. ¶¶ 84, 115; *supra* ¶¶ 204-16, 223-27.

1946. New GM reported a fair value of common equity in the amount of $16.4 billion in its 2009 10-K. JX-0009-0109; Hubbard Test 2385:23-2386:6. If Prof. Hubbard's estimation of New GM's common equity value correct, then New GM misstated its equity value in an amount

ranging from approximately $17 billion to approximately $24 billion. Hubbard Test. 2386:2-2387:20 ("[Y]es, I think New GM got it wrong in that number."); Fischel Test. 2644:20-2645:22, 2654:23-2655:16; JX-0009-0109.

1947. As Prof. Fischel testified, the calculation of the subsidy cost has no relevance to the value of the Representative Assets, and the available evidence does not permit a reliable estimate of the subsidy cost as of any date. Fischel Test. 2640:20-2641:3, 2657:20-2659:6.

1948. The fact that a Government subsidy was required to sustain operations establishes that Old GM was not a going concern as of June 30, 2009 absent the subsidy, and thus that the Representative Assets should not be valued on a going concern basis. Fischel Decl. ¶¶ 90, 94; Fischel Test. 2657:20-2660:2.

1949. By subtracting the total value of what Treasury received from the total amount that invested, an *ex post* proxy estimate of the subsidy can be derived. Fischel Decl. ¶ 81; Fischel Test. 2640:14-2642:23.

1950. Prof. Fischel performed this exercise—based on the value of New GM's common equity, preferred equity, and notes as of December 31, 2009—and arrived at an estimated subsidy cost of approximately $28 billion. Fischel Decl. ¶ 81; Fischel Decl. Ex. E; Fischel Test. 2640:14-2642:23.

1951. Applying that $28 billion estimated subsidy cost to Prof. Hubbard's equation, in place of the $15.3 or $19.4 billion values proposed by Prof. Hubbard, returns a common equity value based on actual return on investment that is broadly consistent with KPMG's $19.9 billion valuation. *See* Hubbard Decl. ¶¶ 9, 61, 77, 86; DX-0141-0265.

b. Prof. Hubbard's Purported Opinion Regarding the WACC Of GMNA Should Be Accorded No Weight

1952. Prof. Hubbard also takes issue with the WACC used by KPMG in its DCF valuation of GMNA, opining that KPMG's "unreasonably high" WACC value (23%) resulted in a "depressed" estimate of GMNA's TIC and common equity values. Hubbard Decl. ¶¶ 8, 10, 119; Hubbard Test. 2322:22-2323:9, 2323:10-18; *see also* Fischel Decl. ¶ 97.

1953. Prof. Hubbard purports to compute what he claims is a more "reasonable range" for GMNA's WACC (8.3%-11.5%). Hubbard Decl. ¶¶ 12, 166-71.

1954. He opines that had KPMG valued GMNA using a WACC at the high end of this range, KPMG would have arrived at an equity value of $18.7 billion for GMNA and a TIC value of $44.6 billion for GMNA, with the result that "no TIC adjustment would be needed for GMNA." Hubbard Decl. ¶¶ 12, 173-74; Hubbard Test. 2411:21-2414:14; Fischel Decl. ¶ 97.

1955. New GM disclosed in its 2009 10-K that it had "used discount rates ranging from 16.5% to 23.5% and a weighted-average rate of 22.8%." JX-0009-0108. Prof. Hubbard's opinion implies that New GM provided false and misleading financial statements to the SEC. Fischel Test. 2644:20-2645:22.

1956. Prof. Hubbard admitted—contrary to his direct testimony—that he never actually computed a WACC for GMNA. *Compare* Hubbard Test. 2400:5-2401:5 *with* Hubbard Decl. ¶ 166 ("In this section I compute a reasonable range for GMNA's WACC.").

1957. Prof. Hubbard computed a WACC for New GM, not GMNA. Hubbard Test. 2400:5-2401:5

1958. Prof. Hubbard stated that he "assumed" that GMNA and New GM shared the "same WACC" because GMNA was the "vast bulk" of New GM. Hubbard Test 2400:10-2401:5.

Prof. Fischel testified that it was incorrect to assume that the discount rate for New GM would apply to GMNA. Fischel Test. 2663:10-2665:19.

1959. KPMG data demonstrates that, with respect to various components of KPMG's fair value calculations—inventory, PP&E, brands, technology, dealer network, etc.—GMNA represented only a fraction of the value of New GM. Hubbard Test. 2400:5-2404:9; DX-0141-0003.

1960. KPMG estimated New GM's common equity at almost $20 billion, whereas GMNA's common equity was estimated at negative $4 billion. DX-0141-0003, DX-0141-0265, DX-0141-0266; Hubbard Decl. ¶¶ 9, 61, 63.

1961. Prof. Hubbard testified that his assumption that GMNA and New GM shared the same WACC rested on his finding that GMNA accounted for the "vast majority" of New GM's projected "free cash flows." Hubbard Test. 2400:5-2404:20; *see also* Fischel Decl. ¶ 105.

1962. Prof. Hubbard's direct testimony was that GMNA accounted for 95.5% of New GM's free cash flows. Hubbard Decl. ¶¶ 72, 120.

1963. On cross-examination, Prof. Hubbard stated that while GMNA represented 95.5% of New GM's free cash flows from 2009-2014, GMNA represented approximately 82% of the present value of free cash flows. Hubbard Test. 2404:10-2406:24. Prof. Fischel testified that the 82% figure was "quite misleading" because it was computed in reliance on WACC figures that Prof. Hubbard contends are unreasonable. Fischel Test. 2663:10-2665:19.

1964. Prof. Hubbard's 95.5% figure is obtained by focusing selectively on projected free cash flows for the years 2009-2014 and omitting the terminal year. Fischel Decl. ¶¶ 105-06; Fischel Test. 2663:7-2665:19.

1965. Any complete analysis of the relative cash flows of GMNA and New GM must include the terminal year, because the terminal year cash flow determines the value of cash flow in all years after 2014. Fischel Decl. ¶ 106.

1966. From 2009 to the terminal year, GMNA's cash flow was projected to decrease as a percentage of New GM's cash flows, and GMNA's terminal year cash flows account for only 56.5% of New GM's projected terminal year cash flows, much lower than the 95.5% Prof. Hubbard cites. Fischel Decl. ¶ 106.

1967. A comparison of the terminal values for New GM and GMNA, "reflect[ing] the present value of free cash follow occurring after the explicit forecast period," discloses a similar ratio of approximately 50%. DX-0141-0265, -0266; Hubbard Decl. ¶ 91; *see also* PX-0826-0020 & -0022, Shannon P. Pratt and Roger J Grabowski, *Cost of Capital: Applications and Examples* 44-46 (5th ed. 2014) ("The capitalized value of the projected cash flows following the discrete projection period is most commonly called the *terminal value* or *residual value*. Some authors have adopted the term *continuing value* to indicate that the capitalized value represents the present value of cash flows in years following the discrete period.").

1968. A "handbook for practitioners" upon which Prof. Hubbard relies, Hubbard Decl. ¶ 131, describes "common errors" committed by practitioners. PX-0826-0318 to -0335 (Shannon P. Pratt and Roger J Grabowski, *Cost of Capital: Applications and Examples* 1181-98 (5th ed. 2014)).

1969. The text states that the "risks of each of the businesses owned by the diversified company need to be reflected in a unique cost of capital." PX-0826-0329 (Shannon P. Pratt and Roger J. Grabowski, *Cost of Capital: Applications and Examples* 1192 (5th ed. 2014).

1970. Prof. Hubbard acknowledged that "KPMG calculated a different WACC for each of the New GM business units." Hubbard Decl. ¶ 106; *see also* DX-0141-0078, -0278-81.

1971. Prof. Hubbard proposes a WACC that he claims is appropriate for New GM as of July 10, 2009, when the 363 Sale closed, rather than the Valuation Date. Fischel Decl. ¶ 123; Hubbard Test. 2322:13-18; *see also* Hubbard Decl. ¶¶ 155, 157, 159-60, 168.

1972. Prof. Hubbard's WACC analysis focuses on a date five days after the approval of the 363 Sale and more than a week after the Valuation Date, when hundreds of objections were pending and there was no guarantee that the 363 Sale would successfully close. Fischel Decl. ¶ 123; *see also* Klein Decl. ¶¶ 31-32; Klein Test. 2786:11-2788:7.

1973. Prof. Hubbard makes no attempt to demonstrate that the analysis is relevant as of the Valuation Date. Fischel Decl. ¶ 124.

1974. According to Prof. Hubbard, re-running KPMG's calculations with a reduced WACC of 8.3%-11.5%, while leaving all else equal, would have resulted in higher values for GMNA's common equity and TIC. Hubbard Decl. ¶¶ 173-74; Hubbard Test. 2411:21-2414:14; Fischel Decl. ¶ 117.

1975. Prof. Hubbard does not adopt these higher values as his own and expresses no opinion as to whether these higher values would be the correct values for GMNA's common equity and TIC. Hubbard Test. 2324:9-2326:15 ("[T]hat is not my number.").

1976. Prof. Hubbard assumed that KPMG's calculations were correct in all other respects and did not consider whether KPMG's analysis contained any errors beyond WACC value, including any countervailing errors that may have tended toward a lower equity valuation. Hubbard Test. 2325:5-11.

1977. Prof. Hubbard concludes that the WACC value assigned to GMNA by KPMG was "driven largely" by the Company-Specific Risk Premium ("**CSRP**") that KPMG computed for GMNA. Hubbard Decl. ¶ 127; *see also* Fischel Test. 2649:6-2650:2.

1978. Prof. Hubbard contends that KPMG's use of a CSRP was categorically improper, opining that a CSRP has "no basis in financial theory." Hubbard Decl. ¶¶ 127, 169; Hubbard Test. 2390:17-2392:6 ("None. Zero.").

1979. However, as KPMG observed, CSRPs are in fact "commonly utilized in financial reporting valuations," and KPMG had itself used CSRPs in "numerous valuations for financial reporting purposes" that "passed the scrutiny of various reviewers including the SEC." DX-0141-0070.

1980. Use of a CSRP is a state of the art practice among valuation professionals. PX-808-0215, -0216 (Shannon P. Pratt, Valuing A Business: The Analysis and Appraisal of Closely Held Companies 184-85 (5th ed. 2008) (The "state of the art in the twenty-first century" involves incorporation of an "element reflecting the size effect" and an adjustment for "investment-specific risk for the subject investment")); Hubbard Test. 2398:20-2399:24.

1981. A textbook relied upon by Prof. Hubbard, Hubbard Decl. ¶ 131, states that the "pure" form of CAPM to which Prof. Hubbard subscribes—which excludes CSRPs and size premia—is "fraught with empirical problems." PX-0826-0166 (Shannon P. Pratt and Roger J. Grabowski, *Cost of Capital: Applications and Examples* 444 (5th ed. 2014)).

1982. A "modified CAPM" that "includes adjustments for size and specific company risks," of the sort employed by KPMG, is "generally accepted." PX-0808-0224 (Shannon P. Pratt et al., *Valuing A Business: The Analysis & Appraisal of Closely Held Companies* 193 (4th ed. 2000)); *see also* Fischel Test. 2649:6-2651:10.

1983. Hubbard stated in direct testimony that it was "unclear whether the size premium even exists as a matter of financial theory," Hubbard Decl. ¶ 151, but the text that he cites for this proposition in fact endorses the size premium as an "empirically derived correction to the pure CAPM." PX-0826-0136.

1984. Prof. Hubbard suggests that KPMG's use of a size premium in computing the cost of equity for GMNA was a "misapplication of the CAPM," because GMNA was in the "top decile" of the size distribution. Hubbard Decl. ¶¶ 151-52.

1985. Market value of equity is the standard measure of size for purposes of computing a size premium, and GMNA's equity value was determined by KPMG to be negative. *See* PX-0826-0077 (Shannon P. Pratt and Roger J Grabowski, *Cost of Capital: Applications and Examples* 302 (5th ed. 2014); DX-0141-0266; Hubbard Decl. ¶ 63.

1986. KPMG determined that a CSRP was appropriate for GMNA upon extensive consideration of the relevant risks, including the "additional risk associated with financial distress" and that management's forecasts would not be met. DX-0141-0017, -0069-77.

1987. Use of a CSRP allowed KPMG, among other things, to account for its view that New GM's projections were optimistic not by adjusting the projections, but by increasing the WACC. Hubbard Decl. ¶¶ 107, 144; Hubbard Test. 2431:12-25, 2434:14-2435:10.

1988. It is not unusual for practitioners to be provided with management-prepared forecasts that are "aspirational, rather than expectational," representing "management's belief as to what can be accomplished if they succeed in carrying out their business plan." PX-0826-0160 (Shannon P. Pratt and Roger J Grabowski, *Cost of Capital: Applications and Examples* 394 (5th ed. 2014)); *see also* Hubbard Test. 2425:11-2426:21 ("Management is often aspirational.").

1989. According to a practitioner's textbook relied upon by Prof. Hubbard, "[r]arely are the projections tempered for possible downside outcomes." PX-0826-0160 (Shannon P. Pratt and Roger J Grabowski, *Cost of Capital: Applications and Examples* 394 (5th ed. 2014)).

1990. Prof. Hubbard concludes that KPMG's use of a CSRP is "never acceptable, in theory or in practice." Hubbard Decl. ¶ 144.

1991. Increasing WACC is a "commonly applied method used by practitioners to account for the overly optimistic forecasts provided to the analyst." PX-0826-0160; *see also* Hubbard Test. 2426:22-2427:14.

1992. Prof. Richard Ruback of Harvard Business School, whom Prof. Hubbard acknowledges as an authority, similarly recognizes that increasing WACC in light of optimistic management forecasts is a practice not only "generally accepted by valuation professionals" but in fact endorsed by both the American Society of Appraisers and the American Institute of Certified Public Accountants. PX-0822-003; *see also* Hubbard Test. 2427:15-2429:16 ("I think he's a very good financial economist.").

1993. Prof. Hubbard concludes that the "proper way to value a company" with "questionable management forecasts" is not to increase the WACC, but to "adjust the forecasts, or to add weights to forecast scenarios." Hubbard Decl. ¶¶ 144, 182; Hubbard Test. 2434:6-13, 2416:16-2418:7.

1994. Prof. Richard Ruback of Harvard Business School wrote that "[p]ractitioners typically account for these down-sides by increasing the discount rate beyond the market-based cost of capital whereas academics generally prefer adjustments to the cash flow forecasts themselves." PX-0822-010.

c. Prof. Hubbard's WACC Analysis Is Inconsistent with Prof. Hubbard's Own Valuation Opinion and Yields Paradoxical Results

1995. Prof. Hubbard's method for deriving an implied equity value for GMNA, if applied to New GM, results in a common equity value inconsistent with his own conclusions regarding the value of New GM's equity and leads to the conclusion that, as of July 10, 2009, New GM would not have required the DIP financing provided by Treasury. Fischel Decl. ¶¶ 116, 121-22.

1996. Prof, Hubbard concluded that the highest reasonable WACC for New GM is 11.5 percent. Hubbard Decl. ¶ 12; Fischel Decl. ¶ 117.

1997. By mechanically applying this WACC value to KPMG's TIC calculations, and leaving all else equal, Prof. Hubbard derived a TIC value for GMNA of $44.6 billion and a common equity value for GMNA of $18.7 billion. Fischel Decl. ¶ 117; *see also* Hubbard Test. 2407:22-2408:5 ("I just held constant everything else in KPMG's assumptions.").

1998. It is not Prof. Hubbard's opinion that these are correct values for GMNA's TIC and common equity. Hubbard Test. 2324:9-2326:15.

1999. Prof. Fischel applied the same methodology that Prof. Hubbard used to derive these implied values for GMNA to the entirety of New GM and, using a WACC of 11.5%, arrived at an implied common equity value for New GM, as of July 10, 2009, of $62.5 billion. Fischel Decl. ¶¶ 121-22; *see also* Fischel Test. 2651:13-2653:12.

2000. Using a WACC of 8.3%, the lower bound of Prof. Hubbard's proposed range, yields a valuation for New GM, as of July 10, 2009, of $108 billion. Fischel Test. 2653:20-2654:19.

2001. If New GM's equity value really had been as high as $62.5 billion to $108 billion, then New GM would have been solvent even without the DIP financing, and the financing extended by the Government to New GM was completely unnecessary. Fischel Decl. ¶ 122.

2002. This result demonstrates that Prof. Hubbard's WACC analysis is fundamentally unsound. Fischel Decl. ¶ 122.

2003. Moreover, the $62.5 billion to $108 billion figure arrived at using Prof. Hubbard's approach is more than $20 billion higher than the highest equity value estimate obtained by Prof. Hubbard through his "purchase price-based valuation." Hubbard Decl. ¶¶ 9, 84-86, 176; Fischel Test. 2651:23-2653:5.

2004. Prof. Hubbard states that a "DCF-based valuation" cannot be meaningfully compared with a "purchase price-based valuation," Hubbard Decl. ¶ 176, but in his own opinion he sets out to contrast his "purchase price-based valuation" with KPMG's DCF-based valuation. Hubbard Decl. ¶ 9 ("[T]he purchase price implies that New GM's common equity was worth between $33.4 and $40.1 billion, much greater than the $19.9 billion equity value estimated by KPMG."); Fischel Decl. ¶¶ 118-24.

2005. If a "DCF-based valuation" cannot be meaningfully compared with a "purchase price-based valuation," then Prof. Hubbard cannot also claim that his market value estimate of New GM's equity has any bearing on his opinion that KPMG's TIC adjustment was unnecessary. Fischel ¶¶ 118-19.

9. Ms. Keller's Conclusions Are Unsupported and Not Credible

2006. Ms. Keller was retained by counsel for JPMorgan and the Defendants Steering Committee to comment on the reasonableness of certain "Fresh Start Projections" of New GM, as well as the reasonableness of KPMG's company-specific risk premium. Keller Decl. ¶ 7.

2007. Ms. Keller is an automotive industry analyst, not an appraisal expert, a valuation expert, or an economics expert. Keller Decl. ¶¶ 1-2; Keller Test. 2056:20-25 & 2057:2-6.

2008. Ms. Keller is not an accounting expert and she is not a certified public accountant. Keller Test. 2057:7-13.

2009. Ms. Keller is not familiar with ASC 820 or ASC 805. Keller Test. 2058:11-16.

2010. Ms. Keller has never been involved with a valuation of a company for purposes of that company's preparation of its fresh start financial statements. Keller Test. 2058:17-24.

2011. Ms. Keller has no experience assessing the reliability of a company's projections in connection with that company preparing its fresh start balance sheet. Keller Test. 2059:7-12.

2012. Ms. Keller did not conduct any quantitative analysis of New GM's projections. Keller Test. 2065:13-16.

2013. Ms. Keller has no experience calculating a company's weighted average cost of capital. Keller Test. 2061:20-23.

2014. Ms. Keller has no experience assessing the reasonableness of a company's weighted average cost of capital. Keller Test. 2061:24-2062:3.

2015. Ms. Keller has no experience calculating a company specific risk premium or determining whether it is appropriate to apply a company specific risk premium. Keller Test. 2062:13-2063:2.

2016. Ms. Keller expresses no opinion whether a company specific risk premium should have been applied in calculating the WACC for New GM. Keller Test. 2063:3-7.

2017. Other than this case, Ms. Keller has never been engaged to review the risks considered in determining the appropriate company specific risk premium for a company. Keller Test. 2064:2-7.

2018. Ms. Keller's source for the "Fresh Start Projections" was not New GM, or even the KPMG Report, but a "work paper" prepared by Deloitte & Touche LLP ("**Deloitte**") that Ms. Keller believed had been "used by KPMG." Keller Test. 2064:8-24, 2074:5-10.

2019. Ms. Keller never spoke to anyone at Deloitte about the preparation of this "work paper." Keller Test. 2074:13-15.

2020. Ms. Keller also did not communicate with anyone at New GM or KPMG about the projections. Keller Test. 2073:20-2074:4.

2021. In assessing the "reasonableness" of the "Fresh Start Projections," Ms. Keller did not undertake to examine the data used to develop the forecasts. Keller Test. 2066:23-2068:16, 2072:19-22, & 2073:15-19.

2022. Ms. Keller had no access to this data and acknowledged at trial that she had simply accepted many of the forecast figures at "face value," without inquiring whether New GM itself had done anything to assess the accuracy of the underlying data. Keller Test. 2066:23-2068:16, 2072:19-22, & 2073:15-19.

2023. Ms. Keller never made any effort herself to confirm the accuracy of the data underlying the projections and did not analyze what methodology, if any, was employed in developing the projections. Keller Test. 2065:12-16.

2024. Ms. Keller never subjected the forecasts to anything like a quantitative analysis and perceived no need to do so, testifying that the projections appeared to her to be reasonable "on their face." Keller Test. 2065:12-2066:12, 2123:20-2126:4.

2025. Ms. Keller provides no analysis whatsoever to support her conclusion that the "Fresh Start Projections" were "reasonable," beyond retailing the many promised benefits that she believed New GM could expect to enjoy as a result of the bankruptcy process—including the

shedding of "legacy costs and burdensome labor contracts," reduced labor costs, elimination of "excess assembly capacity" and underperforming dealers, decommissioning of "stale" and unpopular brands, promotion of a "product renaissance," improved net revenues, and greater adaptability. Keller Decl. ¶¶ 55-57, 59-63, 64-70, 71-72, 73-74, 75-83, & 84

2026. Moreover, though Ms. Keller states she analyzed them, she admits that she does not know how KPMG arrived at its risk assessments. *See* Keller Test. 2086:23-2087:3, 2089:5-8 , 2090:18-2091:6, 2091:7-2092:10

2027. Ms. Keller did not communicate with anyone at KPMG or New GM about KPMG's risk assessments. Keller Test. 2085:22-2086:5.

2028. She does not know what information or materials KPMG reviewed in connection with assessing the risks. Keller Test. 2091:7-2092:10.

2029. She does not know what methodology, if any, KPMG applied to assess the risks. Keller Test. 2091:7-2092:10.

2030. She does not know what relative weights KPMG had assigned to each risk factor. Keller Test. 2091:7-2092:10.

2031. She does not know how KPMG aggregated the factors they considered to determine the appropriate risk factor. Keller Test. 2090:18-2091:6; 2091:7-2092:10.

2032. In fact, Ms. Keller admits that she could not understand the meaning of some of KPMG's risk factors. Keller Test. 2090:8-17, 2141:22-2144: 9; Keller Decl. ¶¶ 121 & 123.

2033. On cross-examination, Ms. Keller stated, for the first time, her opinion that KPMG ignored what she considered to be the greatest risk facing New GM, which was the risk that the corporate culture that had existed at Old GM would remain at New GM, allowing New GM to fall into the same patterns of mismanagement. Keller Test. 2101:12-2103:18.

B. Defendants' Appraisal Is Flawed and Unreliable

2034. Defendants advance a second valuation approach for the 40 Representative Assets through their appraisal expert, Carl C. Chrappa.

2035. Mr. Chrappa is a professional appraiser who claims to have over forty years of professional experience in inspecting, appraising and valuing equipment, including automotive machinery and equipment. Chrappa Decl. ¶ 8.

2036. As discussed above, Mr. Chrappa valued the Representative Assets using the Fair Market Value in Continued Use ("**FMVICU**") with Assumed Earnings premise of value for 38 of the 40 Representative Assets. Chrappa Test. 1883:16-21; Goesling Decl. ¶ 426.

2037. Despite having appraised assets in the automotive industry four or five dozen times, Mr. Chrappa has never before used fair market value in continued use with assumed earnings as a premise of value. Chrappa Test. 1885:4-9.

2038. In fact, Mr. Chrappa cannot remember a single instance, except perhaps with leases, where he has used fair market value in continued use with assumed earnings as a premise of value to value any industrial assets. Chrappa Test. 1885:10-1886:14.

2039. Mr. Chrappa has never used fair market value in continued use with assumed earnings as a premise of value to value any assets in the context of a bankruptcy, even though he has done other valuations in connection with bankruptcies. Chrappa Test. 1888:9-17.

2040. Mr. Chrappa was able to use a fair market value only by finding that Old GM was a willing seller that was under no compulsion to sell. Chrappa Test. 1891:10-21.

2041. Mr. Chrappa conceded that if the Government had forgone the 363 Sale and there were no market participants willing to purchase Old GM's assets on a going-concern basis, then the appropriate premise of value for the Representative Assets would be "orderly liquidation value in place." Chrappa Test. 1905:14-1906:15.

2042. Mr. Chrappa further testified that if there had been no market as of June 30, 2009, that could absorb GMNA's manufacturing plants with machinery and equipment in place, then the appropriate valuation premise would be piecemeal sale, the valuation premise used by Mr. Goesling. Chrappa Test. 1909:3-16.

2043. Mr. Chrappa admitted that he was not aware of any buyer, other than the U.S. and Canadian governments, that would have been willing to buy GMNA's manufacturing plants on a failed facility basis. Chrappa Test. 1910:11-1912:18.

2044. In addition, Mr. Chrappa determined it was appropriate to assume that Old GM's earnings were sufficient to support its operations and it was not necessary despite Old GM's economic difficulties to do an earnings analysis. Chrappa Test. 1920:12-1925:8.

2045. Mr. Chrappa's appraisal is based on the assumption that KPMG's WACC was overstated. Chrappa Test. 1925:9-1926:9.

2046. Mr. Chrappa admitted at trial that he would have had to make a downward adjustment to his appraised values—essentially, the TIC adjustment—if KPMG's WACC value were correct. Chrappa Test. 1930:12-1931:12.

2047. Having determined premise of value, Mr. Chrappa decided to exclusively use the Cost Approach to value the machinery and equipment. Chrappa Test. 1932:9-1933:11.

1. Mr. Chrappa Improperly Disregards Market Data

2048. Mr. Chrappa testified that his singular reliance on the Cost Approach is due to the inability to gather a significant quantity of retrospective secondary market data for an analysis based on market comparables, given the passage of time, poor quality of data, and the customized nature of many of the assets. Chrappa Decl. ¶¶ 47-50.

2049. However, an appraiser should not disregard the Market Approach for more commonly traded assets with active markets, as Mr. Chrappa has done in his appraisal. Goesling Decl. ¶ 456.

2050. The 40 Representative Assets include certain presses, robots, gear hobbers, gear shapers, broaches and inspection equipment that were all commonly traded pieces of equipment having active markets as of the Valuation Date. Goesling Decl. ¶ 456.

2051. Mr. Chrappa failed to consider the over 23,000 auction lots and resulting sales of GM equipment that occurred between 2006 and 2012. Goesling Decl. ¶ 457; *see* PX-0350 (Reviewed Asset Auction Lots).

2052. Mr. Chrappa ignored the actual market prices paid for two of the subject presses that were sold in a private treaty sale and at auction (Representative Asset Nos. 29 and 30). Goesling Decl. ¶ 457.

2053. In most cases, Mr. Chrappa's disregard of the Market Approach results in his values being significantly overstated. Goesling Decl. ¶ 457.

2054. The fact that Mr. Chrappa so blatantly disregarded an applicable approach that the ASA deems to be reliable and often the best indication of value undermines the credibility of his appraisal and the concluded values therein. Goesling Decl. ¶ 457.

2. Mr. Chrappa Erroneously Calculates Economic Obsolescence

2055. As discussed above, perhaps one of the most critical steps involved in applying the Cost Approach is the estimation of economic obsolescence to adjust for depreciation of the value of property due to "external factors," including the economics of the industry, reduced demand for the product, increased competition, and other similar factors. Goesling Decl. ¶ 458.

2056. Mr. Chrappa's exclusive use of the Cost Approach and unsupportable rosy view of the economy and automotive outlook as of the Valuation Date resulted in his very limited

consideration of economic obsolescence and, ultimately, in concluded values that were overstated. Goesling Decl. ¶ 458.

2057. Specifically, inutility was the *only* form of economic obsolescence that was considered by Mr. Chrappa for 38 of the Representative Assets. Goesling Decl. ¶ 459.

2058. Mr. Chrappa made no attempt to acknowledge or verify the existence of other possible forms of economic obsolescence despite specific guidance provided by the ASA to the contrary. Goesling Decl. ¶ 459.

2059. In this regard, the ASA states: "Developing an inutility penalty is a way of measuring one form of economic obsolescence within the Cost Approach. In practice, when dealing with relatively new assets that are not operating at their capacity because of economic reasons, additional economic obsolescence is probably present. To measure this may require a detailed analysis of the business and a subsequent allocation of any economic penalties to the individual assets or groups of assets." PX-0163-0079 (ASA at 79).

2060. While a competent appraisal might consider inutility as a component of economic obsolescence, there is no possible justification for an appraiser to ignore the other economic obsolescence factors, described in detail above, including, among other things, the severe financial distress of General Motors and the poor general state of the economy as of the Valuation Date. Goesling Decl. ¶ 459.

2061. A competent appraisal would also need to objectively investigate the economics of the industry, reduced demand for the product, and increased competition as possible additional forms of economic obsolescence. Goesling Decl. ¶ 459.

2062. When valuing assets under a FMVICU premise, this would likely require a detailed analysis of the business using the Income Approach and a subsequent allocation of economic obsolescence to the individual assets. Goesling Decl. ¶ 459.

2063. Mr. Chrappa did not undertake this analysis, and thus his economic obsolescence factors do not meet professional appraisal standards and are entirely unreliable. Goesling Decl. ¶ 459.

2064. Mr. Chrappa's inutility penalty calculation is also flawed. Goesling Decl. ¶ 460.

2065. Mr. Chrappa's inutility penalty calculation was developed based on a comparison of the forecasted production for 2009 through 2014 to capacity at the plant in which the asset was located. Goesling Decl. ¶ 460.

2066. Mr. Chrappa did not measure economic utilization on an asset-by-asset basis, even where asset-specific data was available. Chrappa Test. 1956:8-1962:4.

2067. Mr. Chrappa stated that he did not use actual utilization rates prior to 2009 because "New GM is a new company," but he was unable to point to any professional literature that suggests that future projections are more reliable in such situations. Chrappa Test. 2008:20-2009:12.

2068. The inutility penalties calculated and applied in Mr. Chrappa's appraisal were: 62% at Defiance; -16% at Warren Transmission; and no penalty for economic obsolescence at Lansing Delta Township Assembly and Lansing Regional Stamping. Goesling Decl. ¶ 460.

2069. Mr. Chrappa determined that utilization at Defiance was projected to average 25% of capacity in the future, and so computed a 62% inutility penalty that he has applied to five of the six Defiance assets included in the 40 Representative Assets (he did not apply the penalty is the Gas Cleaning System for the #4 Cupola, which he valued at $0). Goesling Decl. ¶ 460.

2070. Based on Mr. Goesling's participation of the inspection at Defiance, all five of the penalized Defiance assets were observed to be in use but also numerous assets had been permanently idled or abandoned in place. Goesling Decl. ¶ 460.

2071. As such, there is clearly inutility at Defiance. Goesling Decl. ¶ 460.

2072. While an inutility penalty is often considered and rightfully applied in determining the aggregate value of an entire group of assets used for a given process, that application of the inutility penalty to individual assets results in unintentional distortion of individual asset values, causing some to be overvalued and others to be undervalued. Goesling Decl. ¶ 460.

2073. This is confirmed by the circumstances Mr. Goesling observed at Defiance. Goesling Decl. ¶ 460.

2074. Examination of the two Representative Assets located at plants that were not expected to be part of New GM and were planned for future shutdown and liquidation highlights the absurdity of Mr. Chrappa's approach. Goesling Decl. ¶ 461.

2075. Plant specific capacity and utilization information was not available for these two locations, so Mr. Chrappa estimated the economic obsolescence adjustment at -30%, stating, without further explanation or support, that the adjustment would be "reasonable in light of the [automotive industry] situation at that time." Chrappa Decl. ¶ 111.

2076. A competent appraisal would question why assets temporarily operating in a plant planned for closure and liquidation would receive an unsubstantiated -30% adjustment for economic obsolescence when asset values in the ongoing operation of GM's operating Defiance were reduced for economic obsolescence by over double the amount. Goesling Decl. ¶ 461.

2077. On the other hand, Mr. Chrappa attributes no economic obsolescence to the assets at the Lansing plants. Chrappa Decl. ¶¶ 99-100; Chrappa Test. 1948:4-1949:16, 1956:4-7.

2078. Ultimately, Mr. Chrappa's application of economic obsolescence is erratic and so partial as to be entirely unjustifiable. Goesling Decl. ¶ 462.

2079. Mr. Chrappa's concluded values, which are divorced from the market realities as of the Valuation Date significantly overstate the concluded values and are not reliable. Goesling Decl. ¶ 462.

C. Net Book Value Is Not an Appropriate Methodology for Valuing the Representative Assets

2080. No party has argued in favor of the use of net book value, and no testimony or expert opinions were provided in support of using net book value to value the Representative Assets.

2081. As Mr. Furey explained at trial, net book value is simply the original cost of an asset, periodically adjusted for financial reporting purposes to reflect "accounting depreciation." Furey Test. 1350:6-14.

2082. The depreciation deduction is typically applied in a straight-line fashion, based on the asset's expected useful life (also an accounting concept). Furey Test. 1350:6-1351:8.

2083. As the American Society of Appraisers notes, this process is "not a method of valuation." PX-0163-0014 (ASA at 14).

2084. Rather, it is "typically derived through a cost allocation process, not a valuation process." PX-0163-0014 (ASA at 14).

2085. Though it is possible that net book value may approximate appraisal value, it will do so "only by chance." PX-0163-0014 (ASA at 14).

2086. The Term Loan Agreement required Old GM to provide Collateral Value Certificates setting forth collateral values based on net book value. *See e.g.*, PX-0023-0003 & -0024; JX-0001-0011 (defining "Collateral Value," for purposes of the Term Loan, as "the aggregate net book value of the Collateral . . . .").

2087. The Term Loan Agreement further provided that the ratio of the outstanding balance of the Term Loan and the net book value of the collateral was not to be less than 2.5:1. PX-0288-0042.

2088. In March 2009, the Term Loan Agreement was amended to increase the ratio from 2.5:1 to 3.25:1.

D. Evercore's Fairness Opinion is Not a Relevant or Reliable Indicator of Value

2089. Evercore, as an advisor to Old GM, assisted Old GM leading up to the bankruptcy filing in the winter and spring of 2009. JX-0003-0006 (Worth Decl. ¶ 13).

2090. One of Evercore's assignments was to opine on the fairness of the 363 Sale to Old GM (the "**Fairness Opinion**"), and specifically the fairness of the "purchase price" of the transaction. JX-0003-0016.

2091. In order to value one component of the "purchase price"—the equity stake in New GM that was to be provided to Old GM as consideration for the sale—Evercore calculated a value for New GM's equity based on a discounted cash flow analysis and using New GM financial projections provided by management. JX-0003-0103 & -0098.

2092. This assignment valued the business in the hands of New GM after the 363 Sale and assumed the sale was consummated. JX-0003-0103 & -0098; Worth Test. 1819:16:-1820:2. Evercore did not value or appraise individual assets of New GM. JX-0003-0020.

2093. Evercore used a valuation date of July 31, 2009, as that date was Evercore's "best guess" as to the date by which the 363 Sale would be consummated. Worth Test. 1819:16:-1820:2.

2094. The Fairness Opinion states that for purposes of Evercore's analysis, Evercore "assumed and relied upon, without undertaking any independent verification of, the accuracy and completeness of all of the information publicly available, and all of the information supplied or otherwise made available to, discussed with, or reviewed by us . . . ." JX-0003-0019.

2095. Evercore further states that:

> At the Company's direction, we (i) did not rely upon any standalone financial forecasts relating to the Company (except for the Liquidation Analysis) and (ii) did not perform certain analyses that we would customarily prepare for the Company in connection with a fairness opinion, because of the Company's determination that such forecasts and analyses are not meaningful as a result of the extraordinary circumstances of the Company described herein.

JX-0003-0019.

2096. Evercore was provided with financial projections for New GM and, with respect to those projections, Evercore stated:

> [W]e have assumed that they have been reasonably prepared on bases reflecting the best currently available estimates and good faith judgments of management of the Company as to the future financial performance of [New GM] under the business assumptions reflected therein. . . . *We express no view as to any of the [New GM] Projections or financial data relating to the Company or to [New GM], or the assumptions upon which any of those projections or data are based, nor do we express any view as to the feasibility of [New GM]'s achieving those projections* or for [New GM]'s ability to support the capital structure upon which those projections are based . . . .

JX-0003-0019 (emphasis added) & -0017.

2097. Evercore was not expressing a view as to whether New GM would achieve the New GM projections. Worth Test. 1857:17-21.

2098. As part of its discounted cash flow analysis, Evercore calculated a WACC range for New GM of 9.5% to 11.5%. Worth Test. 1826:6-9.

2099. Evercore also assisted Old GM with certain aspects of the second viability plan that Old GM submitted to the Government in February of 2009 ("**VP2**"). JX-0006-0025-26.

2100. In connection with VP2, Evercore estimated an enterprise value for Old GM upon implementing the restructuring outlined in VP2. Worth Test. 1860:15-17.

2101. Mr. Worth testified that Evercore used the same WACC range—9.5% to 11.5%—in connection with its VP2 enterprise valuation. Worth Test. 1860:22-1861:7.

2102. For purposes of that valuation, Evercore assumed that the projections set forth in VP2 would be achieved in all material respects. Worth Test. 1861:23-1862:3.

2103. Ultimately, the restructuring plan set forth in VP2 was rejected by the Government. Worth Test. 1863:2-4.

PROPOSED CONCLUSIONS OF LAW

I. DEFENDANTS HAVE FAILED TO MEET THEIR BURDEN OF PROOF THAT THE REPRESENTATIVE ASSETS ARE SURVIVING COLLATERAL

Defendants bear the burden of proving that each Representative Asset is included in their Surviving Collateral. To meet this burden, Defendants must prove that the asset (1) was within the grant of collateral under the Term Loan, (2) was covered by a valid, first priority fixture filing, and (3) is a fixture under applicable state law. Defendants have failed to meet their burden as to 39 of the 40 Representative Assets, in their entirety, and as to portions of Representative Asset No. 23 (Aluminum Machining System), for the following reasons.

First, the following three assets are not Surviving Collateral because they were not owned by Old GM during the relevant period or are subject to a prior lien: (1) Representative Asset No. 32, the Schuler Transfer Press; (2) Representative Asset No. 33, the B3-5 Transfer Press; and (3)

Representative Asset No.11, the Lansing Delta Township Assembly's Central Utilities Complex, or CUC. Defendants have conceded that Assets No. 32 and No. 33 are not Surviving Collateral. JPTO Stipulated Facts ¶ 66. For Asset No. 11, the CUC, Defendants did not offer any evidence at trial to contradict the express language in the operative agreements, providing that Old GM did not own the CUC and that the CUC asset is subject to a prior lien. *See* Section I.A.2 about the agreements governing the CUC, below. Thus, Asset No. 11 also is not part of the Surviving Collateral.

Second, all assets located at the Lansing Delta Township Assembly and Lansing Regional Stamping facilities are not Surviving Collateral because they are not covered by a fixture filing. As explained below, Defendants have failed to offer evidence that the Eaton County Fixture Filing satisfies the U.C.C.'s requirement that the filing provide constructive notice of a lien against the Lansing Facilities. Further, the trial testimony of Defendants' title search expert, James Marquardt, does not speak to that key legal issue and is otherwise insufficient to meet Defendants' burden to prove that assets located at the Lansing Facilities are Surviving Collateral.

Finally, 36 of the Representative Assets and portions of two additional Representative Assets are not Surviving Collateral because they are not fixtures.

The following chart provides an overview of the reason or reasons why each of the Representative Assets is not included in the Surviving Collateral:

Representative Asset No.	Asset Description	Outside grant of collateral	Not covered by fixture filing	Not a fixture under applicable state law
1	OP-150 Select; Check Place Shims Auto Station			X
2	GA Pits & Trenches		X	
3	Power Zone Roller Conveyor Automation TCH MOD 3			X
4	Paint BLDG Lines – Process Waste ELPO		X	
5	Paint Mix & Circulation – Electrical		X	X
6	Paint Dip Conveyor – ELPO Oven IMC		X	X

Representative Asset No.	Asset Description	Outside grant of collateral	Not covered by fixture filing	Not a fixture under applicable state law
7	Paint TC Automation Software		X	X
8	GA EOL Paint Spot Reprocess Sys Paint Mix Room		X	X
9	Paint TC2 CC Bell Zone		X	X
10	Opticell – Robotic Measurement System		X	X
11	Lansing Delta Township Assembly Utility Services	X	X	X (in part)
12	BS Robot LAZN-150R1		X	X
13	BS Weld Bus Ducts		X	X
14	Leak Test Base Machine Qty = 1			X
15	GA T/W: Soap; Mount and Inflate		X	X
16	BS Skid Conveyor - LAZA		X	X
17	BS P&F Conveyor – Body Side Inner LH DEL		X	X
18	GA Conveyor: Vertical Adjusting Carrier (VAC) Sys – Carriers (Qty 87)		X	X
19	BS CMM Full Body Machine – LY90		X	X
20	GA Conveyor Sub-ASM Receiving (SAR): WTD100 – Wheel & Tire Delivery		X	X
21	GA Conveyor: Skillet-Final-Leg 1		X	X
22	Fanuc M-710IB/70T Robot			X
23	Aluminum Machining System			X (in part)
24	LFS220 Base Shaping Machine-Op 20 Transfer Drive Gear			X
25	Liebherr Hobb Machine from St. Catharines			X
26	Core Delivery Conveyor System CB116 & 122			X
27	Emissions System #4 Cupola			X
28	100 Ton Vertical Channel Holding Furnace			X
29	Transfer Press-GG-1			X
30	TP-14 CS1-1 Transfer Press Danly ET-2			X
31	Danly 4000 Ton Press		X	X
32	AA-11 Schuler #1 AA Crossbar Transfer Press	X	X	X
33	B3-5 Transfer Press System Incl. Destacker and EOL	X	X	X
34	Build Line W/ Foundation			X
35	Button up and Test Conveyor System			X
36	Helical Broaching Equipment			X
37	Courtyard Enclosure			X (Real property)
38	System Gas Cleaning No. 4 Cupola			X
39	CB 91 Robot			X
40	P&H 7 ½ Ton Charger Crane 6E Cupola			X

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

As shown in the chart in the preceding section, Representative Asset Nos. 11, 32, and 33 are not included in the Surviving Collateral because they are outside the grant of collateral.

1. Defendants Concede that the Leased Presses Are Not Surviving Collateral

The Leased Presses (Representative Asset Nos. 32 and 33) are not Surviving Collateral because they were excluded from the grant of collateral set forth in Article II of the Term Loan Collateral Agreement. Defendants admit they have no security interest in these assets. JPTO Stipulated Facts ¶ 66. This is so because each of the Leased Presses are sale-leaseback assets and not owned by Old GM. FOF IX.A.[13]

2. The CUC Is Not Surviving Collateral

Defendants contend that the grant of collateral of the Term Loan and the Term Loan Collateral Agreement includes Representative Asset No. 11 (the Central Utilities Complex or the CUC), despite the plain language of three agreements: the Tri-Party Agreement, the Utilities Service Agreement, and the Loan and Security Agreement. JX-0012; JX-0013; JX-0014. At the outset, it is worth noting that Defendants admit that any interest they have in the CUC is second priority to the lien created in favor of GMAC and its successors. JPTO Stipulated Facts ¶ 68.

Pursuant to the terms of the governing agreements, Old GM did not own the CUC and, for that reason alone, did not grant 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 the grant of collateral in the Term Loan Collateral Agreement.

Defendants also contend they have a security interest in Old GM's "residual interest" in the CUC. Any such residual interest of Old GM was also excluded by clauses (ii) and (iii) of the Term Loan Collateral Agreement's grant of collateral. Moreover, the interest is subordinate to

[13] References to "FOF" are to Plaintiff's Proposed Findings of Fact, *supra*.

the perfected, first priority interest of GMAC and Defendants have failed to meet their burden to establish the value of the residual interest.

a. The CUC Was Not Owned by Old GM on June 1, 2009

The U.C.C. and the plain language of the Term Loan Collateral Agreement make clear that Old GM only granted a security interest to the extent of its interest in an asset or property. The Term Loan 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 . . . ." JX-0002-0006 to 0007 (Term Loan Collateral Agreement Article II); *see also* N.Y. U.C.C. § 9-203 (McKinney 2016) ("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 . . . ."); *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.").

The CUC Agreements make clear that Delta II owned the CUC on June 1, 2009. Pursuant to the terms of the USA, Delta II owns, operates, maintains, and possesses the CUC. *See* JX-0013-0006 (USA Preamble). It has all responsibilities and privileges associated with ownership. JX-0013-0006 (USA Preamble). While Old GM paid for utility services pursuant to the USA, it had no right to enter the CUC without reasonable prior notice to Delta. JX-0013-0053 to 0054 (USA § 11.12). Delta II is responsible for obtaining required permits and licenses with local, state, and federal regulators. JX-0013-0036 to 0037, 0041 (USA § 8.01 & § 11.03(b)).

The terms of the LSA between Delta II and GMAC further confirm Delta II's ownership of the CUC. The LSA expressly requires that Delta II own the CUC as of the date of the agreement and requires Delta II to remain the owner of the CUC through full payment of the loan. FOF IX.A. It shall remain the owner "free from any lien, security interest or encumbrance . . . ." JX-0014-0026 (LSA § 7.01(g)(vi)).

Accordingly, by the plain language of the CUC Agreements, the CUC was not owned by Old GM.

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

Even if the CUC were owned by Old GM, it was excluded from the Term Loan Collateral Agreement's grant of collateral. Clause (ii) of Article II of the Term Loan 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. JX-0002-0006 to 0007 (Term Loan Collateral Agreement Article II). 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. JPTO Stipulated Facts ¶ 68.[14] Second, the creation of additional liens on the CUC is prohibited by or would constitute a default under the CUC Agreements. Section 5.01(f) of the Tri-Party Agreement expressly states that Old GM will be in default under the agreement if it creates a lien on or security interest in the Collateral, which includes the CUC. FOF IX.A; JX-0012-0024 to

[14] Due to a scrivener's error, clause (ii) refers to the incorrect section of the Term Loan Agreement. Defendants do not contest that the reference should be to section 6.02(b)(vii) of the Term Loan Agreement. Defendants also do not contest that, to the extent a lien was created by the CUC Agreements, it is a lien permitted by section 6.02(b)(vii) of the Term Loan Agreement. JPTO Defs. Contentions ¶ 33 & n.6.

0025 (Tri Party Agreement § 5.01(f)). Section 7.01(g)(vi) of the LSA similarly prohibits Delta II from creating additional liens on the CUC. FOF IX.A; JX-0014-0025, 0027 (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." JX-0012-0024 to 0025 (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 Term Loan Collateral Agreement pursuant to Article II clause (ii).

c. Any Residual Interest of Old GM in the CUC Was Excluded from the Grant of Collateral By Article II Clauses (ii) and (iii) of the Term Loan Collateral Agreement

Defendants' contention that the Term Loan Collateral Agreement granted them a security interest in Old GM's "residual interest" in the CUC also fails. Defendants claim the CUC Agreements did not prohibit Old GM from granting a security interest in its "residual interest" in the CUC. But Defendants are wrong. Section 5.01(f) of the Tri-Party Agreement prohibits Old GM not only from granting a security interest in the Collateral—including the CUC—but also in "*any right or interest therein*." FOF IX.A; JX-0012-0024 to 0025 (Tri Party Agreement § 5.01(f)) (emphasis added). Thus, the same exclusion set forth in clause (ii) applies equally to any residual interest Old GM had in the CUC and serves to exclude any such residual interest from the scope of the Term Loan collateral.

Moreover, any residual interest of Old GM also was excluded by clause (iii) of Article II of the Term Loan Collateral Agreement. Clause (iii) excludes "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. JX-0002-0007 (Term Loan Collateral Agreement Article II clause (iii)). That is, the same provisions of the CUC Agreements discussed above, prohibiting

the creation of additional liens on the CUC and any interest therein, also serve to exclude any residual interest of Old GM pursuant to clause (iii)'s exception. FOF IX.A; JX-0012-0024 to 0025 (Tri Party Agreement § 5.01(f)); JX-0014-0025, 0027 (LSA § 7.01(g)(vi)).

Defendants contend that because Old GM was the "true owner" of the CUC as of June 1, 2009, Old GM's interest in the CUC was not an "asset consisting of rights under a contract." They claim that because Old GM had the option to purchase the CUC under the CUC Agreements, it was the "true owner." But as of June 1, 2009, Old GM's right to purchase the CUC was a right existing solely by virtue of the terms of the CUC Agreements, a right that had not been exercised. As of June 1, 2009, Old GM had not purchased the CUC and it was not the owner. FOF IX.A. Any and all rights and interests Old GM had in the CUC as of June 1, 2009 were therefore "rights under a contract" that are properly excluded from the grant of collateral pursuant to clause (iii).[15]

d. Defendants Fail to Establish the Value of any Residual Interest in Which They Claim to Hold a Security Interest

Even if Defendants were granted a security interest in the CUC under the Term Loan Collateral Agreement, and even if they had a perfected security interest in the CUC, Defendants have failed to prove the value of such security interest. Defendants admit that their security

[15] Defendants offer no support for their assertion that Mich. Comp. Laws Ann. §§ 440.9407 or 440.9408 (West 2016) apply to exclude the anti-assignment provisions found in the Tri-Party Agreement or Loan and Security Agreement. Under Section 3.07 of the Tri-Party Agreement, Debtor unambiguously "confirms and agrees to the restrictions on (i) the pledge, encumbrance, transfer, assignment, or other conveyance of, or alteration or modification with respect to, the Collateral, the System, the Loan Documents and the USA Documents as more particularly described in Section 7.01(g)(vii) of the Loan Agreement." JX-0012-0017 to 0018 (Tri-Party Agreement § 3.07(c)). Under Section 5.01(f), Old GM was likewise prohibited from creating a lien on any interest in the CUC. JX-0012-0024 to 0025 (Tri Party Agreement § 5.01(f)). Contractual provisions restricting assignment are routinely enforced. *See, e.g. Century Indem. Co. v. Aero-Motive Co.*, 318 F. Supp. 2d 530, 539 (W.D. Mich. 2003). Where, as here, "the parties have unambiguously manifested" an intent to prevent assignment, "there is no reason whatsoever to void a valid contract clause entered into by equal partners." *Riley v. Hewlett-Packard Co.*, 36 Fed. Appx. 194, 199 (6th Cir. 2002) (holding anti-assignment clause in subcontract agreement enforceable notwithstanding Michigan U.C.C. Article 9).

interest (if any) is subordinate to GMAC's first-priority interest in the asset. JPTO Stipulated Facts ¶ 68. As of June 1, 2009, GMAC had a perfected, first priority security interest in the CUC because GMAC perfected its security interest via the Delta II Fixture Filing prior to the filing of the Eaton County Fixture Filing. FOF IX.A; *see* N.Y. U.C.C. § 9-322 (McKinney 2016) ("Conflicting perfected security interests . . . rank according to priority in time of filing or perfection.").[16]

But Defendants offered no evidence of the value of GMAC's interest. The LSA provides that the loan is secured by a note. FOF IX.A. Neither the note nor any proof establishing the outstanding balance of the loan as of June 1, 2009 has been proffered by Defendants. Without proof of the value of GMAC's security interest in the CUC (which Defendants acknowledge takes priority), it is impossible to establish the value of Defendants' interest in the CUC. Defendants therefore have failed to meet their burden of proof to establish the extent of and value of any security interest they purport to have in the CUC.

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

All of the Representative Assets with an "x" mark in the chart in Section I above in the column titled "Not covered by fixture filing" are not included in the Surviving Collateral because they are located in the Lansing Delta Township Assembly plant or the Lansing Delta Township Stamping plant (collectively, the "**Lansing Facilities**"). There is no fixture filing that covers assets located in the Lansing Facilities.

[16] It is worth noting that the Delta II Fixture Filing lists Delta II as the debtor—not Old GM—further indicating that Delta II was the owner of the CUC and that a fixture filing listing Old GM as debtor is ineffective against the CUC. Mich. Comp. Laws Ann. § 440.9502 (West 2016) (requiring financing statements to provide the name of the debtor); *see also* Mich. Comp. Laws Ann. § 440.9503 (West 2016) cmt. 2 ("The requirement that a financing statement provide the debtor's name is particularly important.")

1. Defendants Bear the Burden to Show a Perfected Security Interest in Any Fixtures at the Lansing Facilities

As discussed above, Defendants acknowledge that they bear the burden of proof to establish the extent and value of their Surviving Collateral. JPTO § III (Burden of Proof). Defendants' contention that Plaintiff is attempting to avoid Defendants' lien on the fixtures at the Lansing Facilities, and thus bears the burden on this issue, is incorrect. Plaintiff does not challenge the validity of the Eaton County Fixture Filing, or the perfection of the lien on any property covered by the Eaton County Fixture Filing. Rather, Plaintiff asserts that no Term Loan collateral at the Lansing Facilities is covered by the Eaton County Fixture Filing, and therefore Defendants do not have a perfected first-priority lien on any assets determined to be fixtures at the Lansing Facilities. In this respect, the Lansing Facilities issue is no different from the more general issue of defining the proper scope of Defendants' Surviving Collateral, which is the issue that lies at the very heart of what this action has always been about and as to which Defendants acknowledge that they bear the burden.

2. The Eaton County Fixture Filing Does Not Describe the Real Property Where the Lansing Facilities are Located

The parties agree that the Eaton County Fixture Filing includes a metes-and-bounds description and a street address that identify a vacant parcel across the road from where the Lansing Facilities are located. FOF IX.B. Nonetheless, Defendants claim that the Eaton County Fixture Filing was sufficient to give constructive notice of a lien against fixtures at the Lansing Facilities. *See* Mich. Comp. Laws Ann. § 440.9502(2) (West 2016) (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"). But the Eaton County Fixture Filing itself does

not cover the Lansing Facilities, and therefore does not give constructive notice of a lien against these facilities.

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. FOF IX.B. 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. FOF IX.B. The parcel described in Exhibit A of the Eaton County Fixture Filing is denoted in a red outline on Adv. Pro. Dkt. No. 827 Ex. 1, a sketch plan of the area jointly commissioned by the parties. FOF IX.B. Defendants admit, and there is no doubt from Adv. Pro. Dkt. No. 827 Ex. 1, that the metes and bounds description in the Eaton County Fixture Filing does not include the two facilities or any portion of those facilities. FOF IX.B.

The address in the Eaton County Fixture Filing is also for the empty lot across the street from the Lansing Facilities. FOF IX.B. 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). FOF IX.B. The Eaton County Fixture Filing lists an address of 8400 Millet Highway, which Defendants concede is the address for the empty lot across the street from the Lansing Facilities. FOF IX.B. No buildings associated with the Lansing Facilities are located at the address in Exhibit A to the Eaton County Fixture Filing. FOF IX.B.

3. The Eaton County Fixture Filing Does 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 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 Lansing Facilities are located. This is not correct.

Under Michigan's enactment of the U.C.C., 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. FOF IX.B. *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 metes and bounds description that matches the empty lot. FOF IX.B. The metes and bounds description in Exhibit A to the Eaton County Fixture Filing is the legal description of the property, and is the most specific description of the property on the fixture filing. FOF IX.B. Defendants admit that the address in Exhibit A to the Eaton County Fixture Filing also unambiguously refers to the empty lot. FOF IX.B.

Defendants' expert, James M. Marquardt, concedes that the Eaton County Fixture Filing does not give constructive notice of a lien against the Lansing Facilities because on its face it refers to the vacant lot. FOF IX.B. In *Schweiss v. Woodruff*, 73 Mich. 473, 478 (1889), a case relied upon by Defendants in their Amended Pre-trial Brief (Adv. Pro. Dkt. No. 900) ("**Defs. Amended Pre-trial Brief**") at 69, the Supreme Court of Michigan determined that "[t]here are cases where the subsequent purchaser has the right to rely upon the face of the record, and it is not bound to make inquiry outside of what the records disclose. Such are errors in recording when the record contains a wrong description of land conveyed . . . ." Similarly, here there is no dispute that Exhibit A of the Eaton County Fixture Filing contains the legal description and common street address for the vacant lot, and not for any other real property. FOF IX.B. Accordingly, if a bona fide purchaser of the Lansing Facilities were to view the Eaton County Fixture Filing (which is unlikely because it is recorded against the vacant lot, a separate parcel of

land associated with a different Section number than the Lansing Facilities),[17] the purchaser would have no reason to question that the Eaton County Fixture Filing secured the parcel clearly indicated by the fixture filing itself, and thus would be under no duty to make any further inquiries. *Id.*

4. Even Under an Inquiry Notice Standard, There Is No Evidence Showing That a Potential Purchaser Would Have Learned of Defendants' Lien

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 that could have led the purchaser to information indicating that the fixture filing should have been filed against the Lansing Facilities. The stamp in question is located below and apart from the address and the metes and bounds description and reads: "GM Assembly Lansing Delta, 8400 Millett Hwy, Lansing, Eaton County, MI, LandAmerica File No. 100729." FOF IX.B. The stamp appears to have been made by LandAmerica, the title insurance company that handled the Eaton County Fixture Filing. Defendants' argument that this is sufficient for "inquiry notice" has no merit.

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. FOF IX.B. It does not contain the legal, formal, or official name of either 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

[17] The buildings associated with the Lansing Facilities are primarily located on Section 33. FOF IX.B. The parcel described in the metes and bounds description in Exhibit A of the Eaton County Fixture Filing is within Section 28. FOF IX.B. The street address in the fixture filing, 8400 Millett Hwy, is also associated with Section 28, and not with either Section 32 or Section 33. FOF IX.B.

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. FOF IX.B. 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 a single line of the stamp on the Eaton County Fixture Filing—"GM Assembly Lansing Delta"—was sufficient to trigger a duty to inquire further.[18] Defendants concede, as they must, that the address and the metes and bounds legal description in Exhibit A of the Eaton County Fixture Filing would not provide notice of a lien against the Lansing Facilities. FOF IX.B. Defendants further concede that the bottom three lines of the stamp pertain to the vacant parcel. FOF IX.B. Nonetheless, they argue that a bona fide purchaser was on inquiry notice, and had a purchaser inquired, it is possible that additional inquiry could have turned up information indicating that the intended parcel was the parcel where the Lansing Facilities are located. But 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'"). Further, Defendants offer no evidence to show that even if

[18] The cases Defendants cite to support their argument are inapposite. *See, e.g.*, *Schweiss v. Woodruff*, 73 Mich. at 479 (noting that bona fide purchasers have a right to rely on the face of the recorded instrument, and are not bound to make inquiry beyond the recorded instrument where, as here, the recorded instrument contains a wrong description of the conveyed land); *Am. Fed. Sav. & Loan Ass'n v. Orenstein*, 265 N.W.2d 111, 112 (Mich. Ct. App. 1978) (in a case where neither the U.C.C. nor description of property were at issue, court found a prudent person to be on inquiry notice only when the ambiguity on a subordination clause was "so obvious"); *In re Mich. Lithographing Co.*, 140 B.R. 161, 167 (Bankr. W.D. Mich. 1992) (alleged ambiguity in property description not at issue).

a potential purchaser had inquired, the purchaser would have learned of Defendants' lien. *Id*. ("even assuming the Bank's argument [regarding inquiry notice] is correct (a very big assumption indeed), the Bank has failed to elicit or introduce *any* evidence regarding what the inquiry notice would have disclosed. The court declines to speculate or invent facts that might favor the Bank.") (emphasis in original).

To accept Defendants' position, a hypothetical purchaser examining title to the 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 Eaton County 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).

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, 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 that 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 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 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 were 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 to inquire further about the filing 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 properly recorded" and "it was the Bank's responsibility to ascertain that a recording regarding [the correct property] actually occurred." *Id*. at 654-55.[19]

[19] 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).

In re Vandenbosch and *In re Hudson* dictate the proper outcome here.[20] The Eaton County Fixture Filing was recorded in the real property records of the vacant lot and not the real property records of either of the Lansing Facilities. Under Michigan law, the Eaton County Register of Deeds is required to maintain an index of instruments accepted for recording that includes, among other things, the location of land by section, town and range, platted description, or other description authorized by law. FOF IX.B. The Eaton County Register of Deeds indexed the Eaton County Fixture Filing as associated with Section 28. FOF IX.B. Defendants concede that the buildings associated with the Lansing Facilities are primarily located on Section 33. FOF IX.B. Additionally, a Delta Township Assessor's tax map shows the outline of the Lansing Facilities' plant buildings primarily in Section 33. FOF IX.B.[21] Accordingly, had a bona fide purchaser searched the real property records of either the Lansing Delta Township Assembly or the Lansing Regional Stamping facilities, the purchaser would not have uncovered the Eaton County Fixture Filing. But even assuming the purchaser had discovered the Eaton County Fixture Filing, Defendants have offered no evidence showing that the potential purchaser would have learned of the lien had the purchaser inquired further. *See In re Hudson*, 455 B.R. at 656

[20] Defendants do not meaningfully distinguish *In re Vandenbosch* or *In re Hudson* in their Pretrial Brief. Defs. Amended Pre-trial Brief 70. *In re Vandenbosch* demonstrates that under Michigan law, where it is undisputed that a mortgage mistakenly describes a vacant lot adjacent to the property (as it is undisputed that the Eaton County Fixture Filing describes a vacant lot adjacent to the Lansing Facilities) a bona fide purchaser did not have requisite notice. 405 B.R. at 264. The requisite notice was derived from the filing itself. *Id.* Therefore, whether a title searcher would have possibly uncovered the fixture filing was irrelevant to the analysis regarding notice. Similarly, *In re Hudson* demonstrates the same premise that the notice requirement is derived from the filing itself, and citing *In re Vandenbosch*, the court found that notice had not been met where a mortgage erroneously described an adjacent parcel. 455 B.R. at 654. In finding that notice had not been met, the *In re Vandenbosch* court referenced the fact that a bona fide purchaser would check the grantor-grantee index for conveyances regarding the parcel at issue, and not any other parcel. 455 B.R. at 656.

[21] Moreover, the Delta Township Assessor's online records identify two parcels of land associated with 8175 Millett Highway, the address for the Lansing Facilities. The first parcel, which has a total area of approximately 324 acres, contains a legal description that covers only a 33 foot strip of land in Section 28, a 33 foot strip of land in Section 32, and a large swath of Section 33. The second parcel contains a legal description for land located entirely within Section 33. FOF IX.B. As already explained above, the Eaton County Fixture Filing does not describe any parcel on any of these three sections where any portion of the Lansing Facilities is located.

(although skeptical of the inquiry notice standard, finding no notice where there was no evidence of what the inquiry would have disclosed).

Instead, Defendants offer the opinion of Mr. Marquardt, who concedes that the Eaton County Fixture Filing does not give constructive notice of a lien against the Lansing Facilities FOF IX.B., but argues that a title searcher would have supposedly included the Eaton County Fixture Filing as a *potential* encumbrance against the Lansing Facilities. FOF IX.B. Even if inquiry notice were the standard, Mr. Marquardt's opinion and argument fails for several reasons: (i) there is no authority to support the type of search described by Mr. Marquardt, (ii) the decision to include the Eaton County Fixture Filing as a potential encumbrance is a business decision related to title insurance practices unrelated to the standard for notice under the Michigan U.C.C., and (iii) Mr. Marquardt offers no opinion about what would have been discovered had a potential purchaser inquired further of Old GM.

First, Mr. Marquardt describes the search he performed whereby he discovered the Eaton County Fixture Filing. Prior to conducting the title search, Mr. Marquardt was aware of the Eaton County Fixture Filing and knew exactly what to look for. Although Mr. Marquardt regularly relies on third party title insurance companies to perform title searches, he did not request an independent third-party title company to perform a title search of the parcels of land where the Lansing Facilities buildings are located. FOF IX.B.

Notwithstanding, Mr. Marquardt suggests that a title searcher would search the Eaton County grantor-grantee index for all recorded documents (except Plats) in Delta Township against General Motors from January 1, 1987 through June 1, 2009. FOF IX.B. This search would yield 104 recorded documents. FOF IX.B. Although the Eaton County Register of Deeds indexed the location of land for each of the 104 recorded documents, Mr. Marquardt contends

that a real property searcher examining the chain of title to the Lansing Facilities would examine each of the 104 recorded documents, including those that are not associated with the Section where the Lansing Facilities are located. FOF IX.B. The title searcher would then have located the Eaton County Fixture Filing among the numerous filings. This type of search goes beyond "ordinary diligence," *In re Hudson*, 455 B.R. at 656, and Defendants offer no authority that describes or supports the type of search performed by Mr. Marquardt.

Second, Mr. Marquardt suggests that a title searcher would have seen one line of the stamp referencing the incorrect name of the Lansing Delta Township Assembly plant and included the Eaton County Fixture Filing as a potential encumbrance against the property where the Lansing Facilities are located, even though the other lines of the stamp are consistent with the fixture filing in describing the vacant parcel. Mr. Marquardt contends that the Eaton County Fixture Filing would be included as a "Schedule B" item on a title insurance commitment. FOF IX.B. "Schedule B" is the schedule of a title insurance commitment that lists the exceptions to title. FOF IX.B. The decision to include a recorded document on a "Schedule B" of a title insurance commitment is for business reasons. Mr. Marquardt admits that to avoid a business risk, a title insurer may include a recorded document that may not necessarily apply to the given property. FOF IX.B. Therefore, according to Mr. Marquardt, a title insurer would include the Eaton County Fixture Filing as a "Schedule B" item on a title insurance commitment to avoid the business risk of exposure to a claim requiring defense of title to the Lansing Facilities. FOF IX.B.

The business decision to include the Eaton County Fixture Filing as a potential encumbrance on a title insurance commitment is not based on the requisite standard for notice under the Michigan U.C.C. Mr. Marquardt admits that, in rendering his opinion, he did not

consider Michigan Comp. Laws Ann. § 440.9502(2), the Michigan U.C.C. provision that requires fixture filings to provide a description of the real property to which the collateral is related sufficient to give constructive notice of a mortgage under Michigan law if the description were contained in a record of the mortgage of the real property. He does not offer an opinion with regard to how that statute applies to the Eaton County Fixture Filing. FOF IX.B.

Finally, Mr. Marquardt provides no evidence that a potential purchaser would have learned of the Eaton County Fixture Filing had the purchaser inquired of Old GM. According to Mr. Marquardt, upon receipt of a title search report that lists the Eaton County Fixture Filing as a potential encumbrance on the Schedule B exclusions to title, the potential purchaser would then have contacted an Old GM employee to inquire about the potential lien. FOF IX.B. Mr. Marquardt does not know what would have been said during the hypothetical conversation between a potential purchaser and Old GM employee. FOF IX.B. Similar to *In re Hudson,* where the court rejected the mortgagor's argument, in part, because it provided no testimony of what would have been revealed had the hypothetical inquiry in fact occurred, 455 B.R. at 656, here it is equally uncertain what the bona fide purchaser would have learned if the purchaser had sought to have a conversation with Old GM.[22]

[22] While Defendants assert in a footnote that a purchaser is on constructive notice of liens identified by a title agent, Defs. Amended Pre-trial Brief 68 n.37, the cases cited in support are either distinguishable or do not stand for that proposition. *See Royce v. Duthler,* 531 N.W.2d 817, 821 (Mich. Ct. App. 1995) (in an action to quiet title involving open and obvious paved driveway, court did not find constructive notice of easement, but instead observed that various documents showing easements that were seen by purchaser at closing—including surveys, title insurance policy, and right-of-first-refusal agreement—should have alerted purchaser to the possibility of easements); *Wash. Mut. Bank v. JPMorgan Chase Bank,* No. 285573, 2009 WL 3365865, at *2 (Mich. Ct. App. Oct. 20, 2009) (where borrower's credit report contained information about prior mortgage, notwithstanding that title commitment did not reveal any prior recorded mortgage, lender should have made further inquiry); *Richards v. Bank of N.Y. Mellon,* 13–cv–12414, 2013 WL 4054586, at *2 (E.D. Mich. Aug. 12, 2013) (where plaintiff admitted to having actual notice of claim of interest in the property, the court otherwise noted that "recordation of a mortgage constitutes constructive notice to all subsequent lienholders that a mortgage exists on a property," and noted that failure of a title company to discover a recorded interest "does not nullify the constructive notice provided by the recordation"); *Orenstein,* 265 N.W.2d at 112 (in a case where constructive notice was not at issue, and the court found a prudent person to be on inquiry notice only when the ambiguity on a subordination clause was "so obvious," the court commented that "[c]ases in which title defect would prevent a diligent title searcher from discovering the deed or recognizing its

Ultimately, 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. *See In re Hudson*, 455 B.R. at 654-55. The Defendants' failure to do so was a fatal flaw that precludes a finding that assets located at the Lansing Facilities are included in the Surviving Collateral.

In sum, 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.

5. Plaintiff Is Not Precluded from Arguing that the Assets at the Lansing Facilities Are Not Subject to a Fixture Filing

Plaintiff is permitted to assert its claim that assets located at the Lansing Facilities are not included in the Surviving Collateral. In the Amended Complaint, Plaintiff asserted its claim that due to the termination of the Delaware Financing Statement, Defendants did not perfect their first priority lien, and thus 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. FOF IX.B. Plaintiff's contention with regard to the Eaton County Fixture Filing falls squarely within the boundaries of this claim that it asserted in the Amended Complaint.[23] Plaintiff admits

applicability must be distinguished from those in which the deed would have been discovered and a possible error revealed").

[23] Contrary to Defendants' contention, Plaintiff does not challenge the perfection of Defendants' lien on the property described on the Eaton County Fixture Filing. As discussed above, Plaintiff asserts that Defendants have failed to show that the assets contained at Lansing Delta Township Assembly and Lansing Regional Stamping facilities are

the validity of the Eaton County Fixture Filing[24] but asserts that in fact no Term Loan 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.

C. 36 of the 40 Representative Assets Are Not Fixtures

1. Defendants Fail to Correctly Apply the Three Part Test Under Ohio Law

It is settled Ohio law that an asset that "primarily benefits the business and not the realty" is considered personal property. *Gen. Elec. Co., Lighting Div. v. Am. Mech. Contractors,* No. 2000-L-211, 2001 WL 1647158 at *3 (Ohio Ct App. Dec. 21, 2001). "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)).[25]

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*, the court found that a very large and complicated caging system that was necessary to an egg production business primarily benefited the

covered by a valid, first priority Fixture Filing. Thus, Defendants' argument that Plaintiff is time-barred from asserting this argument is misplaced.

[24] Plaintiff admits the validity of the Eaton County Fixture Filing, does not challenge the perfection of the lien on the property described on that filing, and has not sought to use its avoidance powers under § 544(a). Under these circumstances, a separate adversary proceeding was not required, and the cases cited by Defendants in support of this argument are all inapposite.

[25] Application of this legal principle to the seven Representative Assets located in Ohio (Representative Asset Nos. 26, 27, 28, 30, 38, 39 and 40) is further discussed in FOF ¶¶ 578 to 710 and Section I.C.3 below.

particular business and not the realty. *Pine Creek Farms v. Hershey Equip. Co.*, No. 96CA2458, 1997 WL 392767, at *3 (Ohio Ct. App. July 7, 1997). 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 Jarvis v. Wells Fargo Fin. (In re Jarvis)*, 310 B.R. 330, 338 (Bankr. N.D. Ohio 2004) (holding that farrowing and gestation structures benefited the swine business, not the realty, because not easily used by a future hypothetical purchaser); *Litton Sys., Inc. v. Tracy*, 728 N.E.2d 389, 392 (Ohio 2000) (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* (*Standard Oil*), 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, 329

(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).[26]

Seeking to escape the consequences of this principle of Ohio law, Defendants contend that *Mid-Ohio* "reaffirmed a long standing principle of Ohio law: in Lien disputes, industrial machinery is deemed a fixture when 'integral and necessary' to the premises." Defs. Amended Pre-trial Brief 16. *Mid-Ohio*, however, is on its face not applicable to the current issue.

Mid-Ohio is specifically a mechanic's lien case, not a more general "lien case" as Defendants argue. The case revolves around not the interpretation of the three-part fixture test but rather the interpretation of the Ohio mechanic's lien statute, Ohio Rev. Code Ann. ("**R.C.**") § 1311.02 (West 2007). The court in *Mid-Ohio* never decided whether the paint line at issue was a fixture or not, instead generally concluding that the lien was enforceable because "the work and materials Mid-Ohio furnished are, as a matter of law, improvements to a building, fixture, appurtenance, or other structure." *Mid-Ohio Mech., Inc. v. Carden Metal Fabricators, Inc.*, 169 Ohio App. 3d 225, 232 (2006). Despite what Defendants suggest, the court did not decide under which category—building, fixture appurtenance, or other structure—the paint line fell.

In fact, the *Mid-Ohio* court based its decision exclusively on the definition of "structure" and "appurtenance." The court primarily relied on *Tri-State Crane*, the only other case to interpret the revised R.C. 1311.02, which held that a dredge was a structure subject to a mechanic's lien. *Mid-Ohio*, 169 Ohio App. 3d at 231. Notably, and as *Mid-Ohio* recognizes,

[26] 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.

Tri-State Crane did not apply the three-part *Teaff* test and did not address whether the dredge was a fixture. *Id*. citing *Tri-State Crane Rental Inc. v. Watson Gravel, Inc.*, Nos. C-030392, 2004 WL 534829, at *2 (Ohio Ct. App. March, 19, 2004). In addition to relying on *Tri-State Crane*, the *Mid-Ohio* court also looked at the inclusion of "appurtenance" in the Revised Code definition and how this word, like "structure," is a general and inclusive word and is thus broad enough to include the paint assets at issue. *Id*. at 232.

The court itself specifically acknowledged that its holding is limited to the mechanic's lien context:

> We hold that the use of such general and inclusive words as "structure" and "appurtenance" demonstrates the legislature's intention to permit mechanic's liens in a broad variety of improvements to real estate. Ohio has had mechanic's lien statutes since at least 1823. A mechanic's lien is often the only security for payment a subcontractor or material man has for material and work provided to a contractor. The legislature intended to provide all those involved in the construction industry, from the project owner to the subcontractors and material men, the stability and consistency necessary for them all to conduct their business.

Id. Accordingly, although it contains some limited dicta about the three-part fixture test,[27] the *Mid-Ohio* decision is not helpful in this case and certainly is not dispositive. Moreover, even should the Court find *Mid-Ohio*'s holding in some way informative, the majority of paint assets at issue in that case are assets that Plaintiff concedes are fixtures, including a paint oven and sludge removal equipment. *Mid-Ohio*, 169 Ohio App. 3d at 227.

The only other cases relied on by Defendants are very old—*Brennan v. Whitaker,* 15 Ohio St. 446 (Ohio 1864); *Whitaker-Glessner Co. v. Ohio Savings Bank & Trust Co.*, 22 F.2d 773 (6th Cir. 1927); and *Willis v. Beeler*, 90 F.2d 538 (6th Cir. 1937)—and are of limited

[27] For example, although acknowledging that the *Tri-State Crane* court did not look at the issue of whether a dredge was a fixture, the *Mid-Ohio* court speculates, without analysis or reference to facts, "It appears to this court that the dredge might well have met the definition of a fixture as well." *Mid-Ohio,* 169 Ohio App. 3d at 232. Such an off-hand comment should not be the basis for this Court to disregard the extensive fixture analysis performed by other courts.

importance in light of the multitude of cases to have subsequently interpreted and applied the three-part fixture test under Ohio law. *See, e.g.*, *In re Jarvis*, 310 B.R. at 336 (stating in the priority of competing claims context that personal property is not adapted under Ohio law for purposes of the *Teaff* test if the chattel is specific to the type of business conducted on the realty); *Gen. Elec. Co.*, 2001 WL 1647158, at *3 (applying same standard to statute of limitations context); *G&L Invs*, 1998 WL 553213, at *3 (applying same standard to contract context); *Pine Creek Farms*, 1997 WL 392767, at *3 (applying same standard in the statute of limitations context); *Standard Oil*, 60 N.E.2d 52 (applying same standard to tax context); *Zangerle v. Republic Steel Corp. (Republic Steel)*, 60 N.E.2d 170 (Ohio 1945) (same); *Roseville Pottery*, 77 N.E.2d 608 (same). The Court should reject Defendants' solution of simply disregarding these decisions as somehow inconsistent with controlling Ohio authority. Defs. Pre-trial Brief 17 n.10.

Moreover, two of the cases cited by Defendants were decided in the context of a mortgage that covered both machinery and equipment *and* the realty to which they were attached. In both cases, the Ohio court found an intention to make the equipment part of the realty from the fact that the mortgage for the building specifically referred to equipment at issue. *Willis*, 90 F.2d at 541 ("An intention to impress the character of fixtures upon this machinery is shown here by the specific reference to the equipment in each of the three mortgages"); *Whitaker-Glessner*, 22 F.2d at 774 (noting that the mortgage covered all property in connection with the facility and the machinery and equipment were in the plants at the time the mortgages were given).[28] In contrast, here, the interest in the machinery and equipment was given without the interest in the buildings or land, leading to the opposite conclusion as to GM's intention.

[28] The issue in *Brennan v. Whitaker*, the third case, primarily discusses whether a mortgagor of the realty without knowledge of a pre-existing chattel mortgage on a boiler is nonetheless subject to the existing mortgage. Although the fixture status of the boiler is discussed, the primary issue is the priority of the legal interests. Here, there is no such consensus on the status of the Representative Assets.

Defendants are correct that several of the key Ohio cases that address the three part fixture test have been decided in the tax context. *See Standard Oil*, 60 N.E.2d 52; *Republic Steel*, 60 N.E.2d 170; *Roseville Pottery*, 77 N.E.2d 608. All three cases, however, interpret *Teaff* and apply the three part fixture test under Ohio common law. *Standard Oil*, 60 N.E.2d at 513-14; *Republic Steel*, 60 N.E.2d at 542; *Roseville Pottery*, 77 N.E.2d at 93. For example, in *Standard Oil*, the Ohio Supreme Court stated in relevant part:

> As to all the items involved herein, the evidence is undisputed as to their nature, use to which they are put, and their moveability. Nearly all the machinery and equipment are specially designed for the refinery industry and are not adapted for use by any other industry. They were installed solely for the purpose of serving the appellant's manufacturing enterprise and to furnish the processing necessary for the manufacture of its products and were not installed for the purpose of serving or benefiting the real estate. Some of the items are not even annexed to the real estate in any manner. Every item that is attached is readily removable without injury to itself or to the realty, either as a unit or by disassembling, and some have been moved. Those which, by reason of their size would have to be dismantled, can be reassembled in another place. If the industry moved[,] all of said items would be moved with it.

Standard Oil, 60 N.E.2d at 59. Nothing in the holding in *Standard Oil* provides any indication the Ohio Supreme Court intended to limit it to the tax context. Accordingly, in deciding the status of the assets located in Ohio, this Court should rule that assets that benefit GM's business, and not the realty more generally, are not fixtures.

2. An Asset Is Not a Fixture Unless There Are Objective Facts Showing Intent on the Part of the Annexing Party to Make the Asset a Permanent Part of The Realty

Under the U.C.C., a fixture is personal property that has become so "related to particular real property" as to become part of it. *See* N.Y. U.C.C. § 9-102(a)(41) (McKinney 2014).[29] In determining whether personal property has become so related to real property as to be treated

[29] The Term Loan 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. *See* Term Loan Collateral Agreement § 1.01 and Term Loan Agreement § 1.01.

like real property, Michigan and Ohio courts apply a three-part test that on a case-by-case basis looks at the asset's method of attachment, the adaptation of the asset to the realty, and most importantly, whether the annexing party intended to make the asset a permanent part of the realty. *See generally West Shore Servs., Inc. v. Dep't of Treasury*, No. 321085, 2015 WL 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."); *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.").

Under this three-part test, and consistent with the language of the U.C.C., goods remain as personal property unless specific, objective facts demonstrate that the annexor intended the asset to become a permanent accession to the realty. *See, e.g.*, *Gen. Elec. Co.,* 2001 WL 1647158, at *3 ("Any doubt must be resolved in favor of finding the item personal property."); *Pine Creek Farms,* 1997 WL 392767, at *3 ("[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 (Mich. 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.").

The pivotal question in fixture-classification 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 of Mich., Inc. v. City of Roseville*, 425 N.W.2d 53, 57 & n.13 (Mich. 1988) (stating that significance of attachment depends on intention of attaching party, not the manner of attachment); *see also Controls Grp., Inc. v. Hometown Commc'ns Network, Inc.*, No. 266347, 2006 WL 1691346 (Mich. Ct. App. June 20, 2006) ("Accession requires more than bolting a piece of equipment to the floor to serve a particular purpose, whether permanently or indefinitely."). The key issue is whether objective facts indicate intent to make the items part of the realty.[30]

a. Defendants Failed to Consider or Even Acknowledge Objective Evidence Regarding GM's Intent

As this Court clarified in its April 7, 2017 *in limine* order on the topic (Adv. Pro. Dkt. 948) and as Defendants acknowledged in their eve-of-trial brief, evidence about GM's subjective intent is not relevant to the three-part fixture test. Defendants concede that "testimony that GM had the intent to install assets permanently [is] inadmissible state of mind testimony." Adv. Pro. Dkt. No. 966 at 1 (Defendants' Memorandum of Law in Support of the Admissibility of Testimony of Former GM Employees Probative of GM's Intent, dated April 23, 2017) ("**Defendants' MOL in Support of Intent Testimony**"). Consistent with the leading cases in Michigan and Ohio, this Court has explained that what is relevant is "testimony about objective indicators of GM's intent at the time of annexation" of each of the Representative Assets. Adv. Pro. Dkt. No. 948 at 7.[31]

[30] Although Defendants argue for a presumption of permanence when GM annexed an asset it owned to realty that it owned, such a presumption, even if applicable, is not dispositive. Courts consistently analyze all relevant objective facts in deciding whether an asset is a fixture, even in those cases that apply such a presumption. *See, e.g.*, *In re Mahon Indus. Corp.*, 20 B.R. at 840 (noting the presumption but nonetheless analyzing the attributes of the crane and the agreement between the parties to reach a fixture determination).

[31] *See West Shore Servs., Inc. v. Dep't of Treasury*, No. 321085, 2015 WL 4469666, at *2 (Mich. Ct. App. July 21, 2015) ("The surrounding circumstances determine the intent of the party making the annexation, not the annexor's

In reaching their opinions, however, Defendants' experts failed to consider essentially all of the relevant objective facts revealing GM's intent with regard to the Representative Assets:

- They failed to consider GM's eFAST data that provided information about how many assets were transferred between GM facilities over an approximately six-year period, even though a company's movement of similar assets suggests a lack of intent to permanently annex. *Controls Grp.*, 2006 WL 1691346 (finding "the fact that [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).

- They failed to consider GM's retirement data that showed when fixed assets were retired in relation to when they were installed, even though the removal of similar assets before the end of their useful lives suggests a lack of intent to permanently annex. *See, e.g.*, *Tuinier v. Bedford Charter Twp.*, 599 N.W.2d 116, 119 (Mich Ct. App. 1999) (defining permanence in part as whether an asset remains in place for its useful life).

- They failed to analyze the Maynards and Hilco auction data or any other sales data, even though the existence of a secondary market for similar assets suggests a lack of intent to permanently install. *Controls Grp.*, 2006 WL 1691346 (saleable nature of asset significant to fixture determination).

- They failed to consider New GM's tax treatment of the Representative Assets, even though courts find such treatment significant to determining intent. *Pine Creek Farms*, 1997 WL 392767, **3-4; *Controls Grp*., 2006 WL 1691346 (finding significant that presses taxed as personal property).

- They failed to consider documentation of New GM's policies and procedures with respect to relocation of assets, including the asset recovery governance board and accounting policies relating to the relocation of assets. *Cont'l Cablevision of Mich., Inc.*, 425 N.W.2d at 58 (looking at service agreement and accounting and business practices to infer intent).

- They failed to consider evidence that New GM leased machinery and equipment separately from the realty, even though contemporaneous agreements are considered the most indicative of intent. *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

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").

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);

- They failed to analyze whether Old GM sold and marketed similar machinery and equipment separate and apart from the realty when GM facilities were closed, even though, in evaluating whether an asset is a fixture, courts look to whether a company would expect to sell the asset with the realty. *Controls Grp*., 2006 WL 1691346.

b. Defendants Instead Applied a Bright-Line Rule That GM Intended All Manufacturing Assets to Be Permanent

Instead of looking at all of this objective evidence relevant to the issue of how GM in fact treated assets similar to the Representative Assets, Defendants' fixture witnesses offer an overarching theory: virtually all manufacturing assets installed at Old GM plants are fixtures because, as a matter of corporate planning, Old GM generally intended to keep its manufacturing assets in use for as long as possible. For example, in addition to opining about eleven of the Representative Assets, Eric Stevens, the first witness called by Defendants to testify at trial, also was presented as an "overview witness" with respect to Old GM's manufacturing-asset planning process generally. In addition to Mr. Stevens, Defendants had Mr. Buttermore and Mr. Pniewski testify to provide an overview of Old GM's planning process. Those two witnesses testified generally and did not address themselves to any of the Representative Assets.

All of the planning-related testimony presented by Defendants spoke broadly and generally about all of Old GM's manufacturing assets, and was not specific to any of the Representative Assets. At trial, for example, Mr. Stevens testified in the extreme that there "was no consideration of the possibility or the intent to remove during design or installation phases of any of the assets that we were responsible for." Stevens Test. 25:3-9. According to Mr. Stevens' testimony about GM's general corporate intent (which he reframes as "design principle"

testimony to avoid the corporate intent label), the overarching goal was always the "specification" of "equipment and [] installation methods [to ensure] that those assets would continue in place to operate for as long as they could as long as the useful lives allow." Stevens Test. 25:10-18.

Mr. Buttermore did not testify about any particular asset. Instead, in his own words, he was "offering an opinion of what I believe our – me and my fellow executives who put the product programs in place, what we intended at the time we did it." Buttermore Test. 1313:3-8. As shown at trial, to make his opinion seem like something other than the general, subjective corporate intent testimony that it is, Mr. Buttermore simply sprinkled the word "objective" into his written direct testimony, in order to differentiate it from his earlier expert report. Buttermore Test. 1314:17-1316:21.

Mr. Pniewski also did not testify about any specific asset. Pniewski Test. 1271:8-11. Again, in describing his recollection of GM's planning process, he claimed that GM only ever expected its assets to be permanently in place: "I would say it is the only realistic assumption when you are making a plan, planning for success, all right. And it is our intent that, you know, when we put something in place, it's our intent that it stays there until it can't be used anymore." Pniewski Test. 1280:10-22. For the reasons discussed below, all of Defendants' generalized design and planning testimony is unreliable, irrelevant, and unhelpful to the Court.

c. Courts Do Not Look at General Corporate Planning Evidence When Making Fixture Classification Determinations

In Defendants' MOL in Support of Intent Testimony, Defendants contend that their experts' testimony about GM's corporate planning constitutes objective facts as to what GM

generally intended when it installed its manufacturing assets.[32] Adv. Pro. Dkt. No. 966 at 3. Despite what Defendants argue, however, the type of testimony about general corporate planning offered by Defendants' experts is not relevant to the three-part fixture test as outlined under Michigan and Ohio law.

None of the cases cited by Defendants analyzes general corporate planning as a relevant consideration. Instead, all of the cases cited by Defendants turn on an evaluation of the objective characteristics of the contested asset and all other facts that shed light on the annexing party's intent. For example, in *In re Mahon Industries* the court looked at (1) the history of the specific building; (2) how the cranes were conveyed with the real estate; (3) the agreement between the parties as part of the mortgage to maintain the cranes as fixtures; and (4) how the other party did not contest that the rails upon which the crane traverses are fixtures. 20 B.R. 836, 840. In finding an intent for the asset to be permanently attached to the realty, the court did not rely on any general testimony about corporate planning or manufacturing engineering design principles of the sort offered by Defendants' experts.

None of the other cases cited by Defendants suggests that general corporate policy is ever relevant to what a party intended as to the specific assets at issue. *Dehring* v. *Beck*, 110 N.W.

[32] The Court should also not credit Defendants' corporate planning evidence because it is nothing more than a disguised argument that the Court already rejected. As laid out in Plaintiff's motion *in limine* to exclude the former GM employees, Mr. Stevens (and Mr. Buttermore) opined in his expert report that the "overwhelming norm was that once a fixed asset was installed it was expected to be operated in place until the end of its useful life." Memorandum of Law in Support of Plaintiff's Motion to Exclude Testimonies and Expert Reports of Former GM Employees (Adv. Pro. Dkt. No. 934), at 17. The four other experts in turn specifically relied on this statement from Mr. Stevens in reaching their opinions in their expert reports. *Id*. at 22 n.12 (noting string cites of the reliance); Declaration of Eric B. Fisher in Support of Plaintiff's Motion to Exclude Testimony and Expert Reports of John Buttermore, Dan Deeds, Max Miller, Eric Stevens, and Steve Topping, Ex. B (Expert Report of Eric Stevens ¶ 41) (filed under seal). Because the Court excluded such testimony as impermissible corporate state-of-mind testimony and irrelevant testimony about GM's subjective intent, in their written directs the former GM employees now assert that "as a matter of corporate planning," GM intended to keep its manufacturing assets in place for as long as possible. *See, e.g.*, Buttermore Decl. ¶ 40; Stevens Decl. ¶ 39. Having formed their opinions on the basis of an improper assertion about GM's subjective corporate intent, these same opinions cannot now be saved by simply claiming that they are now based on "corporate planning," instead of subjective corporate intent.

56, 57 (Mich. 1906) (determining parties' intent based on terms of real estate mortgage and the particular attributes of the assets in question); *Peninsular Stove Co. v. Young*, 226 N.W. 225, 226 (Mich. 1929) (determining intent of annexing party based on whether the specific asset benefits the use of the land generally); *Mich. Nat'l Bank v. City of Lansing*, 293 N.W.2d 626, 627-28 (Mich. Ct. App. 1980), *aff'd*, 322 N.W.2d 173 (Mich. 1982) (determining intent of annexing party based on method of attachment of asset and the relationship between the specific asset and the use of the realty); *Tuinier v. Bedford Charter Twp.*, 599 N.W.2d 116 (Mich. Ct. App. 1999) (determining in tax context the annexing party's intent based on the specific attributes of the asset, whether the land was specially adapted to use as a greenhouse, and lack of movement of the asset); *In re Cliff's Ridge Skiing Corp.*, 123 B.R. 753, 759 (Bankr. W.D. Mich. 1991) (determining annexing party's intent—an issue not directly disputed by the other party—through planning documents relating to financing agreement and the particular attributes and method of attachment of the chairlift).[33] The cases cited by Defendants in fact demonstrate how courts in Ohio and Michigan consistently apply a thorough and asset-specific analysis when making fixture determinations.

[33] *Ray* v. *GTE Prods. Corp.*, 15 F.3d 179, 2 (5th Cir. 1994) (determining an asset was an improvement to real property for statute of repose purposes because the electrical switch was necessary to use of the building); *Enerquin Air, Inc.* v. *State Tax Assessor*, 670 A.2d 926, 929-30 (Me. 1996) (determining annexing parties intent based on relationship between the asset and use of the realty and the particular methods of attachment and attributes of the asset).

d. Defendants' General Planning Evidence Is Not Relevant

The corporate planning evidence introduced by Defendants is irrelevant to the fixture determination because it does not relate to the time of annexation and thus does not relate to actual choices that were made about the particulars of how to install the Representative Assets or assets like them. *See* April 7, 2017 *in limine* order (Adv. Pro. Dkt. No. 948) at 7 (what is relevant is "testimony about objective indicators of GM's intent *at the time of annexation*") (emphasis added). As Mr. Stevens acknowledged at trial, he was out of the country during the years leading up to the opening of the Lansing Delta Township Assembly plant and was uninvolved in the process of installing these assets at the plant. His involvement in the planning process predates the annexation of assets at the Lansing Assembly Plant by more than two years. In general, as Mr. Stevens explained, the planning process occurs years before any asset is actually annexed at a plant. Stevens Test. 1271:12-1272:18; *see also* Pniewski Test. 1274:18-1275:5. Because Mr. Stevens' planning testimony does not shed light on the process of annexing the Representative Assets or even generally relate to the time of annexation, it is irrelevant.

Similarly, at trial, Mr. Pniewski conceded that his testimony was about the "planning process at General Motors" and not about the "process of installing assets." Pniewski Test. 1274:11-17. He also acknowledged that planning happens years before installation. Thus, for example, although Mr. Pniewski states he was involved in planning for products eventually launched at the Lansing Assembly Plant, his involvement occurred "before it was decided that those products would be made at a new facility in Lansing." Pniewski Test. 1276:10-15. This is consistent with Mr. Stevens' planning experience. At trial, on direct examination, Mr. Stevens stretched to assert that he was involved in planning for assets related to the six-speed line at Warren Transmission. Stevens Test. 65:10-66:11. However, on cross-examination, Mr. Stevens clarified that GM's "decision to allocate the six-speed line to the Warren Transmission facility as

opposed to some other facility happened while [he was] in Europe." Stevens Test. 201:20-24. In other words, these executives were involved in high-level product planning. They were not involved in planning for the installation of manufacturing assets at particular plants. Their testimony is of limited to no use with respect to the issue of whether 40 specific assets located in specific plants are or are not fixtures.

According to Mr. Stevens, this general corporate intent to install assets to work for a long time has become more pronounced over the past couple of decades as manufacturing assets have become more flexible in their range of uses and more integrated.[34] But this testimony sheds no light on the only relevant issue here: objective facts concerning annexation of the assets from which this Court may infer Old GM's intent at the time of annexation.

e. Defendants' General Planning Testimony Is Not Reliable

The planning evidence offered by Defendants is not corroborated by any documents and is so general as to be almost entirely unhelpful. For example, there is not a single planning document admitted into evidence by Defendants that confirms any statement made by any of Messrs. Stevens, Buttermore and Pniewski about the process of planning for manufacturing lines at Old GM plants. According to Mr. Stevens, they did not even try to seek corroborative documents. *See, e.g.*, Stevens Test. 237:12-25 (conceding that Defendants did not seek planning documents involving the movement of assets or accounting policies concerning asset movement).

[34] The difficulty in Defendants' general approach is embodied in the Lean-Agile-Flex concept. Lean-Agile-Flex is a powertrain concept that only applies to powertrain assets. Buttermore Decl. ¶ 35 (discussing how Lean Agile Flex strategy was implemented at GM powertrain facilities); Deeds Decl. Ex. A at 10 (describing Mr. Buttermore as "an architect of Lean, Agile, Flex, the powertrain component of GM's Global Manufacturing System"). At trial, however, Defendants attempted without basis to extend the concept of Lean-Agile-Flex equipment to all of the Representative Assets without regard to whether the assets are powertrain assets and without regard for whether the assets in question actually exhibited characteristics of Lean-Agile-Flex equipment. This is another example of the perils associated with Defendants' broad-brush approach to the fixture-classification issues.

All of the planning evidence at trial came from witnesses paid by Defendants. None of it is supported by any Old GM or New GM documents or testimony.[35] The fact that this planning evidence came from paid consultants, as opposed to coming from Old GM or New GM, should enter into this Court's evaluation of what weight to assign to the evidence. Defendants had every discovery tool at their disposal to obtain planning documents and third-party planning testimony to aid their case. Their utter failure to seek or obtain any such evidence is telling and further calls into question the reliability of the paid-for planning testimony offered by Defendants at trial.

Unlike Mr. Goesling, Defendants' experts have never before worked with the fixture test that they were asked to apply here. *See, e.g.*, Stevens Test. 205:7-24; Deeds Test. 546:19-23; Thomas Test. 831:11-22. As a result, Defendants' experts were particularly dependent on counsel for instructions about what to consider and what not to consider. *See, e.g.*, Stevens Test. 202:22-203:4, 203:18-25, 261:6-262:11 (describing how test and all criteria were supplied by counsel); Deeds Test. 549:2-12. And even with such guidance, the experts were not able to consistently and meaningfully apply the three-part fixture test. For example, at odds with Defendants' other experts, Mr. Topping stated that when determining whether an asset bolted to the realty was attached for purposes of the fixture test, he would look at adaptation and "the intent of General Motors as well when I am determining annexation." Topping Test. 962:4-14. Mr. Topping also could not definitively say whether an asset attached via cement or concrete was necessarily attached for purposes of the three-part fixture test. Topping Test. 963:23-964:6.

[35] Stevens claims he was involved in "codifying" GMS. Stevens Test. 419:15-22. However, no GMS codification documents were produced in this case. Stevens Test. 418:8-12.

Further, because their collective work began from the point of view that all installed manufacturing assets at GM are intended to be permanent, Defendants' experts' classification conclusions were essentially predetermined. They then set about marshalling facts to support their preexisting views about GM's intent for its manufacturing assets to be permanent. Because of their approach, which focused as a starting point on what these experts could recall about GM's planning process, selection bias and confirmation bias intruded in a significant way into their work and Defendants' experts lacked even basic curiosity about the many factors that Mr. Goesling considered to be relevant. They also were incurious about most of the information produced in discovery, relying instead on what they could recall about their time as former executives and employees of GM.

Defendants' experts' approach failed to take into account many relevant factors. For example, in offering their opinions, Defendants' experts never even considered the issue of whether the Representative Assets are the kinds of assets that would typically be conveyed along with the real property. Defendants' experts consistently acknowledged that, in reaching their opinions that all of the Representative Assets are fixtures, they did not consider any evidence related to plant sales or closures, as such events were "extraordinary." *See, e.g.*, Stevens Test. 344:10-21, 348:7-13, 349:6-12; Topping Test. 912:16-21, 993:8-994:19; Miller Test. 1045:10-1046:7, 1048:11-1049:7; Pniewski Test. 1278:5-14. Defendants' characterization of plant closings as extraordinary is undermined by the fact that issues concerning plant closings are expressly anticipated and addressed in GM's accounting policy manual (FOF ¶ 479), as well as the substantial number of GM facilities that actually have closed over the past few decades (FOF ¶¶ 475-82).

Similarly, Defendants' experts dismiss as "extraordinary" the movement of assets due to a host of different reasons, including: consolidation of manufacturing operations (Miller Decl. ¶ 161); plants that sat idle "as other needs were proceeding in other plants" (Stevens Test. 348:7-13); allocation of new products to plants (Stevens Test. 349:6-12); and plants that suffered from a loss of demand for the vehicles they were manufacturing (Topping 993:20-994:19). There are so many different business reasons that have caused the movement of manufacturing assets at GM. This history shows that, far from extraordinary, the movement of assets is simply a necessary feature of the U.S. automotive business.

Evidence about whether assets would typically be considered part of the realty in a transaction between industry players in a plant sale or closure situation is of central importance to the question of whether a good, like a robot or a machining center, has become an accession to the realty. *Controls Grp.*, 2006 WL 1691346. Yet, because GM's planners supposedly did not plan for plant sales or closures or other so-called "extraordinary events," Defendants' experts did not consider such events or the wealth of information made available in discovery about such events in reaching their opinions.

When it came to the movement of assets, Defendants' witnesses claimed that they only considered asset movements if those movements occurred in the "ordinary course of business." Deeds Test. 609:22-610:8; *see also* Deeds Decl. ¶ 184. And even when asset movement occurs in the ordinary course of business, and even when the movement involves one of the actual Representative Assets, such movement is disregarded as an "unexpected circumstance." Miller Decl. ¶ 158 (discussing the "unexpected circumstance" of the decision to expand the body shop that led to the relocation of the Opticell Robotic System, Representative Asset No. 10). Indeed, Mr. Miller did not even deem relocation of the very asset about which he was offering an opinion

to be worthy of mention in his initial report. Miller Test. 1221:18-1222:18. This movement-in-the-ordinary-course-of-business standard is not imposed by the case law – and it is a standard that excludes much meaningful evidence of asset movement. Obviously, Old GM was not in the practice of routinely rearranging its fixed manufacturing assets. But there is nonetheless significant testimony and evidence in this case about the movement of manufacturing assets under circumstances relating to Old GM's business. For example, Mr. Topping described how a paint shop conveyor was removed from GM's Oklahoma City facility when the facility was idled because of low demand for the SUV it was building. Topping Test. 993:8-994:19. However, by defining the ordinary course of business exclusively as the operation of manufacturing assets in place, Defendants' experts were able to dismiss this and similar evidence of asset movement as not relevant.

Relatedly, because Defendants' experts focused on GM's "ordinary course of business," this perspective skewed their work in other ways as well. For example, Defendants' experts always based their estimates and analysis on removing one piece of equipment from a crowded facility in active operation. *See, e.g.*, Deeds Test. 601:24-603:13. At trial Mr. Deeds acknowledged that his removal estimates would "look very different" if all of the manufacturing equipment was being removed from a facility that was being sold to a new company. Deeds Test. 603:14-25. Similarly, Defendants' experts included in the cost of removal of a particular asset the lost profits stemming from this removal. For example, when estimating removal costs for the B3-5 press, Mr. Miller included the significant decrease in capacity at Lansing Regional Stamping plant from the removal of the press, including the millions of dollars GM would have to spend to buy stamped parts from third parties and the loss in revenue from any resulting decrease in vehicle production at a cost of $35,000 per vehicle. Miller Decl. Ex. B ¶ 38.

A good example of how Defendants' experts' focus on their undocumented recollection of GM's planning practices led them to disregard important evidence is their failure to consider testimony and documents produced by GM that directly concern issues of asset movement. For example, before trial, Mr. Stevens had not requested or considered evidence about GM's Asset Recovery Governance Board ("**ARGB**") or seen the pertinent testimony of current GM employee Jeffrey Niszczak about the ARGB. Stevens Test. 236:17-237:20. According to Mr. Niszczak, the ARGB helps to implement "GM's policy to reuse assets or make the best use of its assets." Stevens Test. 229:9-230:22. Similarly, Mr. Stevens (and all of Defendants' experts) failed to consider Joint Exhibit 17, which is GM's formal accounting policy "encourag[ing] the transfer of fixed assets within GM legal entities," in order to "secure the maximum use" of GM's fixed assets. Stevens Test. 233:10-234:19; JX-0017-38 (General Motors Corporation, Accounting Policy, Real Estate, Plant and Equipment, Section 32, dated June 2009). As it turns out, GM actually does have written policies and internal boards responsible for the relocation of manufacturing assets. Mr. Stevens and the other experts hired by JPMorgan did not consider any of that evidence; nor were they the least bit curious about it. Defendants' experts did not seek "any documents about accounting policies concerning the movement of assets," and they did not seek any "planning documents about the movement of assets within GM." Stevens Test. 237:12-25. To reiterate, there is not a single planning document in evidence to corroborate any of the general planning testimony offered by Defendants' experts; nor is there a single document confirming that Messrs. Stevens, Buttermore or Pniewski played a role in GM's planning process; nor is there a single planning document in evidence related to any of the plants where the Representative Assets are located (or any other GM plant).

And even once Plaintiff brought to light, through discovery from GM, accounting policy evidence and evidence about the ARGB, rather than evaluate such evidence, Defendants' experts simply dismissed it as relating to an "extraordinary" situation because planners do not plan for assets to be reused. But clearly others at GM do. And given GM's history of plant closures, products that did not go as planned, and manufacturing assets that quickly became obsolete or outdated, it seems perfectly reasonable that, in addition to those at GM (like Mr. Pniewski when he was a GM executive) who claim to have always and everywhere planned for permanence, others at GM planned for what happens when those best-laid plans go awry. As Mr. Goesling's more comprehensive review of all relevant evidence demonstrates, with respect to many kinds of assets, even as GM planned for the assets to stay in place for as long as possible, GM simultaneously made provisions for how those assets could be efficiently reallocated if and when the need should arise due to shifts in demand, product materials, regulations, the economy or a host of other factors. As explained in greater detail below, these kinds of substantial changes in manufacturing assets occurred with some regularity over the course of GM's history, and particularly its recent history.

f. Defendants' General Planning Testimony Simply Ignores All Contradictory Evidence

The lack of reliability and relevance of the generalized, uncorroborated testimony about Old GM's intent to annex its assets permanently is underscored by how the Defendants' experts dismiss as "extraordinary" all evidence that shows that assets were in fact moved before the end of their useful lives. There is substantial, specific factual evidence about frequent and significant changes in manufacturing equipment at the plants where the Representative Assets are located and specific steps that GM took to plan for asset movement and plant closures, and yet Defendants' experts dismiss all evidence of asset movement as caused by extraordinary events

that were never anticipated. Messrs. Stevens, Buttermore and Pniewski's generalized, undocumented recollections about the planning process at Old GM are challenged by the objective reality that the automotive market has been subject to all kinds of change. The facts suggest that, whatever planners may have planned, Old GM had to, and did, remain alert to the possibility of significant changes to its manufacturing assets; and that Old GM had to, and did, relocate and remove manufacturing equipment in response to all kinds of market changes and pressures.

The objective facts concerning those of the Representative Assets that Plaintiff has determined to be non-fixtures demonstrate that Old GM was careful to maintain the flexibility to relocate or retire assets as the need arose. These facts undermine Defendants' claim that the manufacturing assets were intended to be permanent. Instead, the facts are more consistent with Mr. Goesling's understanding that "change is just inevitable. And I believe that GM has to recognize that that's going to happen, even as they put assets in place. That obviously they want them to last as long as they possibly can, but something is going to change." Goesling Test. 3321:15-3324:3; *see also* Pniewski Test. 1279:6-1280:22 (agreeing with Mr. Goesling that change is inevitable but concluding that the expectation of permanence is "the only realistic assumption when you are making a plan, planning for success").

The actual experience of Defendants' experts confirms that there were regular changes to manufacturing assets installed at GM plants, including at plants where the Representative Assets are located. For example, over the course of Mr. Deeds' 39-year career with GM, GM transitioned from making 3-speed transmissions to 4-speed transmissions, and then from 4-speed transmissions to 6-speed transmissions. Deeds Test. 567:22-572:5. These changes in transmission products required significant changes in manufacturing assets in the

transmission plants where Mr. Deeds worked, including Warren Transmission. Deeds Test. 567:22-572:5. And when Mr. Deeds left GM, it was moving towards higher speed transmissions. Deeds Test. 568:15-568:19. Mr. Deeds himself was involved in the removal of manufacturing equipment on seven or eight different occasions. Deeds Test. 572:6-572:10. He removed assets related to the manufacture of rear-wheel drive transmissions to make way for assets to manufacture front-wheel drive transmissions at the Willow Run plant. Deeds Test. 572:15-25. He removed virtually all of the three-speed transmission manufacturing assets from the Windsor plant, including assembly lines, conveyors, machining transfer lines and gear machines; and Mr. Deeds described these changes as driven by regulation and fuel economy, acknowledging that assets were removed before the end of their useful lives. Deeds Test. 573:12-575:2. He also removed assets from the Romulus plant to make room for new V8 manufacturing assets at that plant (Deeds Test. 575:3-575:20); and at the Flint V6 plant, he removed manufacturing assets to make room for new assets to manufacture a crankshaft product. Deeds Test. 575:21-576:15. At Flint North, Mr. Deeds was involved in removing torque converter manufacturing equipment when the facility was not shutting down. Deeds Test. 576:16-577:7. Then, at Livonia Engine, he removed manufacturing assets related to a V8 truck engine crankshaft as well as assets related to the manufacture of a V6 engine and these assets were either sold or moved to other GM plants. Deeds Test. 577:8-579:14. Mr. Deeds did a second stint at Willow Run, where he was again involved in removing manufacturing assets. Deeds Test. 579:15-580:9. He also was involved in removing the 4-speed equipment from the Warren Transmission facility at the end of his career with GM. Deeds Test. 580:10-580:14. Many of the removed assets were either relocated within GM for reuse or sold to others for reuse. None of this experience is described in Mr. Deeds' written direct testimony; nor was it

taken into account by Mr. Deeds or any of the other experts hired by JPMorgan with respect to their fixture analysis.

Similarly, the story of the Defiance, Ohio foundry is a tale of substantial changeover in the mix of manufacturing assets due to important shifts in materials and processes.
Over the last 15 years, Defiance has been transitioning from iron to aluminum production as a result of the need to reduce vehicle mass to comply with fuel economy requirements and in response to consumer demand for higher gas mileage. FOF ¶ 580. Since the manufacturing equipment used to make aluminum parts is different from that used to manufacture iron parts, over the years GM has had to install new equipment for the production of aluminum components. FOF ¶ 583.

In addition, Mr. Thomas testified about how Defiance not only changed from iron to aluminum production but, also within this same time period, changed from the lost foam aluminum process to the precision sand aluminum process. FOF ¶ 585.

In addition to equipment changeover in connection with Defiance's shift to aluminum, there have also been specific instances of equipment changeover at Defiance. For example, in 2007, GM installed $35 million of new machinery and equipment at Defiance in connection with the relocation of the malleable iron business from a closing facility in Saginaw, Michigan. FOF ¶¶ 592-93. Upon installation, GM knew this would be a short-lived production line, and, in fact, three years after installation, the line ceased production and the process of removing the machinery and equipment began. FOF ¶¶ 594-602.

Again, none of this evidence factors into the analysis performed by Defendants' experts.

g. Defendants' Theory Leads to an Extreme View of What Is a Fixture

Defendants assert that the business purpose of GM plants is "to efficiently and cost-effectively mass produce automobiles." Defs. MOL in Supp. of Intent Test. at 3 (Adv. Pro. Dkt. No. 966). To endorse this theory, however, would be to establish a bright-line rule that a company could intend for all attached assets that assisted in any way in the manufacturing process to be fixtures. No court has defined the category in such sweeping terms. Courts recognize that the fixture 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.

Although Defendants' witnesses had clearly been prepared to testify that not all manufacturing assets are fixtures, the non-fixture examples they provided only serve to demonstrate how extreme their view of the fixture category really is. For example, when asked whether he would consider any asset that is installed as part of an integrated manufacturing line

to be a fixture, Defendants' expert Daniel Deeds resisted, arguing that a self-guided vehicle would be an example of a non-fixture. Deeds Test. 545:15-546:18. This suggests that, in the view of Defendants' experts, an asset related to a GM manufacturing process would literally need to be on wheels and in motion, in order for it to be considered a non-fixture. *See also* Deeds Test. 612:24-613:11 (saying that he "wouldn't necessarily agree" that maintenance shop tools, such as a drill press or belt sander, are fixtures); Miller Test. 1153:17-1154:9, 1157:21-1158:8 (stating that dies and other "mobile equipment," such as small drill presses and bench grinders the size of TVs, would be the non-fixture assets in a stamping facility).

h. Mr. Goesling Is the Only Asset Expert to Analyze All Objective Facts That Were Learned in Discovery

In rendering his opinions about fixture classification, Plaintiff's expert, David Goesling, reviewed the documents and data produced by numerous non-parties, including New GM, and analyzed the data to draw inferences about GM's intent with regard to the Representative Assets. For example, Mr. Goesling used the three eFAST spreadsheets provided by New GM to systematically track those assets that GM transferred between its facilities from 2009 to 2015. PX-0022 (Transfer Analysis). Mr. Goesling used this data to analyze whether GM had relocated the Representative Assets or assets similar to the Representative Assets.

Similarly, Mr. Goesling isolated certain data from GM's retirement spreadsheet, produced by KPMG, to quantify GM's retirement of assets from 2004 to 2009. PX-0020 (Retirement Analysis). From Mr. Goesling's analysis, it is possible to track whether assets were in fact retired sooner than the useful life estimates provided by Defendants' experts.

In addition, from the secondary market data produced by Maynards and others, Mr. Goesling created a spreadsheet that allowed him to determine whether Old GM sold Representative Assets or assets similar to the Representative Assets. PX-0350 (spreadsheet

containing combined spreadsheets); PX-0348 (combined spreadsheet with groupings of asset sales similar to Representative Assets), PX-0347 (summary sheet of same).

Mr. Goesling also considered GM's tax classifications, which, according to deposition testimony from a New GM witness knowledgeable about this issue, were approached in a manner consistent with elements of the legal test that applies to this case. FOF ¶¶ 483-88. Mr. Goesling found that there was a "fairly decent" correlation between his fixture/non-fixture classifications and GM's tax classification. FOF ¶ 567.

Rather than provide an alternative analysis of their own, Defendants' experts have merely taken aim at the work Mr. Goesling has done in analyzing and summarizing the objective data regarding the Representative Assets that was made available during the course of discovery. Mr. Goesling is the only expert to have relied on precisely the type of objective and verifiable evidence that Michigan and Ohio courts hold to be determinative.

Finally, although not an exhaustive list of the evidence considered, Mr. Goesling also evaluated any documents that he could locate about the Representative Assets or similar assets, including, for example, the patent he identified that covers the Wheel Tire Assembly Machine (PX-0153), manuals concerning the installation and operation of the Representative Assets (for example PX-0222, PX-0223, PX-0224, PX-0225), and lease agreements entered into by GM with respect to the Representative Assets (PX-0220, PX-0283). Defendants ignore or dismiss all of this evidence.

3. The Representative Assets At Defiance And The Mansfield Press Are Not Fixtures Because They Are Not Essential To Use Of The Realty

As explained above in Plaintiff's Proposed Findings of Fact, seven of the Representative Assets are located in Ohio: six at GM's Defiance Foundry in Ohio (Representative Asset Nos. 26, 27, 28, 38, 39 and 40) and one press sold by RACER Trust from GM's Mansfield, Ohio

stamping facility (Representative Asset No. 30). Each of the Defiance assets is discussed more fully above in the Proposed Findings of Fact. FOF ¶¶ 577-703 (Defiance); FOF ¶¶ 704-10 (Mansfield Stamping). The evidence demonstrating that these assets are not fixtures is described there in more complete detail. In summary, the evidence shows the following:

- The Defiance assets primarily benefit GM's business and not the realty, as required under Ohio's application of the fixture test discussed in Section I.C.1 above. Rather, the Defiance assets are all specific to iron parts manufactured at the foundry. Even if this Court were to determine that the Defiance facility is only suitable for use as a foundry (though there is evidence that most of the facility is a standard heavy duty manufacturing building), Defiance could have an entirely different mix of foundry assets to make aluminum parts, and it would still be functioning as a foundry. Thus, the Defiance assets are tied to a specific manufacturing process and are not essential to use of the facility as a foundry.

- The Vertical Channel Holding Furnace, Representative Asset No. 28, was installed new at a cost of several million dollars when the malleable iron business was moved to Defiance, even though GM knew at that time that the malleable iron business would only be continued for a period of a few years. Because GM did not have specific plans to use the Vertical Channel Holding Furnace for its useful life at the time of installation, and GM in fact removed it after a few years, Defendants cannot credibly maintain that GM nonetheless intended at the time of installation to make the asset a permanent accession to the realty.

- The CB 91 Robot at Defiance (Representative Asset No. 39) and the Core Delivery Conveyor at Defiance (Representative Asset No. 26) are also not fixtures for the reasons discussed in the sections below about robot assets and conveyor assets.

- GM's Mansfield facility is a standard high bay manufacturing building. Representative Asset No. 30 is a stamping press suited to a particular manufacturing process, but it is not essential to most manufacturing uses of the Mansfield facility and is not essential to the realty. Accordingly, it is not a fixture under Ohio law. *See, e.g.*, *Gen. Elec. Co., Lighting Div.*, No. 2000-L-211, 2001 WL 1647158 at *3 (Ohio Ct App. Dec. 21, 2001) (not a fixture if asset primarily benefits business and not realty).

- The assertion by Defendants' expert that the Mansfield stamping facility could only be used as a stamping facility is not supported by the evidence. Mr. Miller concedes that after the bankruptcy RACER Trust removed the stamping presses, including Representative Asset No. 30, and separately sold the facility to a development group that "identified two tenants that

are interested in occupying much of the 2.5 million-square-foot building." Miller Decl. Ex. A at 54. RACER Trust's decision to offer the building for sale for reuse confirms that the stamping facility, even if initially designed for stamping, was in no way adapted exclusively for this use. *In re Jarvis*, 310 B.R. at 338 (holding that farrowing and gestation structures benefited the swine business, not the realty, because future users of the land would not necessarily need this equipment).

- Although the Mansfield facility was ultimately demolished, there is no evidence to suggest that it was demolished because the site could only be used as a stamping facility. Miller Decl. Ex. A at 54. Instead, RACER Trust sold it expecting the buyer would reuse the building and was surprised when the buyer instead demolished it. Miller Decl. Ex. A at 54.

- Representative Asset No. 30 is also not a fixture for the reasons discussed in the Section discussing presses immediately below.

4. The Presses Are Not Fixtures

As explained above in Plaintiff's Proposed Findings of Fact, five of the Representative Assets are stamping presses (Representative Asset Nos. 29, 30, 31, 32 and 33). Each of the press assets is discussed more fully in paragraphs 720 through 857 above, and the evidence demonstrating that they are not fixtures is described there in more complete detail. In summary, the evidence shows the following:

- Presses, including the largest press systems, have been moved by GM for reuse to other facilities before the end of their useful lives. In fact, approximately half of GM's largest presses have been moved by GM between facilities. *See, e.g.*, *Controls Grp.*, 2006 WL 1691346 (finding a printing press was personal property where press was purchased from another user and moved to Michigan where it was installed); *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]").

- More than 150 GM stamping presses have been sold at auction or in private sales by Maynards and Hilco. *See 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).

- GM has retired numerous presses well before the end of those presses' useful lives.

- Presses are classified by GM for tax purposes as personal property. *See Pine Creek Farms*, 1997 WL 392767, at **3-4 (treatment of assets as personal property for tax purposes indicative of intent); *Controls Grp.*, 2006 WL 1691346 (finding significant the treatment of asset as personal property on tax returns).

- Many of GM's presses and related assets are subject to leases expressly requiring that they be treated as, and always remain, personal property. *See, e.g., In re Johns-Manville Sales Corp.*, 88 F.2d 520, 521-22 (6th Cir. 1937) (looking at the terms of mortgage agreement and accounting entries in determining intent under Michigan law); *Whitaker-Glessner*, 22 F.2d at 773-74 (looking at terms of 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. 679, 695 (looking at sales agreement to determine the parties intended to include the assets in the sale of the realty); *In re Jarvis*, 310 B.R. 330, 335 (stating that depending on the relationship between the parties there could be a different fixture determination); *Cont'l Cablevision*, 425 N.W.2d at 58 (looking at service agreement and accounting and business practices to infer intent).

- As Defendants' expert concedes, GM's consistent practice is to not leave presses behind when it idles, closes or sells plants. Defendants' expert could not identify a single instance when GM or any other automotive manufacturer had ever left a press behind at a plant. In other words, at GM, presses do not typically remain behind with the realty. *Controls Grp.*, 2006 WL 1691346.

5. The Robots Are Not Fixtures

As explained above in Plaintiff's Proposed Findings of Fact, four of the Representative Assets are robots (Representative Asset Nos. 10, 12, 22 and 39). Each of the robots is discussed more fully in paragraphs 858 through 881 above, and the evidence demonstrating that they are not fixtures is described there in more complete detail. In summary, the evidence shows the following:

- Robots are substitutable assets, meaning that they are highly adaptable to many different purposes in an automotive plant.

- It takes relatively little time and effort (less than a day) to remove a robot for reuse. Indeed, Defendants' expert testified with specificity about the relative speed with which robots may be removed from a GM plant. *See 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).

- There is a robust secondary market for the sale of robots for reuse. Maynards and Hilco have sold thousands of robots. *See Controls Grp.*, 2006 WL 1691346; *All City Commc'n,* 661 N.W.2d at 853; *In re Whitlock Ave.*, 16 N.E.2d at 282.

- Robots are not only moved between GM facilities, but also within GM facilities, as evidenced by the movement of Representative Asset No. 10 within Lansing Delta Township Assembly over the course of a single weekend. *See, e.g.*, *Controls Grp.,* 2006 WL 1691346; *Litton Sys.,* 728 N.E.2d at 392.

- The areas of the plant where these robots are installed have not been customized in any way to accommodate these robots.

- Robots are classified by GM for tax purposes as personal property. *See Pine Creek Farms,* 1997 WL 392767, at **3-4; *Controls Grp.*, 2006 WL 1691346.

6. The Machining Equipment Assets Are Not Fixtures

As explained above in Plaintiff's Proposed Findings of Fact, three of the Representative Assets are machining assets, all located in Warren Transmission (Representative Asset Nos. 24, 25 and 36). Each of the machining assets is discussed more fully in paragraphs 910 through 994 above, and the evidence demonstrating that they are not fixtures is described there in more complete detail. In summary, the evidence shows the following:

- Machining equipment is relatively easy to remove and even larger machining assets take less than two weeks to remove. Much machining equipment is not physically attached to the plant floor, but is rather attached to vibration pads that rest on the plant floor. *Scovill Mfg.,* 1982 WL 8551, at *3.

- There is a robust secondary market for this machining equipment. *See Controls Grp.*, 2006 WL 1691346; *All City Commc'n,* 661 N.W.2d at 853; *In re Whitlock Ave.*, 16 N.E.2d at 282.

- GM has a history of moving machining equipment between plants. Indeed, Representative Asset No. 25 was moved from GM's St. Catharines, Ontario plant to Warren Transmission. *See, e.g.*, *Controls Grp.,* 2006 WL 1691346; *Litton Sys.,* 728 N.E.2d at 392.

- GM has retired many machining assets, like those among the Representative Assets, before the end of their useful lives.

- The areas of the plant where these machining assets are installed have not been customized in any way to accommodate these machining assets. Defendants' effort to describe the 12-inch concrete floor below these assets or the ceiling height above these assets as customized was shown at trial to be not credible, as the floor is uniform throughout the entirety of the manufacturing areas of the plant and the highest ceiling height is found throughout a 100,000 square foot area of the plant.

- The machining assets are classified by GM for tax purposes as personal property. *See Pine Creek Farms,* 1997 WL 392767, at **3-4; *Controls Grp.*, 2006 WL 1691346.

7. The Conveyors Are Not Fixtures

As explained above in Plaintiff's Proposed Findings of Fact, eight of the Representative Assets are conveyors (Representative Asset Nos. 3, 6, 16, 17, 20, 21, 26, and 35). Each of the conveyors is discussed more fully in paragraphs 995 through 1122 above, and the evidence demonstrating that they are not fixtures is described there in more complete detail. As Mr. Goesling explained at trial and as depicted in Exhibit D to Mr. Goesling's written direct testimony, the conveyors included among the Representative Assets exist along a spectrum from easier to remove to more difficult to remove. Nonetheless, based on consideration of all relevant facts, all eight of the conveyors at issue are not fixtures. In summary, the evidence shows the following:

- All of the conveyors are constructed from sectional pieces, which promotes ease of configuration and installation, and also promotes ease of reconfiguration and removal.

- Floor conveyors, including Representative Asset Nos. 3, 21 and 35, are relatively easy to remove.

- GM has retired conveyors before the end of their useful lives and has moved conveyors (*e.g.*, relocation of button up and test conveyor from Willow Run to GM Toledo, and relocation of skillet conveyor from Spring Hill to Orion).

- Evidence at trial revealed instances where GM reconfigured and added to conveyors, demonstrating this asset type's inherent flexibility.

- The conveyors are classified by GM for tax purposes as personal property.

8. The Paint Shop Assets, Except For Representative Asset No. 4, Are Not Fixtures

As explained above in Plaintiff's Proposed Findings of Fact, five of the Representative Assets are paint shop assets, all located in Lansing Delta Township Assembly (Representative Asset Nos. 4, 5, 6, 7 and 9). Plaintiff acknowledges that Representative Asset No. 4, which is one of the paint shop assets, is a fixture. Each of the other four paint shop assets is discussed more fully in paragraphs 1123 through 1188 above, and the evidence demonstrating that they are not fixtures is described there in more complete detail. Although many assets found in the Lansing paint shop likely are fixtures because of the unique customization of the building with many of the paint shop assets, four of the five paint shop assets included among the Representative Assets are not fixtures. In summary, the evidence shows the following with respect to the non-fixture paint shop assets:

- Representative Asset No. 5 (Paint Mix and Circulation Electrical System) is comprised of off-the-shelf components and the system is housed in cabinets with lift points that facilitate ease of relocation. GM has previously relocated similar electrical distribution equipment for reuse and has retired similar assets before the end of their useful lives. GM classified Representative Asset No. 5 as personal property.

- Though Representative Asset No. 6 (Paint Dip Conveyor) spans all three levels of the paint shop, the conveyor is made up of modular sections that are three to twenty feet in length and connected by nut and bolt fasteners. All utility connections associated with this conveyor use loose cabling and

quick disconnect fittings for easy separation. According to Defendants' expert, GM has previously relocated at least one paint shop conveyor for reuse. This asset was classified by GM as personal property.

- Representative Asset No. 7 (Paint Top Coat Automation Software) is software that allows users to monitor the paint spray application equipment. Because it has no physical presence, it cannot fairly be said to be an asset that is attached. Defendants' expert concedes that the software may be loaded onto any compatible computer. And Defendants have conceded that they are aware of no case holding that software can be a fixture. This asset was classified by GM as personal property.

- Representative Asset No. 9 (Paint TC2 Bell Zone) is a set of "bells," or paint applicator machines, mounted overhead or installed through the walls of the spray booths in the paint shop. In the other paint application zone (TC1), paint applicators have been replaced due to improvements in paint application technology; specifically, a significant number of paint applicators are being replaced with Fanuc robots that will be programmed to perform the same paint application function. Similar paint application assets have been moved between GM plants; for example, 60 aqua bell paint applicators were moved by GM from its Moraine plant to its Lordstown plant. There is a secondary market for similar painting robots and bells. This asset was classified by GM as personal property.

9. The Non-Production Assets Are Not Fixtures

Defendants argue that any manufacturing asset that is part of an "integrated" production line is a fixture because, among other things, GM planned for all assets that were part of such a line to be permanently installed. As already explained above, this argument is inconsistent with the case law that focuses on the objective facts of each asset, and Defendants' argument also would lead to a fixture category that is overly broad and without precedent. Further, Defendants overlook that a number of the Representative Assets are not part of an integrated production line. The non-production line assets include Representative Asset Nos. 10, 11, 23, 27, 31, 37 and 38, which are all discussed in other sections of this brief, as well as Representative Asset Nos. 8, 13 and 19, discussed immediately below.

The three non-production line assets discussed below are addressed in specific detail in paragraphs 1189 through 1239 in Plaintiff's Proposed Findings of Fact above, and the evidence

demonstrating that they are not fixtures is described there in more complete detail. In summary, the evidence shows the following:

- Representative Asset No. 8 (General Assembly End of Line Paint Mix Room) is a self-contained paint mix room located in the general assembly area, and is an asset where small batches of paint are mixed for touch-up repairs to vehicle bodies. The asset is made up of steel panels fastened together with nuts and bolts, and attached to the floor with lag bolts. GM has previously relocated at least one similar paint mix room. Defendants' expert concedes that this asset could be removed over the course of a weekend. This asset is classified by GM as personal property.

- Representative Asset No. 10 (Body Shop Weld Bus Ducts) are overhead assets that deliver electrical power to the body shop at Lansing. The Bus Ducts are modular and designed for easy reconfiguration. Accordingly, even though there is a network of approximately 10,000 feet of bus ducts in Lansing, Defendants' own expert estimates a modest cost ($150,000) and removal time (one month) for this asset. There is ample evidence of GM relocating bus ducts and retiring bus ducts before the end of their useful lives. There also is an active secondary market for this asset. This asset is classified by GM as personal property.

- Representative Asset No. 19 (Body Shop Coordinate Measuring Machine) was used to take measurements of auto bodies for quality control purposes. This asset was put into service in 2006 and then removed by GM in 2015, before the end of its useful life. Similar assets have been relocated by GM, and there is a secondary market for such assets. GM retired similar assets before the end of their estimated useful lives. The asset was classified as personal property by GM.

10. Representative Asset Nos. 1, 14, 15, 18 and 34 Are Not Fixtures

As explained above in Plaintiff's Proposed Findings of Fact, Representative Asset Nos. 1, 14, 15, 18 and 34 also are not fixtures. Each of these assets is discussed in specific detail in paragraphs 1240 through 1305 above, and the evidence demonstrating that they are not fixtures is described there in more complete detail. In summary, the evidence shows the following:

- Representative Asset No. 1 (OP-150 Shims Auto Station) is attached to the building floor with lag bolts, and attached to a pallet conveyor with Allen bolts. Power and data is supplied through loose wiring attached with quick disconnect fittings. GM has relocated similar assets. Because this asset is specially designed for specific transmission products, there is a

higher likelihood that product changes could require this asset to be replaced. This asset was classified as personal property by GM.

- Representative Asset No. 14 (Leak Test System) includes a test stand fabricated from two sections that are bolted together with supporting legs that are lag bolted to the floor to prevent movement during operation. The asset's electrical connections use flexible conduit with quick disconnect fittings, and the data connections use finger-tightened connectors, allowing for easy removal. GM has relocated similar assets, and similar leak test systems are bought and sold on the secondary market. This asset was classified as personal property by GM.

- Representative Asset No. 15 (General Assembly Tire/Wheel: Soap, Mount and Inflate) is a tire and wheel assembly system located in Lansing Delta Township Assembly. The various stations that comprise this asset are attached to the floor with lag bolts. The utilities and data connections are designed for easy disconnection. The patent describing this asset emphasizes the removability of the components of this asset, and the ease with which the asset may be reconfigured by adding or removing modules. GM has relocated similar assets; there is a secondary market for such assets; and GM has retired similar assets before the end of their useful lives. The asset was classified as personal property by GM.

- Representative Asset No. 18 (Vertical Adjusting Carriers) is a set of 87 carriers that travel along an overhead rail. The carriers are not physically attached to the building, but instead ride along a rail. The rail also is not directly attached to the building. Instead, the rail is attached to white steel, which is then in turn attached to the building. The carriers are designed to accommodate vehicles with specified dimensions and would need to be replaced if there were a need to carry vehicles that fell outside those dimensions. This asset was classified as personal property by GM.

- Representative Asset No. 34 (Build Line w/Foundation) was an assembly line at Warren Transmission used to produce four-speed transmissions. After Warren Transmission stopped manufacturing four-speed transmissions, this entire line was removed. The line was removed approximately eight years earlier than the useful life assigned to it by Defendants' expert. Removal of this line is a good example of how GM removed entire lines, along with all of their related manufacturing assets, when the products made by those lines were no longer in demand.

11. Certain Of The Remaining Assets Are Not Fixtures Because They Are Ordinary Building Materials

There are two assets—the Courtyard Enclosure (Representative Asset No. 37) and the Central Utilities Complex (Representative Asset No. 11)—as to which the parties agree that at

least a portion of the asset constitutes ordinary building materials and is thus not a fixture.[36] Each of these assets is discussed in specific detail in paragraphs 1306 through 1325 in Plaintiff's Proposed Findings of Fact above, and the evidence demonstrating that these assets are ordinary building materials is described there in more complete detail. Paragraphs 1313 through 1318 of Plaintiff's Proposed Findings of Fact also describe the parties' dispute about whether there are components of the Courtyard Enclosure that are fixtures. As explained in those paragraphs, aside from conclusory statements by Mr. Deeds, Defendants have offered no evidence and have not identified a single document to support their claim that there are fixture components that were once contained within the Courtyard Enclosure.

The parties also dispute the proper classification of component assets that are housed within Representative Asset No. 11 (Central Utilities Complex). Plaintiff's classification of the various components of the asset, and the factual basis for those classifications, is summarized in the chart included in Plaintiff's Proposed Findings of Fact at paragraph 1376.

12. The Parties Agree that Two of the Representative Assets are Fixtures

For the reasons described in paragraphs 1326 through 1347 of Plaintiff's Proposed Findings of Fact, Plaintiff agrees that Representative Asset No. 2 (General Assembly Pits & Trenches) and Representative Asset No. 4 (Paint Building Lines – Process Waste ELPO) are fixtures.

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

The Term Loan Collateral Agreement excludes from the grant of collateral all "Equipment" and "Fixtures" that are not located at a "U.S. Manufacturing Facility." FOF IX.C.

[36] As explained in paragraphs 1372 through 1376 of Plaintiff's Proposed Findings of Fact, some of the assets contained within the CUC are fixtures and some are not.

"U.S. Manufacturing Facility" is defined in pertinent part as the 42 facilities listed on Schedule 1 to the Term Loan Collateral Agreement, including any "related or appurtenant" land, buildings, equipment and fixtures. FOF IX.C. Defendants assert that they have a perfected security interest in the Powertrain Engineering Pontiac because it is "related" or "appurtenant" 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 Term Loan 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, 158 (2d Cir. 2000).

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

to be a "related or appurtenant" building to one of the facilities listed in Schedule 1 to the Term Loan 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 Pontiac is not a "related or appurtenant" building to MFD Pontiac. FOF IX.C. MFD Pontiac and Powertrain Engineering Pontiac 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. FOF IX.C. By contrast, Powertrain Engineering Pontiac is a research and development facility where New GM designs, engineers, develops, and tests engines and transmissions. FOF IX.C. The engineering that takes place at Powertrain Engineering Pontiac is not specific to the manufacturing and production at MFD Pontiac. FOF IX.C. The work at Powertrain Engineering Pontiac has nothing to do with MFD Pontiac. FOF IX.C. There is no evidence that the two facilities share management, including plant managers, employees, human resources personnel, testing facilities or storage areas.

MFD Pontiac and Powertrain Engineering Pontiac are two of the many buildings and facilities located on the "Pontiac North Campus." However, MFD Pontiac and Powertrain Engineering Pontiac have two different addresses and are located on opposite sides of a street. FOF IX.C. Powertrain Engineering Pontiac is located at 895 Joslyn Road, in Pontiac, Michigan. MFD Pontiac is located across the street (Glenwood Avenue) from Powertrain Engineering Pontiac at 220 East Columbia Ave. FOF IX.C. 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. FOF IX.C.. MFD Pontiac and Powertrain Engineering Pontiac are located on two differently numbered parcels of land. FOF IX.C. There is no evidence that MFD Pontiac and Powertrain Engineering Pontiac 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. FOF IX.C. In all other respects, MFD Pontiac and Powertrain Engineering Pontiac are not physically or operationally connected in any way. FOF IX.C.

Defendants' contention that MFD Pontiac and Powertrain Engineering Pontiac are related or appurtenant is based solely on the utility trestle, employees at both facilities that belong to the same union, a shared security system that allows employee access to both facilities, filings with the Environmental Protection Agency that cover all the facilities on the Pontiac North Campus, and Detroit news stories that cover all the facilities on the Pontiac North Campus. FOF IX.C. These insubstantial commonalities between the two facilities do not overcome their significant functional and operational differences, or their lack of physical connection.

Moreover, Defendants' argument that MFD Pontiac and Powertrain Engineering Pontiac are appurtenant or related because of a historical relationship between the parcels of land where

the facilities are located should also be rejected. Defendants can point to no authority for the premise that a single conveyance containing the legal descriptions for both MFD Pontiac and Powertrain Engineering Pontiac indicates a relationship between the facilities under conveyancing practices in Michigan. Any historical relationship between the two parcels of land upon which MFD Pontiac and Powertrain Engineering Pontiac are located creates no inference that the two facilities are related or appurtenant. If two parcels of land were historically one parcel, the only relationship between the two parcels is a common parent. Further, Defendants have not offered any authority under Michigan law, that required the use of a single deed, or two or more deeds, to effect conveyances of two or more parcels of real property that are owned by the same grantor. A deed conveying title to both MFD Pontiac and Powertrain Engineering Pontiac does not give rise to any implication that there is or is not any type of relationship between MFD Pontiac and Powertrain Engineering Pontiac, other than that they have a common owner.

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 Pontiac, that facility would have been listed on Schedule 1 of the Term Loan Collateral Agreement. Powertrain Engineering Pontiac 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 Pontiac.

II. FAIR MARKET VALUE IN THE HANDS OF THE DEBTOR IS THE CORRECT STANDARD FOR VALUING THE REPRESENTATIVE ASSETS

The appropriate standard of value for the Representative Assets is their fair market value, as of the Valuation Date, in the hands of Old GM. Under Section 506(a), the Court's valuation analysis must be guided by the proposed disposition or use of the collateral. Sale pursuant to Section 363 was the proposed disposition of all but two of the Representative Assets; therefore, the status of Old GM as of the Valuation Date takes on central importance. As discussed in detail below, as of June 30, 2009, Old GM was not a going concern. To the contrary, Old GM was failing, and failing dramatically. The question for this Court, then, can be simply put: What is the fair market value of assets in the hands of a doomed business enterprise, unable to find a market buyer and unable to sustain its own operations without a government bailout compelled by non-market concerns?

A. Fair Market Value in the Hands of the Debtor Is the Appropriate Standard for Valuing the Representative Assets under Section 506(a)

The valuation of the Representative Assets in this action is governed by Section 506(a) of the Bankruptcy Code, which provides that the value of a secured creditor's interest in a debtor's property must be "determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest." 11 U.S.C. § 506(a)(1) (2016). Under this subsection, two key factors must be considered: First, the "purpose of the valuation," and second, the "proposed disposition or use of the collateral." *In re Motors Liquidation Co.* ("***TPC***"), 482 B.R. 485, 490 (Bankr. S.D.N.Y. 2012). Beyond these broad guideposts, however, the statute does not prescribe any particular valuation methodology; rather, courts "determine value on a case-by-case basis, taking into account the facts of each case and the competing interests in each

case." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 356 (1977), *reprinted in* 5 U.S. Code Cong. & Admin. News 5787, 6312 (1978).

1. The Proposed Disposition of the Representative Assets Was Sale Pursuant to Section 363 of the Bankruptcy Code

In this case, the "purpose of the valuation" is straightforward—to fix the value of the Representative Assets in order to determine the extent of Defendants' security interest—but sheds little light on what valuation methodology is most suitable to the task. Thus, it is the "proposed disposition or use" of the Representative Assets, as of the Valuation Date, that is key to the valuation question before this Court. *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953, 962 (1997); *see also 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").

The use of the disjunctive in "proposed disposition or use" is significant. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise."). Where, as in *Rash*, the debtor seeks to retain the collateral, valuation under Section 506(a) must be informed by the debtor's use. *Rash*, 520 U.S. at 964; *see also TPC*, 482 B.R. at 493. Conversely, where, sale of the asset is contemplated, it is not the *use* of the asset but its proposed *disposition—i.e.*, the proposed sale of the asset—that guides the Section 506(a) analysis. *TPC*, 482 B.R. at 493-95 (retention of collateral by Old GM would have "involve[d] a 'use,' as contrasted to a 'disposition'").

There is no dispute that the proposed disposition of all but two of the Representative Assets, as of the Valuation Date, was not their continued use by Old GM, but their disposition through sale pursuant to Section 363 of the Bankruptcy Code. *See TPC*, 482 B.R. at 491.[37]

2. Value Under Section 506(a) Must Be Assessed from the Perspective of the Debtor

The United States Supreme Court has made clear that value under Section 506(a) is to be assessed from the perspective of the debtor, not that of the creditor. *Rash*, 520 at 963; *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 . . . ."). Thus, under *Rash*, where a debtor retains collateral for its own continued use under a "cram down" option, the value of that collateral is the replacement cost to the debtor, *i.e.*, the "cost the *debtor* would incur to obtain a like asset." *Rash*, 520 U.S. at 965 (emphasis added).

Similarly, where sale to a third party—rather than continued use by the debtor—is the contemplated disposition of the collateral, the value of that collateral is its fair market value *in the hands of the debtor*. *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)). In determining fair market value in the hands of the debtor, the Court must take into consideration any special circumstances related to the debtor that may impair asset value or

[37] The two Representative Assets not proposed to be included in the sale pursuant to Section 363 were retained by Old GM with the intent of selling those assets as part of liquidating the facilities where they were located. *See* JPTO at 8 ("Two of the Representative Assets . . . were assets that were excluded from the 363 Sale, remained behind with Old GM, and were subsequently sold to third parties.").

impede the debtor's ability to "capture fair value for its assets." *ResCap*, 501 B.R. at 596 (rejecting as "flawed" and "unreliable" a valuation of distressed debtor's assets premised on "fair market value in the hands of a solvent company").

3. The Representative Assets Must Be Valued on the Basis of Their Fair Market Value in the Hands of Old GM

Application of these principles leads to one result: The Representative Assets must be valued on the basis of their fair market value, as of the Valuation Date, in the hands of Old GM.

In simplest terms, 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). A standard definition of "market value" in economics is the "estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion." FOF ¶ 1401. Put another way, market value is the 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." *BFP*, 511 U.S. at 537-38 (quoting Black's Law Dictionary 971 (6th ed. 1990)). Market value must be free of distortions caused, for example, 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." FOF ¶ 1402; *see also TPC*, 482 B.R. at 494-95 (rejecting valuation standard premised on unique value to a "specific person or a specific firm" (quotation marks omitted)).

This conclusion is consistent with the approach applied once already by the Bankruptcy Court to value assets of Old GM sold in a 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, sold in a 363 Sale. 482 B.R. at 486-87, 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 urged the Court to adopt "value in use" in the hands of New GM. *Id*. at 494.[38] Applying Section 506(a), Judge Gerber rejected the in-use standard, concluding instead that the fair market value standard controlled. *Id.* at 494-95.[39]

B. Liquidation Value Is the Correct Standard for Valuing the Representative Assets

Old GM had no going concern value as of June 30, 2009. Old GM was in fact on the brink of liquidation, unable to maintain its operations or to generate cash flows absent extensive Government support. New GM, too, was critically dependent on Government support. Indeed, it was only by virtue of an enormous Government bailout—predicated on the willingness of the Government to pump enormous sums of money into a failing company in the hopes of keeping the U.S. economy intact—that New GM was able to sustain operations after the 363 Sale.

Defendants nevertheless urge this Court to adopt a going concern value of New GM (not Old GM), as of a date later than the Valuation Date, as the standard for valuing the

[38] KPMG applied a value in use standard in valuing the assets of New GM as of July 10, 2009. FOF ¶ 1679.

[39] Judge Gerber's conclusion that fair market value was the appropriate methodology for valuing the collateral comports with the decision in *Rash*. There, the Supreme Court 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 (the value to the creditor if the collateral were surrendered to the creditor) but rather based on the asset's "replacement-value" (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.

Representative Assets. Defendants maintain that a going concern valuation is appropriate not because Old GM was itself a going concern—it manifestly was not—but because a different entity, newly created and infused with Government funds, was able to put most of Old GM's assets to use following its acquisition of those assets.

As discussed below, Defendants' position is incorrect as a matter of logic and as a matter of law. That New GM was able to realize value as a going concern was a direct result of the Government bailout, which was not motivated by market factors, but was undertaken to avoid what was feared to be an imminent nationwide macroeconomic catastrophe. The bailout funds certainly were not extended because the assets of Old GM had any value beyond liquidation value in the hands of Old GM. Indeed, if the assets had any independent going concern value, they would have been purchased by a market participant on that basis. But no willing buyer ever emerged to purchase the assets of Old GM as a going concern, because Old GM was not a going concern.

In the end, 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 its potential for profitability—not the firm's assets. Without this cash on New GM's balance sheet, New GM was not solvent, would not have existed as a going concern as of July 10, 2009, when the sale closed, and would not have been able to put Old GM's assets to use. FOF ¶ 1675. Many of the improvements that enable New GM to be a going concern would not have been realized but for the unique nature and magnitude of the Government bailout.[40] For these reasons, and

[40] 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

those discussed herein, liquidation value—and specifically orderly liquidation value ("**OLV**")—is the correct valuation standard for valuing the Representative Assets.

1. When a Firm Is Failing, Liquidation—Not Going Concern—Is the Appropriate Standard of Value

Absent a market-based measure of value, there are two primary valuation standards that are commonly employed when estimating the value of a firm: Value as a going concern and value in liquidation. FOF ¶ 1417. The primary difference between these standards lies in the status of the firm, specifically whether the firm is expected to continue to operate and generate cash flows or to cease operations and sell off its assets. FOF ¶ 1418.

Under a going concern valuation standard, a firm's assets are assumed to remain in continued use as a cash-flow generating assemblage. FOF ¶ 1419. The value of the firm, and its component assets, is estimated based on the present value of the firm's expected future cash-flows. FOF ¶ 1420. The going concern valuation standard is therefore only applicable when a firm is economically viable and can remain in operation without a non-market subsidy of the sort paid in this case. FOF ¶ 1421.

The liquidation standard, by contrast, assumes that a firm will cease operations and that its assets will be liquidated and sold individually or in groups. FOF ¶ 1424. On the hypothesis that there are insufficient cash-flows to support the operations of the firm, the value of the firm is estimated based on the prices one would expect to receive for the firm's assets as part of a disposition of those assets on a piecemeal basis through the secondary markets. FOF ¶ 1425. Under the liquidation standard, the value of a given asset can be estimated based on the price the asset would command in the secondary market. FOF ¶ 1426. When estimating value under a

established by ordinary business dealing at arm's length." *De La Rama S.S. Co., v. United States*, 206 F.2d 651, 654 (2d Cir. 1953).

liquidation standard, costs associated with the liquidation of the assets must be taken into account. FOF ¶ 1427.

For economically viable firms likely to remain a going concern, in possession of assets expected to remain in continued use, valuations can be conducted using either a going concern standard or a liquidation standard, with the higher of the two representing the value of the firm. FOF ¶ 1430. In economically viable firms, the cash-flow-based value generated by the firm's assets operating together often results in an estimated going concern value that is greater than liquidation value, although a persistently unprofitable business may be worth more in liquidation. FOF ¶ 1431. However, in situations where ongoing operations of a firm will almost certainly fail absent a subsidy, as was paid in this case, a going concern standard is inappropriate. FOF ¶ 1432. In such cases, where the firm would be unable to maintain operations and generate cash flows absent a subsidy, the liquidation standard of value is appropriate. FOF ¶ 1433. Consistent with these principles, the assets of a business enterprise "on its deathbed" should be assessed at liquidation value, 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, "prepetition losses and inability to find a buyer"—the assets of that business cannot be "reasonably valued at going concern" value).[41]

[41] *See also Schwinn Plan Comm. v. AFS Cycle & Co.*, 192 B.R. 477, 486-87 (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."); *In re Diplomat Elecs. Corp.*, 82 B.R. 688, 692 (Bankr. S.D.N.Y. 1988) (going concern valuation 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.")

2. Old GM Was Not a Going Concern as of June 30, 2009

As of June 30, 2009, Old GM was not only unable to generate profits, it was on the brink of total liquidation. *See In re Gen. Motors Corp.*, 407 B.R. 463, 493 (Bankr. S.D.N.Y. 2009) ("[T]he only alternative to an immediate sale is liquidation."); FOF III. Absent Government intervention, it was a "certainty or near certainty" that the "patient will indeed die on the operating table." *In re Gen. Motors Corp.*, 407 B.R. at 492 n.54. It was only the Government's willingness to invest in an otherwise non-viable enterprise—as part of a broader plan to avert macroeconomic catastrophe—that permitted Old GM's assets to be put to use in the hands of a newly created, Government-sponsored entity. This Government-sponsored entity was itself a going concern only as a result of Government subsidy. FOF ¶ 1675.

As set out in detail in Plaintiff's Proposed Findings of Fact, *see* FOF III, Old GM's downward spiral is well-documented. Following the bankruptcy of Lehman Brothers and the Government's rescue of AIG, Old GM experienced a significant decline in new auto sales, as well as sales of trucks and SUVs, from which Old GM derived the majority of its revenue and profits. Fischel Decl. ¶ 100; *see* FOF ¶¶ 28, 39, 40. New car sales in the U.S. fell dramatically in 2008, Fischel Decl. ¶ 100, and GMNA was hit hard by the downturn. GMNA's annual revenue dropped by tens of billions of dollars in 2008. Fischel Decl. ¶ 100; Hubbard Decl. ¶ 30. GMNA's operating losses in 2008 topped $10 billion, and were projected to do so again in 2009. Fischel Decl. ¶ 100; Hubbard Decl. ¶ 30; *see* FOF ¶ 38. Strapped for capital, Old GM experienced a steep decline in liquidity leading into the first quarter of 2009. Fischel Decl. ¶ 100; *see* FOF ¶ 35; *see also In re Gen. Motors Corp.*, 407 B.R. at 476-77 (By the fall of 2008, Old GM was "in the midst of a severe liquidity crisis, and its ability to continue operations grew more and more uncertain with each passing day."). Old GM had to begin shutting down

operations, and an infusion of $20 billion in restricted cash from the Government was necessary to keep the company solvent. FOF ¶ 1675.

Old GM's inability 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 investment, further confirming that Old GM was perceived to be incapable of continuing as a going concern. FOF IV. Not only were no private lenders willing and able to finance Old GM's operations, there were no firms willing and able to acquire Old GM's business. *In re Gen. Motors Corp.*, 407 B.R. at 484; FOF IV. Indeed, not a single market participant emerged to buy the assets of Old GM, demonstrating that the market did not view the assets, working together as a collection, to have value as a going concern.

Old GM's plummeting stock and bond prices also signaled the market's expectation of the company's imminent failure prior to the 363 Sale. FOF III.C. Contemporaneous commentary by industry analysts confirmed the expectation that Old GM would almost certainly fail absent Government intervention, and credit ratings issued by the three major ratings agencies are consistent with analysts' pessimism. FOF III.D. A wide range of statements by Government officials and agencies, including some who played a key role in authorizing and managing the bailout, further confirm that liquidation was seen as a real and imminent peril, and retrospective analyses likewise concluded that, absent Government intervention, Old GM would have failed and faced almost certain liquidation. Fischel Decl. ¶¶ 50, 59-62, 70-79; *see also* FOF III.E. Indeed, statements by Government officials close to Treasury's interventions indicate that the U.S. Treasury never expected to see a full return of its investments. Fischel Decl. ¶¶ 84-86; FOF ¶¶ 223-27.

By November 2008, Old GM had no choice but to seek financial assistance from the Government. *In re Gen. Motors Corp.*, 407 B.R. at 477; FOF V. In support of its request for TARP funding, Old GM submitted four versions of its viability plan, each rejected in turn by the Government. FOF ¶ 164. It was not until the fifth submission ("**Viability Plan 4B**") that Old GM's plan was deemed potentially viable, FOF ¶ 166, but even subsequent to that determination, Old GM continued to work with the Government on "the evolving calculation of the required increase" in funding. FOF ¶ 167. Thus, as Prof. Hubbard recognizes, even *after* the Government had deemed Old GM's final plan to be "viable," the amount of assistance required from the Government to sustain operations actually increased, and, without this assistance, operations could not have continued. FOF ¶ 167.

Time was of the essence, given Old GM's immense liquidity shortfall, so a traditional Chapter 11 reorganization was not on the table. Indeed, the Auto Task Force canvassed dozens of experts, consultants and insiders, and found none who believed that Old GM could "survive a traditional chapter 11 process." *In re Gen. Motors Corp.*, 407 B.R. at 485. There was, as Judge Gerber found, no "serious[] dispute" that a "disastrous" liquidation was the "only alternative to an immediate sale." *Id.* at 474 (characterizing liquidation as the "inevitable consequence"), 484 (no "realistic alternatives" to liquidation), 493 ("only alternative to an immediate sale is liquidation").

These facts establish that Old GM was on a steep downward trajectory and had no prospects for sustaining its own operations. Under these circumstances, there simply was no market for the sale of Old GM's assets on a going-concern basis; their only value was the value that could be realized through orderly liquidation. Defendants urge the Court to ignore the market and focus on "reality"—but it is Defendants who ignore the reality of a failed company

whose asset values are not captured by any analysis of *New GM*'s going concern value. The decisions relied upon by the Defendants in support of a going concern valuation are all inapposite in the same way: They all share a common theme, a debtor able to realize going concern value in a market-based sale. *See, e.g., In re SK Foods, L.P.*, 487 B.R. 257, 259 (E.D. Cal. 2013); *In re Wendy's Food Sys., Inc.*, 82 B.R. 898, 899 (Bankr. S.D. Ohio 1988); *In re United Puerto Rican Food Corp.*, 41 B.R. 565, 566 (Bankr. E.D.N.Y. 1984). Here, "[o]nly the U.S. and Canadian Governmental authorities were prepared to invest in GM," and only on account of the compelling public policy interests at stake and the devastating economic consequences of failing to intervene. *In re Gen. Motors Corp.*, 407 B.R. at 480. Simply put, Old GM had no market value as a going concern, and its assets should not be valued on the fiction that it did.

C. The Government Bailout Was Motivated by Non-Market Factors and Does Not Provide a Valid Basis for Using Going-Concern Value

The Term Lenders' position rests on a fundamentally infirm and counterfactual premise: That the Government bailout of General Motors may be reimagined as a market transaction. In fact, the terms of the 363 Sale of assets from Old GM to New GM provide no basis whatever for a market-based valuation of the Surviving Collateral or the Representative Assets, for the simple reason that the 363 Sale was in no way a market-based transaction.

1. The Valuation Proceedings of the Special Court under the Rail Act Provide Relevant Guidance

The facts before this Court are similar to those addressed in a series of proceedings convened, almost fifty years ago, under the Regional Rail and Reorganization Act of 1973 (the "**Rail Act**"). The impetus for the Rail Act was an economic crisis with close parallels to the crisis faced by the American automotive industry in 2008-2009. The failure of several key

railroads—including what was then the nation's largest railroad company—had undermined the viability of the commercial railroad system in the Midwest and Northeast regions of the United States, threatening potentially disastrous implications for the broader economy. S. Rep. No. 93-601, *reprinted in* 1973 U.S.C.C.A.N. 3242, 3246-48 (1973). Congress responded with passage of the Rail Act, emergency legislation aimed at sustaining rail service operations in the affected regions by "replacing them with a new and viable rail services system." *Id*. at 3242.

Given the parallels between the Government bailout of rail operations under the Rail Act and the Government bailout of General Motors through the 363 Sale, the valuation proceedings of the Special Court, and in particular its decision in *Matter of Valuation Proceedings Under Sections 303(c) and 306 of Reg'l Rail Reorg. Act of 1973*, 445 F. Supp. 994 (Special Ct. R.R.R.A. 1977), provide instructive guideposts for the Court's valuation determination here.[42] In both cases, the Government acted to preserve an industry critical to the health of the national economy, and in both cases, the asset acquisitions in question were driven by compelling public policy imperatives and accomplished through the vehicle of a Government-sponsored entity.

The ruling in Valuation Proceedings underscores why a going concern valuation would be inappropriate here. Indeed, as the *Valuation Proceedings* decision makes clear, no going concern value may properly be ascribed to the assets of a terminally failing business enterprise with no ability to generate profits and no capacity, absent Government intervention, to sustain its own operations.

[42] A more detailed discussion of the Valuation Proceedings decision is available in Plaintiff's Memorandum of Law in Response to Order Directing Additional Briefing, Adv. Pro. Dkt. 967.

2. The Government Bailout Was Motivated by Non-Market Factors

Here, the evidence demonstrates, and no party disputes, that the U.S. Treasury's interventions, including the 363 Sale, were motivated by factors that would not be relevant to a commercially motivated market participant, such as the macroeconomic and political impacts of allowing Old GM to fail. FOF IV; *see also* Hubbard Test. 2348:5-20 (A market participant "obviously . . . would not value the public policy objectives that the nation values."); 2355:3-8 ("Private investors would not consider externalities or public policy objectives."). As Prof. Hubbard points out, one of the Government's objectives in providing TARP financing assistance was to prevent a "disorderly bankruptcy," which officials believed could have wide-ranging effects on the broader economy. Hubbard Decl. ¶ 34.

Statements from Government officials confirm that the Government's bailout—the TARP loans, the DIP financing, the 363 Sale to a Government-sponsored New GM—were not premised on an expected return on investment, much less a profit. FOF ¶ 204-16, 223-27. To the contrary, Government officials involved in the bailout made clear that they did not expect to have a full return on investment. FOF ¶ 223-27. The Government was compelled to enter into this non-market deal based on concerns about the impact an Old GM liquidation would have on the U.S. economy and the country at large. FOV IV. These 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. Simply put, the profit motive—central to any ordinary commercial market participant—was not a driving force behind the 363 Sale.

The value of the assets Treasury received as a consequence of the 363 Sale was in fact far less than the value of the financing provided, FOF ¶¶ 217, 1407-08, and the 363 Sale contained several nonmonetary concessions that would never have been considered by a commercial

market participant. FOF ¶¶ 1410-13; *In re Gen. Motors Corp.*, 407 B.R. at 483-84. Moreover, the amount the Government paid was not set by competitive market forces, but by what was deemed necessary to ensure New GM's survival. It was only after the Government several times refused to fund Old GM because it considered the business plan unviable that the Government accepted Viability Plan 4B, the fifth in the series. FOF ¶ 165. Yet, even Viability Plan 4B was premised on the existence of the non-market cash infusion that was necessary to allow New GM to operate.

Thus, far from being a "willing buyer under no compulsion to purchase," FOF ¶ 1401, 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 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. . . . 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 Gen. Motors Corp., 407 B.R. at 480. The 363 Sale therefore does not represent the market value of Old GM and its assets as of June 30, 2009, and it cannot serve as a reasonable market-based measure for valuing the Surviving Collateral. FOF ¶ 1416.

D. Mr. Goesling Applied the Appropriate Valuation Approach

The *Valuation Proceedings* decision set forth three broad principles of direct relevance to the proceedings here. First, market-based valuation is to be given priority over cost-based approaches to the extent that market valuation is feasible. Second, where the Government intervenes in the market, acquiring private assets in order to protect the public interest, the value

of those assets must be determined as if the Government had not intervened. Third, no going concern value may properly be ascribed to the assets of a dying business enterprise that is unable to sustain itself absent Government intervention. On each of these points, the approach to valuation taken by the Trust's appraisal expert, David K. Goesling, is consistent with the Special Court's guidance.

1. Orderly Liquidation Value in Exchange Is the Correct Premise for Valuing the Representative Assets

As discussed, Old GM was not a going concern absent the Government bailout—in fact, Old GM faced imminent liquidation in the absence of Government intervention—and the 363 Sale was not motivated by ordinary market factors. Given this reality, the appropriate way to value the Surviving Collateral is its value in liquidation. FOF IX.A.3. In particular, the most appropriate standard for valuing the Representative Assets, from both an economic and appraisal perspective, is OLV in exchange, the value that would be obtained in an orderly liquidation on the appropriate secondary markets.

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), where the seller is compelled to sell on an as-is, where-is basis, as of a specific date. *See, e.g.,* FOF ¶ 1469; *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). Under the relevant appraisal rules, when it is anticipated that an asset will be removed from its current location and sold for a similar or alternate use, the valuation premise is "value in exchange." FOF ¶ 1456. OLV 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. FOF ¶ 1465.

As Mr. Goesling testified, under the circumstances of this case and based on his study of the automotive equipment market as of the Valuation Date, OLV was the right methodology to select. FOF ¶ 1456. Further, in this case, OLV values and values derived using "Fair Market Value," as that term is defined in the relevant machinery and equipment appraisal literature, approximate one another; and, as of the Valuation Date, OLV often yields higher values than those derived using a Fair Market Value methodology. FOF ¶¶ 1475-78. While courts often use the term "fair market value" to refer generally 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. As Mr. Goesling testified, 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 liquidation. FOF ¶ 1479. Given the depressed market at the time of the Valuation Date, 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. FOF ¶¶ 1477, 1479.

OLV also represents the highest and best use of the Representative Assets under the appraisal rules. 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. FOF ¶¶ 1459-64. From a market perspective, it was neither financially feasible nor maximally profitable for Old GM to continue as a going concern; all market indications are that liquidation of Old GM's assets was the financially feasible and maximally profitable outcome. FOF XIV.B.2.

Orderly liquidation value in exchange is different from, and a higher value than, forced liquidation value or foreclosure value.[43] FOF ¶¶ 1480-86. The primary difference between orderly and forced liquidation is the assumed time period for selling the property. PX-0163. Forced liquidation value contemplates an urgent sale, while orderly liquidation value contemplates sale over a more extended period of time. PX-0163. 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. FOF ¶ 1470. In applying OLV, in contrast, Mr. Goesling assumed nine to eighteen months for the asset sales. FOF ¶ 1473.

2. Mr. Goesling Appropriately Applied Orderly Liquidation Value in Exchange

Mr. Goesling assuming nine to eighteen months for disposition of the Representative Assets is consistent with a "fair market" sale as the term is used by the courts, as opposed to a foreclosure sale. *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, Mr. Goesling considered the three standard appraisal approaches: Market, cost, and income. FOF XIV.B.3; *see also In re Chait Props., Inc.*, No. 8-11-78236-reg, 2013 WL 4858296, at *3

[43] The case law often uses the terms "liquidation" and "foreclosure" loosely, 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 its "forced sale" value). In the appraisal literature, these concepts are distinct.

(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, 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, and it yields "reliable and accurate estimates of value" if adequate data on those comparable sales are available. *Id.*; *see also* PX-0163 ("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.*

In appraising the Representative Assets, Mr. Goesling gave first priority to market value, applying the market approach wherever there was sufficient market data to do so and grounding his valuation on the prices that the assets would have obtained on the secondary market. *See* FOF ¶¶ 1540-57. Significantly, Mr. Goesling is the *only* expert in this litigation to have supplied a market-based valuation for the Representative Assets.

Mr. Goesling prioritized market value in appraising the Representative Assets, applying the market approach wherever market data permitted. *See* FOF ¶¶ 1540-57. Mr. Goesling's approach is consistent with the guidance of the Special Court, which confirmed the general

principle that market value is to be prioritized as a standard of valuation, with cost-based approaches serving as an alternative measure of value if market valuation proves infeasible. *Valuation Proceedings*, 445 F. Supp. at 1011-16 (acknowledging "market value," or "what a willing buyer would pay a willing seller," as the conventional standard). Even under circumstances where market value may be "particularly hard to prove," the Special Court cautioned that the "role of market value" was not to be rejected out of hand. *Id*. at 1029. Only where the "unique circumstances" of a case "make it impossible to establish a market value," may a court be constrained to "resort to some other rule." *Id*. at 1030.

In applying the market approach, Mr. Goesling generally estimated market value based on actual market prices and/or asking prices for comparable assets, adjusting, as appropriate, for factors such as the timing of the sale or the location, type, age, and condition of the equipment. *See* FOF ¶¶ 1541-49; *see also HSBC Bank USA v. UAL Corp. (In re UAL Corp.)*, 351 B.R. 916, 918-20 (Bankr. 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 . . . ."). Mr. Goesling also considered scrap value in those instances where the asset in question appeared to be marketable only as scrap, *see* FOF ¶¶ 1550-53, consistent with the finding of the Special Court that the market value of an asset consists of the higher of its "scrap value" or its "sales value." *Valuation Proceedings*, 445 F. Supp. at 1016.

As the evidence at trial demonstrated, there was more than sufficient market data for many of the Representative Assets as of the Valuation Date. However, Mr. Goesling did not apply market value in those instances where there was no market for the asset or where, due to a lack of comparable sales transactions, historical cost proved to be a more reliable guidepost to

value. *E.g.*, FOF ¶ 1557. In such instances, Mr. Goesling applied a cost approach, basing his valuation on historical cost data and making necessary deductions to account for physical deterioration, functional obsolescence, and economic obsolescence to ensure that the cost values were appropriately aligned with and reflective of the market for the assets. *See* FOF XIV.B.3.b.[44] Mr. Goesling's use of a cost approach as an alternative to market value thus conforms with the Special Court's suggestion that "original cost subject to appropriate deductions" may be a permissible recourse if market value is "impossible to establish." *Valuation Proceedings*, 445 F. Supp. at 1030, 1045.[45]

To determine physical deterioration, Mr. Goesling considered, among other factors, the age of the asset as of the Valuation Date, current physical condition, operating history, and maintenance history. Mr. Goesling also evaluated possible functional obsolescence considering the technology used by the Representative Assets and made adjustments to cost where applicable. FOF IXV.B.3.b. Finally, and critically, Mr. Goesling considered economic obsolescence, including such external economic factors as reduced demand, 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

[44] Neither Mr. Goesling nor Mr. Chrappa used the Income Approach because of the difficulty in determining the potential cash flow associated with the individual assets (or even with individual plants as a whole). *See* Goesling Decl. ¶ 431.

[45] The Special Court's conclusion conforms with the general rule that, where sufficient market data is available, the market approach is the preferred approach to valuation. *See* Am. Soc'y of Appraisers, Valuing Machinery & Equipment 93-94 (2011); *see also* 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.").

offer no return on investment. FOF IXV.B.3.b. As of the Valuation Date, the market for manufacturing machinery was depressed, with little activity for many assets like the Representative Asset, and, therefore, additional depreciation was required to account for those market conditions. FOF ¶ 1521.

In connection with his cost approach to valuing the Representative Assets, Mr. Goesling calculated economic obsolescence by analyzing the difference between his value for replacement cost less depreciation (without consideration of market conditions) and comparing that value to the values arrived at using the market approach. FOF ¶ 1523. He determined that the difference in value between the two approaches was indicative of economic obsolescence, since the market sales should capture all of the extrinsic factors contributing to the obsolescence of a particular type of asset. FOF ¶ 1523. This reconciliation between the cost and market approaches was necessary in order to account properly for the loss in asset value due to economic obsolescence. Goesling Test. FOF ¶ 1523. The economic obsolescence factor that Mr. Goesling applied to the Representative Assets varied depending upon the type of asset. FOF ¶ 1524. Even in the severely depressed mid-2009 market for automotive assets, some assets remained more in demand than others and thus maintained their value more than other assets. Mr. Goesling considered these kinds of distinctions among asset types, in order to arrive at more precise, tailored economic obsolescence discounts. For example, sales of large stamping presses were more impacted by the depressed automotive equipment market than sales of smaller machining assets, like gear hobbers. Goesling Test. 3522:17-3523:15. To account for these differences among asset types, Mr. Goesling's economic obsolescence adjustments varied from around 40% for robots to 95% for conveyors and other property for which there was a limited market or no secondary market as of June 2009. FOF ¶ 1524.

3. Mr. Goesling Appropriately Considered Market Realities

In June 2009, the U.S. economy was struggling, and the market for the Representative Assets—either piecemeal or in groups—was extremely depressed. A fair market value must reflect that reality. These facts cannot be ignored—as Defendants urge—in determining the value for the Representative Assets. Unlike Defendants' experts, Mr. Goesling properly accounted for the market realities in determining the value of the Representative Assets under the cost approach. Despite Defendants' unsupported contentions to the contrary, inutility does not capture all economic obsolescence, as the academic and professional literature make clear. FOF ¶¶ 2057-63.[46] Only Mr. Goesling has incorporated that critical component into his valuation analysis.

In addition, as the Special Court recognized, where the federal government interposes itself to acquire private assets for the public interest, the value of those assets should be determined as if the government had not intervened. *Valuation Proceedings*, 445 F. Supp. at 1016; *see also Matter of Valuation Proceedings under Sections 303(c) and 306 of Reg'l Rail Reorg. Act of 1973*, 531 F. Supp. 1191, 1210 (Special Ct. R.R.R.A. 1981) ("The CMV Opinion established that the [transferors] are entitled to compensation for the properties conveyed by them . . . for whatever they could have realized for them in the absence of the Rail Act."). Under such circumstances, market value must be "determinable in accordance with some external standard," without reference to the value accorded to those assets by the United States Government. *Valuation Proceedings*, 445 F. Supp. at 1015. Thus, in valuing the rail assets in question, the Special Court determined that "special value" of those assets to the United States

[46] KPMG similarly recognized this fact in its valuation of the assets in the hands of New GM with the Government subsidy incorporated. FOF XV.A.5.

Government had to be "excluded as an element of market value." *Id*. at 1014 (quoting *United States v. Miller*, 317 U.S. 369, 375 (1943)).[47]

Consistent with this principle, Mr. Goesling appraised the Representative Assets on the basis of the prices the assets would have commanded in the absence of the Government-sponsored purchase. Mr. Goesling's approach to valuation recognizes that the Section 363 sale, like the acquisition at issue in *Valuation Proceedings*, was not a conventional market transaction undertaken for commercial reasons, but an extraordinary measure driven by urgent public policy concerns and aimed at forestalling the potentially disastrous economic consequences of a collapse of a vital sector of American industry. Because the Government was not acting as a commercially-motivated investor, the unique value of the Representative Assets to New GM—a value that could never have been realized but for the Government's intervention—is not a proper foundation for valuation of the Representative Assets. *Id*. at 1045. Rather, in order fairly to assess the value of the Representative Assets, the Government's intervention must be factored out, and the appraisal must proceed on the premise that no Government subsidy was extended. *See id*. at 1014. As discussed above, absent Government intervention, orderly liquidation was the only alternative.

E. Going Concern Value Is an Inappropriate Standard for Valuation of the

[47] The Special Court's conclusion parallels the general rule that market value of an asset is the price that would be paid for that asset by a hypothetical third-party buyer, not the unique value of the asset to its actual buyer. *See TPC*, 482 B.R. at 493; *see also In re Arden Props., Inc.*, 248 B.R. 164, 172 (Bankr. D. Ariz. 2000) (*Rash* standard focuses on what a "hypothetical," "willing third party buyer would pay"). Judge Gerber took this approach in determining the appropriate methodology for valuing a subset of assets sold by Old GM pursuant to the 363 Sale, holding that the correct measure of value was determined not by the actual terms of the sale between Old GM and New GM, but rather by the market price that would have obtained in a hypothetical sale "between Old GM and an unspecified purchaser." *TPC*, 482 B.R. at 493.

Representative Assets

1. Going Concern Value Cannot Be Ascribed to the Assets of a Business Enterprise That Cannot Sustain Its Own Operations

In *Valuation Proceedings*, the Special Court concluded that no "going concern" value could be properly ascribed to the assets of a failing business enterprise, incapable of sustaining its own operations without government intervention, even if those same assets could be put to continued use by a government-sponsored entity. *Valuation Proceedings*, 445 F. Supp. at 1037 n.54 (rejecting contention that transferors were "entitled to an allowance for the 'going concern' value of their properties despite their unprofitability"), 1041. The Special Court thus found "going concern" valuation inappropriate on the facts presented, because the rail assets in question, although intended for continued use in the hands of the government-sponsored entity, had not been profitable in the hands of their original owners. *Id*. at 1037 n.54, 1041. As the Special Court observed, "[e]conomic viability, i.e., the capacity to operate at a profit, is . . . the sine qua non for an award of going concern value." *Id*. at 1037 n.54 (quoting *In re Port Auth. Trans-Hudson Corp.*, 20 N.Y.2d 457, 480-81 (1967) (Burke, J., dissenting)); *see also In re Diplomat Elecs. Corp.*, 82 B.R. at 692. That the seized assets of the "hopelessly losing railroads" were put to continued use by a government-sponsored entity did not change the analysis; the Special Court concluded that the assets had no "going concern" value, notwithstanding their continued use in the hands of the government-sponsored entity, because the proper focus of the valuation analysis was the status of the transferors, not that of the transferee. *Id.* at 1015, 1037, n.54, 1041. Simply put, the rail assets could not be valued on a "going concern" basis, because the "hopelessly losing railroads" from which they were acquired were not going concerns. *Id*. at 1015, 1032 (inappropriate to ascribe more value to the assets "in their deaths than they had been worth in their recent lives").

The same analysis applies here, because, as of June 30, 2009, Old GM was no more a going concern than the railroads in *Valuation Proceedings*. Old GM was not only unable to generate profits, it was on the brink of total liquidation. *See In re Gen. Motors Corp.*, 407 B.R. at 493 ("[T]he only alternative to an immediate sale is liquidation."). As in *Valuation Proceedings*, it was only the Government's willingness to invest in an otherwise non-viable enterprise—as part of a broader effort to defuse an economic crisis—that permitted the continued operation of the assets at issue in the hands of a newly-created, Government-sponsored entity. It is for this reason that Plaintiff did not value the Representative Assets on a going-concern basis.

The Term Lenders' effort to distinguish *Valuation Proceedings* is unavailing. The Term Lenders contend that whereas the transferors in *Valuation Proceedings* "wished to cease operations," "GM very much sought to remain in the auto manufacturing business." Term Lenders' Supplemental Brief at 1, 7, *In re Motors Liquidation Co.*, No. 09-00504-mg (Bankr. S.D.N.Y. Apr. 24, 2017). The Term Lenders' argument trades on the improper conflation of Old GM and New GM, which are in fact "two distinct legal entities." *TPC*, 482 B.R. at 491. If the distinction between these entities is observed, the Term Lenders' argument falls apart, for Old GM, like the transferors in *Valuation Proceedings*, was a hopelessly failing business enterprise that intended to—and did—discontinue its operations. *See Valuation Proceedings*, 445 F. Supp. at 1017, 1032, 1036. The fact that Old GM's assets—like the rail assets in *Valuation Proceedings*—were put to use by a government-sponsored purchaser does not change the fact that these assets had no going concern value in the hands of Old GM, rendering reproduction cost as inappropriate here as it was in *Valuation Proceedings*. *Valuation Proceedings*, 445 F. Supp. at 1036 ("RCNLD may be a tenable measure of the value of the opportunity to continue a profitable enterprise . . . but it has not relevance here."). Indeed, the valuation approaches

advanced by KPMG and Mr. Chrappa—both grounded as they are in a going-concern premise—necessarily invest the Representative Assets with values that these assets could never have achieved except through government intervention, precisely like the valuation methodologies rejected as the "fantasies of 'experts'" by the Special Court. *Valuation Proceedings*, 445 F. Supp. at 1045.

The Term Lenders' arguments to the contrary miss the mark. In their pre-trial brief, the Term Lenders postulate a hypothetical "internet billionaire" who chooses to buy a "money-losing newspaper" in order to "communicate his or her opinions" to the public, with the "understanding that the paper will never turn a profit." Defendants' Amended Pre-Trial Brief, Adv. Pro. Dkt. No. 900 at 52-53. The Term Lenders contend that if the assets of this hypothetical newspaper company are to be valued, they must be valued on the basis of the price paid by the internet billionaire, rather than on the basis of any "expert-derived liquidation value." *Id*. But the Term Lenders' analogy fails on its own terms, because the price paid by the internet billionaire simply would be the liquidation value of the assets. Whatever his motivations, the Term Lenders' hypothetical internet billionaire would never pay more for the assets of the failing newspaper than those assets were worth on the open market—*i.e.*, their liquidation value. There would be no reason for the internet billionaire to pay more than liquidation value, and the owners of the assets would be in no position to demand more than liquidation value.

That the Term Lenders' hypothetical internet billionaire, having purchased the assets at their liquidation value, might also be obliged to pump additional funding into the newspaper company in order to keep its operations afloat, does not change the fact that the assets of the company were worth no more than liquidation value at the time of their purchase. Similarly, the willingness of the U.S. Treasury to inject additional funds into New GM—with the objective of

sustaining New GM's operations and, more broadly, preserving the American auto industry—does not alter the value of Old GM's assets as of June 30, 2009, or the price at which those assets would have sold on the open market.

2. 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 fact that the Representative Assets were put to use by New GM after the 363 Sale would not increase their market value. Fischel Del. ¶¶ 108-09. Here, no purchaser, including New GM, would have paid more than liquidation value to obtain the Representative Assets (or any subset of Old GM's assets) because they were not worth more than liquidation value. The reason is simple: The market value of an individual asset is determined by aggregate market demand and supply, not by the net profitability of the firm that happens to own the asset at any given time. Fischel Decl. ¶¶ 109-10. Put another way, the market value of an individual tangible asset in a profitable firm is no higher than the value of that asset in a less profitable firm. Fischel Decl. ¶ 109.

Moreover, not only was GMNA sustained as a going concern only by virtue of the massive Government subsidy, but the assets at issue in this proceeding are only a fraction of the total assets of GMNA as an operating going concern. On these issues, *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 in original). Accordingly, even if the Court were to conclude that the Government bailout was a going concern transaction, Defendants would still not be entitled to receive any value not attributable to the particular assets in which they have an interest. 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, brand recognition, and other intangible assets. Moreover, it is undisputed that the purchase price contained a subsidy; none of the value associated with that subsidy is properly attributable to the Representative Assets.

3. Liquidation Value Does Not Produce an Inequitable Result

Defendants are additionally expected to argue that it would be inequitable to hold secured creditors to the liquidation value of the Surviving Collateral, when unsecured creditors who received New GM warrants—enabling them to acquire post-closing outstanding shares of New GM—were able to capitalize on the going concern value of New GM. *See In re Gen. Motors*, 407 B.R. at 482. The argument is misguided. The warrants were part of a negotiated resolution under which unsecured creditors received consideration totaling only a fractional payment on their claims, one portion of which was paid out in warrants as an alternative to cash, on the basis of the warrants' value at that time. *E.g.* JX 0004-0002.

Defendants are further expected to argue, in reliance on *Dewsnup v. Timm*, 502 U.S. 410 (1992), that they are entitled to any increase in the value of the Surviving Collateral that may have been occasioned by the 363 Sale and the concomitant transfer of assets into the hands of the

Government-funded New GM. However, *Dewsnup* is inapposite, for the parties here are agreed that June 30, 2009 is the appropriate valuation date for the Surviving Collateral, and the law in any event requires that the Surviving Collateral be valued in the hands of the debtor, Old GM. Defendants cannot be heard now to protest that whatever increase in the value of the Surviving Collateral may have transpired *after* the Valuation Date, and after the Surviving Collateral was placed into the hands of New GM, "rightly accrues" to their benefit. *Dewsnup*, 502 U.S. at 417; *see also In re Heritage Highgate, Inc.*, 449 B.R. 451, 459-60 (D.N.J. 2011) (declining to extend *Dewsnup* to Chapter 11 context). The ruling in *Urban Communicators PCS Ltd. P'ship v. Gabriel Capital L.P.*, 394 B.R. 325 (S.D.N.Y. 2008), also relied upon by Defendants, is likewise inapposite, as there, too, there was no agreed-upon valuation date. *Urban Communicators*, 394 B.R. at 336-37.

F. Defendants Have Not Met Their Burden of Establishing the Probative Value of Their Proposed Valuation Approaches

Defendants present two approaches to valuing the Representative Assets: (i) "RCNLD" interim values taken from KPMG's work papers, and (ii) an appraisal performed by Mr. Chrappa. Each of these approaches is flawed for multiple reasons, but as a threshold matter, these approaches are not probative of the value of the Representative Assets because they value the assets in use in the hands of New GM as a going concern.

Further, even if the assets were properly valued as part of a going concern, the values urged by Defendants' experts are entirely incredible and based on flawed methodologies that present an inflated view of value. Defendants' values do not reflect the realities of the market and deviate from proper and accepted valuation and appraisal methods, and they cannot meet their burden to establish that these values reflect the fair market values of the Representative Assets.

Defendants also have tendered net book value and a business enterprise valuation of New GM conducted by Evercore as probative of the reasonableness of Defendants' proffered values. For the reasons set forth below, net book value is not probative of fair market value; the similarities between net book values and Defendants' proffered values actually highlights the disconnect between Defendants' values and market realities. Defendants' reliance on Evercore's valuation is similarly misguided, as Evercore valued assets in the hands of New GM after the 363 sale, as a going concern. Moreover, Evercore's valuation was for a limited purpose and, among other things, did not analyze the New GM projections on which it relied.

For each of these reasons, Defendants fail to meet their burden to prove the value of the Representative Assets.

1. The KPMG Report Is Irrelevant to the Valuation of the Representative Assets

As part of their effort to value the Representative Assets in the hands of Old GM as if they were assets of New GM, with all the benefits of the Government subsidy, Defendants turn to the KPMG Report. Their approach requires two steps. First, they seek to have this Court accept the KPMG Report as an appropriate reference point for valuing the Representative Assets, even though KPMG valued the assets in the hands of New GM (inclusive of the Government subsidy), not Old GM, as of a date later than the Valuation Date. To this end, Defendants describe KPMG's "extraordinary" effort in preparing their report. Then, in an attempt to obtain values for the Representative Assets that are approximately twice as high as those actually determined by KPMG, Defendants seek to discredit and dismantle a portion of KPMG Report by alleging a range of poor practices, many of which Defendants contend rise to the level of GAAP violations amounting to multi-billion dollar errors. Further, since many of the KPMG values (including the PP&E value, New GM's equity value, GMNA's equity value, and New GM's

WAAC) were adopted by New GM, New GM also stands accused of several multi-billion dollar GAAP violations.[48] Notably, though Defendants did call at trial a KPMG witness with direct knowledge of the portion of KPMG's work for which Defendants advocate—*i.e.*, the RCNLD values—they did not call a single witness from KPMG, Deloitte, or New GM with knowledge of any of the aspects of the KPMG Report or New GM's financial statements that are implicated by their criticism of KPMG's work.

At bottom, the KPMG Report, inclusive of both its RCNLD interim calculation and its fair value conclusions, is based on a valuation of New GM as of July 10, 2009 for the purpose of assisting New GM with its fresh-start accounting. And for each of the reasons set forth below, the KPMG Report is irrelevant.

a. Because the KPMG Report Values New GM as a Going Concern It Is Irrelevant for Valuing the Representative Assets

It is undisputed that KPMG valued the assets in the hands of New GM with the benefit of the massive Government subsidy; it did not value the assets in the hands of Old GM. FOF XV.A.3. This distinction, which Defendants seek so strenuously to elide, is critical. Old GM was not a going concern. New GM, with the benefit of the massive Government subsidy, was a drastically different entity with an entirely new balance sheet. KPMG's application of a "going concern" or "value in use" standard, *see* DX-0141-0004, while appropriate for valuing assets in the hands of New GM, is not appropriate for valuing assets in the hands of Old GM, which could not demand payment for those assets as part of a going concern, but only for an

[48] In highlighting the numerous violations of GAAP implied by Defendants' arguments, Plaintiff does not intend to suggest that New GM actually violated GAAP in its financial statements. Rather, Plaintiff points out the GAAP violations implicit in Defendants' argument to illustrate that their position is not credible.

amount realizable through an orderly liquidation. *See TPC*, 482 B.R. at 494-95 (rejecting "value in use" standard for valuation of Old GM assets sold pursuant Section 363 sale).

b. The KPMG Report Values New GM as of July 10, 2009, Not June 30, 2009

It is also undisputed that the effective date of the KPMG Report is July 10, 2009, not June 30, 2009. FOF ¶ 1674. As of June 30, 2009, Old GM was a non-viable business enterprise on the brink of "immediate liquidation," in such precarious financial straits that it was deemed unfit to survive even a traditional Chapter 11 proceeding. *In re Gen. Motors Corp.*, 407 B.R. at 484-86. By contrast, as of July 10, 2009, New GM was a going concern, flush with Government funding and shed of many of the significant liabilities that had anchored Old GM. As of June 30, 2009, the fate of the General Motors business and the 363 Sale was uncertain. These uncertainties undoubtedly would have affected KPMG's valuation of New GM as a business enterprise—including KPMG's calculation of the discounted cash flow analysis and, ultimately, its calculation of total invested capital. Defendants own expert, Mr. Lakhani, acknowledged the potential for differences in the business enterprise value as of June 30, 2009. FOF ¶¶ 1689-90; *see also* Klein Decl. ¶ 31 ("The values of certain assets measured as of July 10, 2009 . . . may have been substantially different on June 30, 2009, because uncertainties associated with contingencies existing as of June 30, 2009 may have been resolved as of July 10, 2009).

To support the relevance of the KPMG Report, Defendants' expert, Mr. Lakhani, stated that there were no significant changes in the demand for automobiles as between June 30, 2009 and July 10, 2009. FOF ¶ 1688. Therefore, Mr. Lakhani concludes, the fact that the KPMG Report is as of July 10, 2009, is of no consequence. FOF ¶ 1688. Mr. Lakhani's argument misses the mark and contradicts relevant accounting standards. Using a date other than July 10, 2009—and, specifically, a date before the 363 Sale was approved and New GM purchased Old

GM's assets—would result in an entirely different balance sheet. *See* FOF ¶¶ 1683-92. The discount rate utilized to calculate TIC would have been adjusted to account for the additional risks that the sale would not be approved by the Bankruptcy Court or would not timely close, risks that would impact the rate of return that would be demanded by investors as of June 30, 2009. In other words, the TIC-based Economic Obsolescence Adjustment is premised on GMNA's WACC as of July 10, 2009, but GMNA's WACC as of June 30, 2009 would have been different given the additional risks of non-approval of the 363 Sale. Neither Mr. Lakhani nor Professor Hubbard undertook any analysis to determine what GMNA's WACC would have been on June 30, 2009, or how that would affect KPMG's values. Professor Hubbard acknowledged that his analysis of New GM and the WACC is as of July 10, 2009, not June 30, 2009. FOF ¶ 1971. Mr. Lakhani admits that he did no analysis to determine what the effect would be on the components of WACC and ultimately the value of New GM's equity. FOF ¶ 1692. For this additional reason, KPMG's July 10, 2009 valuation of New GM is not probative.

c. The KPMG Report Is an Accounting Exercise Not Designed to Value Individual Assets

As Mr. Lakhani acknowledged, KPMG was tasked with an accounting endeavor to develop a balance sheet for New GM taken as a whole. Klein Decl. ¶ 30. He also understood and emphasized that KPMG was focused on helping New GM present world-wide consolidated financial statements that were accurate. Klein Decl. ¶ 30. The KPMG report is not an effort to discretely value the individual Representative Assets. Rather, KPMG's analysis was intended to be used by New GM for the limited purpose of providing a fair value of a subset of New GM's "assets, liabilities and equity interests," in accordance with applicable accounting standards, in order to assist New GM in "meeting its financial reporting requirements." DX-0141-0002; FOF XV.A.3. KPMG expressly disclaimed any other use of its report. FOF ¶ 1673.

In fact, although KPMG did provide individual asset values for its Final Concluded Fair Value, when it made subsequent category-based balance sheet adjustments to Personal Property and Building & Improvements, the categories within which the Representative Assets were included, KPMG never "pushed down" the Balance Sheet Adjustments to individual assets. FOF ¶ 1780.[49] What this demonstrates is that in preparing its report for New GM, it was simply not a critical component of the work to provide fair value estimates for each individual asset.

2. Even if the KPMG Report Were Relevant, KPMG's "RCNLD" Interim Values Are Not

Even if KPMG's going-concern valuation of New GM were relevant, Defendants would have this Court adopt partial valuation figures that reflect only an interim stage in KPMG's valuation analysis. These interim figures, which KPMG referred to as "RCNLD Pre EO" in its backup work papers, represent cost-based estimates—specifically, estimates of the cost to replace or reproduce certain assets and/or groups of assets—based on data that New GM's management provided to KPMG or which was derived from historical values recorded in Old

[49] While Mr. Lakhani intimated that KPMG determined final fair values for individual Personal Property and Building & Improvements assets, Lakhani Test. 1670:5-8, Mr. Furey expressly testified to the contrary. *See* Furey Test. 1552:5-9 ("Q. After applying the balance sheet adjustment, KPMG did not allocate the resulting fair values to individual assets, correct? A. That's correct."). Defendants cite to New GM's fixed asset ledger, which includes a value for each accounting entry, and argue that the balance sheet adjustments were eventually pushed down to the asset level. However, there is no evidence regarding how the balance sheet adjustments were purportedly pushed down or the methodology that was applied. In fact, there is no discernable methodology when comparing the change in value between KPMG's Final Concluded Fair Value for the 40 Representative Assets and the value recorded by New GM for those same assets. In Schedule 6.1 to the KPMG Report, the "Fair Value" amounts for the Personal Property and Buildings & Improvements categories (which incorporate the Balance Sheet Adjustments) are 21.98% and 22.89% larger than their respective "Individual Asset Fair Value" amounts (which do not include the balance sheet adjustments). DX-0141-0366. However, when one compares the "Individual Asset Fair Value" amounts to the amounts in New GM's ledger, the percentage increase differs greatly as between the Representative Assets. For example, for Asset No. 11, the CUC, the New GM ledger entry is 0% greater than KPMG's Final Concluded Value. DX-0033. For Asset No. 18, the Vertical Adjusting Carriers, the New GM ledger entry is 79% greater than KPMG's Final Concluded Value. DX-0033. No evidence was presented describing any methodology used by New GM to apply the balance sheet adjustments to individual assets. Accordingly, these final values are not reliable.

GM's books and records. FOF XV.A.4. They represent an interim step in KPMG's valuation process. They are not KPMG's final fair value determinations. FOF ¶ 1700.

The values are incomplete because they do not reflect the adjustment for economic obsolescence, referred to as the TIC-Based Economic Obsolescence Adjustment. FOF XV.A.5. KPMG applied this adjustment based on its determination that the prospective cash flow of a given business unit was insufficient to satisfy the returns required on the underlying assets. FOF ¶¶ 1802-03.[50] Without this economic obsolescence adjustment, there is no market-based check on the value of the assets, as required by both GAAP and germane to Section 506(a). FOF ¶¶ 1804-16. Under the cost approach, GAAP requires the fair value of machinery to not exceed the economic benefit that a market participant buyer would derive from the use of the machine. FOF ¶ 1810. Indeed, GAAP provides the following specific example:

> A reporting entity acquires a machine in a business combination: The machine will be held and used in its operations. The machine was originally purchased by the acquired entity from an outside vendor and, before the business combination, was customized by the acquired entity for use in its operations. However, the customization of the machine was not extensive. The acquiring entity determines that the asset would provide maximum value to market participants through its use in combination with other assets or with other assets and liabilities (as installed or otherwise configured for use).
>
> . . .
>
> If customization of the machine was extensive or if there were not sufficient data available to apply the market approach (for example, because market data reflect transactions for machines used on a standalone basis, such as, a scrap value for specialized assets, rather than machines used in combination with other assets or with other assets and liabilities), the reporting entity would apply the cost approach. When an asset is used in combination with other assets or with other assets and liabilities, the cost approach assumes the sale of the machine to a market participant

[50] Under Defendants' primary valuation proposal and their view that virtually every manufacturing asset is a fixture, the Surviving Collateral transferred to New GM would be valued at approximately $3.2 billion. Lakhani Decl. ¶ 147. 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.

> buyer with the complementary assets and the associated liabilities. The price received for the sale of the machine (that is, an exit price) would not be more than either of the following:
>
> a. The cost that a market participant buyer would incur to acquire or construct a substitute machine of comparable utility
>
> b. The economic benefit that a market participant buyer would derive from the use of the machine.

JX-0020-0278 to 0279 (ASC 820-10-55-36 & 38A). This is exactly what KPMG did. For KPMG's assignment, the economic benefit that a market participant would derive from New GM's PP&E was TIC. FOF ¶ 1812. KPMG was required to account for market-based realities for New GM and its interim "RCNLD" values are therefore entirely unreliable as final fair values of the Representative Assets or of any of GMNA's Personal Property or Building & Improvements.

3. Mr. Lakhani's Argument That the "RCNLD" Values Are the Best Available Indicator of Value Is outside His Expertise and Unreliable

Mr. Lakhani sole assignment was to "analyze the values" of PP&E determined by KPMG. FOF ¶ 1643. He did not himself value or appraise the Representative Assets. FOF ¶ 1644. Nor could he have: By his own admission, he is not a valuation expert; he is not qualified to conduct a valuation; he has no experience appraising machinery, equipment, buildings, or land; and has never previously testified as an expert in any matter. FOF ¶¶ 1645-50. His opinions are therefore either irrelevant or outside the scope of his expertise. FOF XV.A.1.

Despite his lack of experience, Mr. Lakhani opines that the "best available" estimate of the value of the Representative Assets is KPMG's "RCNLD." FOF ¶ 1699. But without experience as a valuation specialist or an appraiser, Mr. Lakhani lacks the specific, relevant knowledge and expertise required to assess the value of the Representative Assets. *See Nimely v.*

City of N.Y., 414 F.3d 381, 399 n.13 (2d Cir. 2005); *Chartwell Litig. Trust v. Addus Healthcare, Inc. (In re Med Diversified, Inc.)*, 334 B.R. 89, 96-97 (Bankr. E.D.N.Y. 2005) (expert not qualified to provide valuation opinion where he has no valuation certifications and instead relies on experience of others). At most, Mr. Lakhani is qualified to testify that the use of RCNLD is an appropriate methodology to use to calculate the values of certain asset categories as part of a fresh start accounting exercise. But this issue in not in dispute. The expertise Mr. Lakhani lacks, and the testimony which should not be credited because it is outside his expertise and is based on no methodology, is the extent to which economic obsolescence should be considered in valuing individual assets or whether the RCNLD approach as applied to each individual asset is the best estimate of value.

4. KPMG's "RCNLD" and Fair Value Calculations Are Imprecise Estimates of the Value of the Representative Assets

Even if KPMG's valuation were somehow probative of the values of the Representative Assets, notwithstanding the limited scope of the KPMG Report, KPMG's calculations for Personal Property and Buildings & Improvements—both its final concluded values and its interim "RCNLD" values—are not reliable values for the Representative Assets. Given the nature of KPMG's task—which included determining a value for over 400,000 discrete machinery and equipment assets—KPMG necessarily employed certain practical expedients in order to efficiently determine values for GMNA's Personal Property and Building & Improvements. Plaintiffs do not take issue with the use of these practical expedients as used by KPMG for purposes of assisting New GM in preparing its fresh start accounting balance sheet. However, it is nevertheless true that this approach sacrifices precision at the asset level, precision that would be—and, with respect to Mr. Goesling's appraisals, is—present in individualized appraisals of the Representative Assets. FOF XV.A.4.

One example of KPMG's inexactitude is KPMG's use of New GM management's aggregated estimates of direct replacement costs.[51] In determining initial replacement costs under the direct method, which KPMG used with respect to 23 Representative Assets, KPMG relied on management-provided estimates that were developed and expressed on a line- or 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 are fixtures. FOF XV.A.4.b.

The asset-specific direct replacement costs used by KPMG for Buildings & Improvements are also imprecise and lack reliability. FOF XV.A.4.d. As Mr. Klein testified, KPMG's unsubstantiated "rule of thumb" estimates to add an additional 10% of a building's replacement cost when estimating the RCN of a site were arbitrary and were determined without any examination of whether the improvements made to any particular building were extensive, nominal, or somewhere in between. FOF ¶ 1795. Under KPMG's approach, two buildings that are the same in all respects, except that one of the buildings has twice as many building improvements as the other, would have drastically different values for the individual building improvements—regardless of the types of improvements made or the conditions of the improvements. FOF ¶¶ 1793-95. It is clear that KPMG's approach was a practical expedient that did not, and was not meant to, determine the value of individual building improvements with meaningful precision. FOF ¶ 1796.

[51] There is virtually no evidence 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 the methodology used by New GM management or what standard was employed, or sufficient evidence to conclude that they complied with GAAP. Klein Decl. ¶ 87; Klein Test. 2762:17-2763:2. In evidence is a declaration of Jay Ewing concerning issues concerning calculating replacement cost. *See* Ewing Decl. However, Mr. Ewing (i) only has personal knowledge concerning New GM's assembly facilities and (ii) does not describe the methodology utilized by New GM to calculate replacement cost even at assembly facilities. *See* Ewing Decl. ¶¶ 14-17.

Further, as Mr. Lakhani admits, 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; KPMG only applied functional obsolescence deductions to assets located at one New GM facility. FOF ¶¶ 1747-48. While KPMG states that it determined functional obsolescence based on site inspections, KPMG did not inspect the Warren or Defiance facilities. FOF ¶¶ 1744, 1749-50. Mr. Furey did testify that excess capital costs, a component of functional obsolescence, were captured where the direct replacement method was used. Furey Test. 1434:22-1436:11. But excess capital costs are only one component of functional obsolescence and, moreover, excess capital costs would not be captured for assets valued via the indirect method. Klein Test. 2745:6-2746:7. KPMG never visited the plant in Defiance, a facility whose assets were valued using the indirect method. Thus, by KPMG's own reasoning, it could not have assessed whether the assets located at Defiance suffered from asset-specific functional obsolescence, yet included none.

Mr. Furey also testified that KPMG shortened the remaining useful life of certain assets to account for aspects of functional obsolescence. Furey Test. 1434:22-1436:11. But again, this method is imprecise and does not fully account for functional obsolescence and changes in technology. Klein Test. 2769:15-2770:24.

Another example of KPMG's inexactitude is the manner in which it applied an adjustment for inutility. KPMG calculated this penalty based upon management-provided utilization rates for entire plants, not utilization rates for individual assets. FOF ¶¶ 1758-62. These plant-specific inutility penalties were applied to all assets located at a plant, irrespective of the actual characteristics or condition of the asset or whether the asset had sustained additional

external economic obsolescence, potentially introducing error at the individual asset level. FOF ¶ 1764.

And with respect to KPMG's "RCNLD" values, proffered by Defendants as the most reliable indicator of value, these values do not reflect fair market values because they exclude the comprehensive economic obsolescence adjustment that KPMG 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 to consider an exercise that the developer of the exercise, KPMG, considered to be only partially complete and which would not be in compliance with GAAP. KPMG recognized that deductions to value for external economic obsolescence is a necessary and required step in valuing New GM's assets. FOF ¶¶ 1767-72; *see also* FOF XV.A.5.

Thus, even if KPMG's valuation were relevant and probative of the value of the Representative Assets, KPMG's final concluded values and KPMG's "RCNLD" values are unreliable indicators of the value of individual Representative Assets.

G. Defendants' Criticisms and Alternative Values Based upon the KPMG Report Are Unreliable and Not Probative

Defendants 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, through Mr. Lakhani, 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 a detailed individual asset-by-asset valuation (which it is not), relying on a backup document as if it were 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, and, if anything, highlights the inapplicability of KPMG's valuation.

Defendants did not prove that their cherry-picked criticisms of KPMG are valid. Thus, even if the KPMG Report itself is probative, for the reasons discussed below, Defendants' criticisms of KPMG should be rejected.

1. Mr. Lakhani's Opinions and Criticisms of KPMG Are Not Probative and Are Unsupported

While Mr. Lakhani, on the one hand, argues in favor of the massive and detailed undertaking of KPMG in calculating "RCNLD," Mr. Lakhani also opines that KPMG grossly violated GAAP and made several improper decisions, all of which downwardly biased the value of the Representative Assets. Mr. Lakhani claims that KPMG and New GM violated GAAP in two key respects. First, Mr. Lakhani contends that New GM and KPMG effectively applied so-called "negative goodwill" and violated GAAP by overstating Goodwill by $6.4 billion when it recorded as Goodwill the difference between the fair value and the GAAP value of DTAs, pensions, and OPEB. *See* FOF XV.A.7.a-b. Second, Mr. Lakhani contends that KPMG violated GAAP by reallocating $7 billion from GMNA's TIC associated with revenues from technology. FOF XV.A.7.c. He further contends that KPMG improperly applied certain intra-company reallocations that should be disregarded. FOF XV.A.7.d. Mr. Lakhani is wrong on all accounts. Even in the event that KPMG's valuation is relevant, Defendants have not met their burden that these criticisms are valid and that they should be adopted by the Court for purposes of determining the value of the Representative Assets.

a. Mr. Lakhani's Contentions that KPMG Applied "Negative Goodwill" and Improperly Determined Goodwill Are Contradicted by the Evidence

Mr. Lakhani has described KPMG's application of economic obsolescence based on its calculation of New GM's total invested capital as an application of "negative goodwill." Mr. Lakhani is alone in this view. As an initial matter, "negative goodwill" is not defined in GAAP and does not appear anywhere in the Accounting Standards Codification, which is the sole source of authoritative GAAP. FOF ¶ 1842. Mr. Lakhani acknowledges as much, stating that the concept of negative goodwill is now expressed as a "bargain purchase," which would exist if (incredibly) it were concluded that the purchase price paid for the assets of Old GM were actually less than the value of those assets, *i.e.*, the Government got a bargain. Such an occurrence would be an extraordinary event, yet it is nowhere mentioned in the KPMG Report or any work papers, Deloitte's review of KPMG's work or by New GM. FOF ¶¶ 1841-47. In fact, but for a single use of the term "negative goodwill" in a single work paper, that term appears nowhere in any KPMG document. FOF ¶ 1841. And, Mr. Furey explained that this isolated reference was not meant to convey that KPMG was applying "negative goodwill" or that it concluded there was a "bargain purchase" under the accounting standards, but simply referred to the calculation of economic obsolescence. FOF ¶ 1841. Mr. Furey was clear that KPMG did not conclude that "negative goodwill" existed. Furey Test. 1548:21-1549:4; FOF ¶ 1841. Rather, what Mr. Lakhani is calling negative goodwill is the TIC-based Economic Obsolescence Adjustment that KPMG concluded was necessary because it captured a particular form of external market-based economic obsolescence affecting the values of certain of GMNA's PP&E. FOF ¶¶ 1840, 1799.

Furthermore, Mr. Lakhani's contention that KPMG and New GM improperly determined Goodwill is unsubstantiated and contradicted by the evidence. KPMG was never asked to value

Goodwill and Mr. Lakhani admitted this on cross-examination. FOF ¶ 1875. As Mr. Klein points out, Mr. Lakhani's contention is predicated on an assumption that KPMG was assigned to apply the accounting rules for fresh-start accounting under ASC 852. FOF ¶ 1835. However, KPMG never "applied" fresh start accounting or the "fresh start accounting" rules found in ASC 852, and it was never asked to do so. FOF ¶ 1836. KPMG was engaged to determine the "fair value" of "certain," but not all, of New GM's assets in accordance with ASC 820.
FOF ¶¶ 1837-38, 1867-76

Further, New GM's calculation of Goodwill is unrelated to the value of the PP&E. As New GM explained in its S-1 Registration Statement, "We recorded Goodwill of $30.5 billion upon application of fresh-start reporting. If all identifiable assets and liabilities had been recorded at fair value upon application of fresh-start reporting, no goodwill would have resulted. . . ." JX-0010-0314 (New GM S-1 at F-56); FOF ¶¶ 1877-80.

In other words, when converting the fair value of certain intangible assets and liabilities to GAAP-required accounting values, the fair value was no longer captured on New GM's balance sheet. In order to record that value, the change in fair value caused by the adjustment was recorded as Goodwill. There is no basis whatsoever to question KPMG's calculation of Goodwill (it was not asked to, nor did it, perform such a calculation) or that of New GM (which explained its methodology in its SEC filings).

b. Mr. Lakhani's Contention that KPMG Should Have Applied the TIC Adjustment across All Assets is Inconsistent with GAAP

Mr. Lakhani asserts in the alternative that even if the TIC-Based Economic Obsolescence Adjustment was appropriate was proper, under FAS 141, KPMG should have applied this adjustment to all of New GM's non-financial assets. FOF ¶ 1850. This argument assumes,

however, that KPMG determined that there was negative goodwill and that it was dealing with this phenomenon. Specifically, FAS 141 describes the steps that should be taken when it is determined that there is negative goodwill. However, as discussed above, KPMG never made such a determination, and the application of economic obsolescence to the PP&E was not prompted by a finding of negative goodwill, but as a necessary step in the valuation of the assets. *See* FOF XV.A.7.a. Moreover, FAS 141 is an out-of-date provision that was revised and superseded in 2007 by FAS 141(R), years before the KPMG Report was issued. FOF ¶¶ 1843-45. Mr. Klein points out that this is a substantive error by Mr. Lakhani, not a mere citation error, because the allocation mechanism suggested by Mr. Lakhani expressly was removed and replaced with an entirely different accounting treatment. FOF ¶ 1857; DX-0171 (Statement of Financial Accounting Standards No. 141 (revised 2007), pp. i-v). In essence, Mr. Lakhani contends (i) KPMG found negative goodwill (though it did not), and (ii) then failed to account for this finding of negative goodwill by applying a methodology that explicitly had been removed from GAAP. FOF ¶ 1857. As Mr. Klein testified, even had there been a bargain purchase, the application of FAS 141 would have violated GAAP. FOF ¶ 1858.

Finally, Mr. Lakhani supports his contention that the TIC-Based Economic Obsolescence Adjustment should have been applied to New GM's intangible assets because those asset categories are, in his view, more subjective and prone to error than KPMG's valuation of PP&E. FOF ¶ 1859. But Mr. Lakhani failed to establish, and in fact did not attempt to establish, any errors in KPMG's valuation of Intangible Assets or Inventory. He therefore provides no basis to conclude that those categories should have been adjusted, even under the outdated provision of GAAP upon which he mistakenly relies. FOF ¶¶ 1861-63.

c. Mr. Lakhani Fails to Provide a Sufficient Basis to Conclude That the TST Reallocation Was an Error

Mr. Lakhani next contends that even if KPMG had not violated GAAP in applying economic obsolescence to reduce the value of PP&E, it violated GAAP in an entirely unrelated manner—this time the error was approximately $7 billion— that also had the effect of eliminating the economic obsolescence adjustment. FOF XV.A.7.c. The alleged error concerns the reallocation of approximately $7 billion away from GMNA to New GM's technology business unit, TST. As Mr. Lakhani acknowledged, KPMG made this reallocation based on information provided to it by New GM management that certain revenues associated with technology owned by TST resided in GMNA's cash flows, and therefore should be reallocated from GMNA to TST. FOF ¶¶ 1885-88. There is simply no basis for Mr. Lakhani to challenge this reallocation. Indeed, GAAP allows KPMG to rely on management determinations with respect to intra-company business unit reporting. FOF ¶ 1889. Mr. Lakhani's after-the-fact criticism contradicts what KPMG was told, is made without any support, and should be disregarded. FOF ¶¶ 1890-91.

d. Mr. Lakhani Similarly Fails to Establish that Other Reallocation Adjustments Were Improper

Finally, Mr. Lakhani's criticisms of other reallocations made by KPMG are entirely without support and should not be credited. *See* FOF XV.A.7.d. Again, Mr. Lakhani is simply second-guessing the contemporaneous decisions of KPMG and New GM regarding the intra-company reporting of New GM's business segments, notwithstanding the fact that he did not have access to any information beyond the high-level statements provided in the KPMG Report. Indeed, Mr. Lakhani does not identify the components of the corporate expenses he claims were inappropriately reallocated. FOF ¶ 1903. As Mr. Klein explains, GAAP affords management

wide latitude in determining the particular business segment that should report certain financial activities and Mr. Lakhani's hindsight criticisms of KPMG and New GM are directly contradicted by the KPMG Report and utterly unsubstantiated. FOF ¶¶ 1895-96. Defendants fall well short of meeting their burden to prove that these reallocations were in error and somehow downwardly biased the value of the Representative Assets.

2. The Expert Testimony of Prof. Hubbard Should Be Accorded No Weight

Defendants offer the opinion of Prof. Hubbard in support of their effort to rewrite the KPMG Report. Specifically, Prof. Hubbard's testimony fits into Defendants' larger argument that the TIC-based economic obsolescence factor applied by KPMG as part of its valuation of New GM's PP&E—what Prof. Hubbard calls the "TIC adjustment"—constituted a $6.4 billion GAAP violation. FOF ¶ 1864. Because the KPMG Report is irrelevant to the valuation of the Representative Assets (for the reasons set forth above), and the purpose of Prof. Hubbard's opinion is simply to justify proposed *adjustments* to the KPMG Report, his opinion is entirely irrelevant to the valuation of the Representative Assets.

Prof. Hubbard's testimony should be accorded no weight by this Court in any event, as it is both irrelevant and unreliable on its own terms. ***First***, Prof. Hubbard values the wrong business (New GM, not GMNA), then compounds this error by computing WACC for the wrong business (again New GM, not GMNA). ***Second***, Prof. Hubbard eschews established business valuation methodologies for an *ad hoc* approach of his own that appears to have no precedent in the economic literature and is wholly dependent—not on cash flows or asset appraisals or financial statements—but on the unlikely meaning Prof. Hubbard attaches to two isolated and equivocal statements cherry-picked from the public record. ***Third***, Prof. Hubbard's valuation analysis is based on the counterfactual premise that the U.S. Treasury acted as a "private

investor" in extending DIP financing to General Motors, when overwhelming record evidence makes clear that the Government bailout was undertaken only reluctantly and for public policy reasons that no private investor would share. ***Fourth***, in criticizing KPMG's DCF-based analysis and WACC calculation, Prof. Hubbard quarrels with valuation techniques that—according to the very authorities on which Prof. Hubbard relies—are recognized as state of the art among practitioners. ***Fifth***, Prof. Hubbard's WACC analysis is ultimately of no probative value because it does not, by Prof. Hubbard's own admission, result in any equity or TIC value for GMNA that Prof. Hubbard is willing or able to endorse as accurate or reliable. ***Sixth,*** while Prof. Hubbard acknowledges that management forecasts are often aspirational and that KPMG determined the WACC for GMNA based in part on its view that New GM's management's projections were overly optimistic, he proposes his own lower WACC for GMNA without making any corresponding adjustments to the projections. Without examining New GM's projections or the analysis performed by KPMG with respect to those projections, Prof. Hubbard nevertheless purports to revalue the entire GMNA and New GM enterprise (and, by implication, the value of the Representative Assets). ***Finally***, to accept Prof. Hubbard's analysis would require concluding that New GM miscalculated its WACC, as reported in its audited financial statements, and also reported a common equity value that was in error by more than ten billion dollars.

a. Professor Hubbard's Opinion Regarding the Imputed Common Equity Value of New GM Should Be Accorded No Weight

Although Prof. Hubbard was retained to opine on the "reasonableness of KPMG's estimate of the equity value" of *GMNA*, FOF ¶ 1904, what he purports to estimate instead is the implied equity value of *New GM*. FOF ¶ 1905. Prof. Hubbard in fact declines to offer any

independent view on the equity value of GMNA, FOF ¶ 1906, and nothing in Prof. Hubbard's testimony suggests how his estimated valuation of New GM might relate to the common equity value of GMNA, much less the value of the Representative Assets. FOF ¶ 1907.[52] Moreover, Prof. Hubbard's approach to valuation, a departure from accepted DCF methodology, ultimately rests on the strained interpretation that Prof. Hubbard gives to two unconnected statements found in the public record. Thus, as discussed below, Prof. Hubbard's valuation of New GM is not only methodologically unsound, it is beside the point.

i. Prof. Hubbard's Valuation Opinion Is Not Relevant

As a threshold matter, the Term Lenders have not met their burden of establishing that the common equity value of New GM has any relevance, direct or indirect, to the value of the Representative Assets. Indeed, nothing in Prof. Hubbard's testimony even hints at how the value of the relevant Representative Assets—all held by GMNA—would or could be derived from the common equity value of *New GM*. FOF ¶ 1909.

Instead, Prof. Hubbard suggests that his imputed equity valuation of New GM has implications for KPMG's valuation work, and in particular for KPMG's decision to apply an economic obsolescence adjustment to the PP&E of *GMNA*. FOF ¶ 1910. Prof. Hubbard's argument appears to be that had KPMG adopted a common equity value for New GM within his proposed valuation range of $33.4 billion to $40.1 billion—rather than the $19.9 billion value obtained through KPMG's own DCF-based analysis—then KPMG would have seen no need to apply an economic obsolescence adjustment to GMNA's PP&E, of which the relevant

[52] Prof. Hubbard opines only that if New GM's equity value were "biased downward," then GMNA's equity value would also be "likely similarly biased downward." FOF ¶ 1908. Prof. Hubbard does nothing to quantify this vague, posited correlation, and the mere suggestion that the equity values of New GM and GMNA would "likely" trend in the same direction does not begin to provide a basis for deriving GMNA's equity value from that of New GM, much less for deriving the value of any of the Representative Assets.

Representative Assets form a small subset. FOF ¶ 1911. Of course, Prof. Hubbard has no special insight into KPMG's analytic process and can only speculate as to how KPMG's work might have played out differently had a different equity or TIC value been adopted.

More fundamentally, however, Prof. Hubbard's suggestion is a *non sequitur*, because his "purchase price-based valuation" is a valuation of *New GM*, not GMNA. FOF ¶¶ 1905, 1916-19. As Prof. Hubbard acknowledges, KPMG calculated TIC values for each of New GM's business units individually, on a unit-by-unit basis, FOF ¶ 1912, and KPMG likewise applied its economic obsolescence adjustment (or "TIC adjustment") on an individual, unit-by-unit basis, based on the TIC values of the respective units. FOF ¶ 1913. Thus, the economic obsolescence adjustment applied by KPMG to *GMNA*'s PP&E was based on the TIC value of *GMNA*; it was not determined by the common equity or TIC value of *New GM*. FOF ¶ 1913.[53] Prof. Hubbard's opinion on the imputed common equity value of *New GM* is, therefore, simply irrelevant; it has no bearing on the "TIC adjustment" that KPMG applied to *GMNA*'s PP&E, because the "TIC adjustment" that KPMG applied to GMNA's PP&E was applied on the basis of *GMNA*'s TIC. FOF ¶ 1913.[54]

ii. Prof. Hubbard's Valuation Opinion Is Not Reliable

Prof. Hubbard's "purchase price-based valuation" is not only irrelevant, it is methodologically unsound. Prof. Hubbard rejects DCF methodology, widely recognized as the "most reliable method for determining the value of a business," *see Lippe v. Bairnco Corp.*, 288

[53] New GM's common equity and TIC values were simply aggregate values, sums of the common equity values and TIC values, respectively, of New GM's business units. FOF ¶ 1914.

[54] Prof. Hubbard stressed in direct testimony that a DCF-based valuation of the sort conducted by KPMG was so incommensurate with his own "purchase price-based valuation" that the methodologies could not be "strictly compared" and there was "no basis in valuation principles or financial theory" to expect that the two methodologies would result in the same values. FOF ¶ 1915. By Prof. Hubbard's own account, his "purchase price-based valuation" has nothing probative to say about KPMG's DCF-based valuation analysis.

B.R. 678, 689 (S.D.N.Y. 2003); *see also In re Young Broadcasting Inc.*, 430 B.R. 99, 126 (Bankr. S.D.N.Y. 2010), in favor of an approach that takes no account of New GM's financial data or cash flows and for which no supporting body of professional or academic literature exists. FOF ¶ 1916. Prof. Hubbard offers no rationale for abandoning established DCF methodology and presents his alternative approach without citation to any relevant research or supporting scholarship. *Lippe*, 288 B.R. at 689 (expert's valuation opinion held unreliable where, among other things, expert failed to perform a DCF analysis); *In re Young Broadcasting Inc.*, 430 B.R. at 127 (rejecting "novel valuation approach" as an unreliable departure from "appropriate DCF analysis" where there was "no evidence" that the method was ever "employed, discussed, and certainly not generally accepted in any academic or professional community").

A close look at Prof. Hubbard's methodology confirms its unreliability. What KPMG's analysts labored for months to compute, Prof. Hubbard purports to accomplish in two arithmetical operations. Starting with the amount "effectively paid" by Treasury to acquire its share of the common equity of New GM, Prof. Hubbard subtracts away the portion that, in his estimation, Treasury invested to "achieve its public policy goals," purportedly leaving an "approximation of market value, without the subsidy." FOF ¶ 1917. Next, Prof. Hubbard divides this amount by the fraction of the U.S. Treasury's share of the equity of New GM to arrive at U.S. Treasury's imputed valuation of 100% of New GM's common equity. FOF ¶ 1918. By this computation, Prof. Hubbard infers that the U.S. Treasury, "acting purely as a private investor," impliedly valued New GM's common equity at between $33.4 billion to $40.1 billion. FOF ¶ 1919.

The math may be basic, but the approach is flawed. Prof. Hubbard acknowledges that the 363 Sale "purchase price" does not represent New GM's market value from the point of view of

a private investor, because it includes a substantial non-commercial Government subsidy motivated by public policy concerns. FOF ¶ 1920. To determine how the U.S. Treasury valued New GM "as a private investor," Prof. Hubbard must subtract away the public policy component of the transaction, leaving only the amount that the Government expected to recoup. FOF ¶ 1921.

Thus, Prof. Hubbard's calculation requires that a dollar figure be assigned to the amount that the U.S. Treasury invested in New GM in order to achieve its "public policy goals." FOF ¶ 1922. But as Prof. Hubbard concedes, "[n]either the U.S. Treasury nor any other government body" has ever provided a "precise estimate" of this amount, nor is the subsidy dealt with by any body of professional or academic literature. FOF ¶ 1923. Prof. Hubbard's effort to divine the dollar value of the public policy component of the U.S. Treasury's investment in New GM—a figure on which Prof. Hubbard's entire valuation exercise depends—thus ultimately comes down to two isolated, ambiguous, concededly imprecise statements. FOF ¶ 1924. On the basis of just these two statements, Prof. Hubbard concludes that New GM grossly misstated its equity value, in an amount ranging from approximately *$17 billion to $24 billion*, in its SEC filings. FOF ¶ 1946.

(a) The Testimony of Ronald Bloom Does Not Support Prof. Hubbard's Conclusions

The first of the two statements is drawn from testimony given by Ronald Bloom, senior advisor to the U.S. Treasury, in connection with a Congressional Oversight Panel hearing held on July 27, 2009. FOF ¶ 1925. From Mr. Bloom's extensive testimony, Prof. Hubbard cherry-picks a single sentence:

> Less optimistic, and in Treasury's view more likely scenarios involve a reasonable probability of repayment of substantially all of the government funding for new GM and new Chrysler, and much lower recoveries for the initial loans.

FOF ¶ 1926.

Based on this isolated remark—which refers to no dollar amounts and does not even distinguish between New GM and New Chrysler—Prof. Hubbard claims that the U.S. Treasury anticipated no recovery at all on the initial $19.4 billion in TARP funding, but full recovery on all DIP financing extended to New GM, yielding a total estimated subsidy cost of $19.4 billion. FOF ¶¶ 1927-28. Mr. Bloom's comment is an exceedingly thin reed to support Prof. Hubbard's subsidy cost estimate. Indeed, Prof. Hubbard's reading of Mr. Bloom' remark is implausible on its face: Mr. Bloom's vague assertion of a "reasonable probability" of recovering "substantially all" funds—terms that Mr. Bloom does not define—is no basis for concluding that the U.S. Treasury had a real expectation (let alone a well-founded expectation) of recouping 100% of all of its investments after the initial $19.4 billion outlay. FOF ¶ 1929.

(b) The June 2009 CBO Report Does Not Support Prof. Hubbard's Conclusions

The second statement relied upon by Prof. Hubbard comes from a report issued by the Congressional Budget Office ("**CBO**") concerning TARP transactions through June 17, 2009. FOF ¶ 1931. In this report, the CBO estimated a subsidy rate of 73 percent with respect to over $50 billion in financial assistance extended, in the form of loans and/or investments, to General Motors, Chrysler, GMAC and Chrysler Financial:

> As of June 17, the Treasury had extended nearly $21 billion in loans to General Motors (GM) and $15.5 billion to Chrysler. It also provided assistance to the two financing arms formerly associated with those businesses: GMAC (formerly General Motors Acceptance Corporation) received $12.5 billion in exchange for preferred stock, and Chrysler Financial received $1.5 billion in exchange for debt obligations. . . . CBO has estimated a subsidy rate of 73 percent on those investments and loans . . .

FOF ¶ 1932.

This statement makes no distinction between New GM and New Chrysler, or between their respective financing arms. FOF ¶ 1933. Prof. Hubbard simply assumes that the CBO's aggregate subsidy rate of 73 percent—encompassing various forms of financial assistance extended to various different entities—applies without adjustment to the $21 billion in loans extended to New GM. FOF ¶ 1934. In addition, although the CBO report does not include any computed subsidy rate for the DIP financing extended to New GM (because that financial assistance was still pending as of the date of the report, FOF ¶ 1935), Prof. Hubbard nevertheless infers that the CBO anticipated full recovery of all DIP financing extended to New GM. FOF ¶ 1936.[55] By adding one unsupported assumption to another, Prof. Hubbard infers that the CBO anticipated recovery of $5.7 billion in TARP assistance to General Motors and full recovery on its DIP financing, yielding a subsidy cost figure of $15.3 billion. FOF ¶ 1937.

(c) Prof. Hubbard Provides No Support for His Conclusion That the U.S. Treasury Expected Full Repayment of DIP Financing Extended to New GM

In an effort to bolster his sparse source material, Prof. Hubbard additionally contends, again citing to a statement of Mr. Bloom, that the Auto Task Force was instructed to behave in a "commercial manner" by the White House, and that the U.S. Treasury thus extended DIP financing to New GM "as a private investor would have done," with the expectation of (at least) a full return on its investment. FOF ¶¶ 1938-39.

As an initial matter, in asserting that the U.S. Treasury acted as a "private investor would have done," Prof. Hubbard does not meaningfully address the plain fact that no "private

[55] Prof. Hubbard explained at trial that he assumed that if CBO anticipated any recovery at all on the TARP funding extended to New GM and New Chrysler, then it must have anticipated full recovery on the more senior DIP financing. FOF ¶ 1936.

investor" would have invested in New GM expecting "essentially zero" rate of return, and without any regard for the time value of money. FOF ¶ 1940.

In any event, the statement cited by Prof. Hubbard, read in its full context, does not at all support Prof. Hubbard's interpretation. What Mr. Bloom said was that the Government would manage its "ownership stake in a hands-off, commercial manner," meaning that the Government would not intervene in New GM's day-to-day business management decisions. FOF ¶ 1939. Indeed, far from suggesting that the U.S. Treasury had invested in New GM as if it were a private investor, Mr. Bloom emphasized in his statement that the Government had subsidized New GM only reluctantly, in order to avert a "devastating" and otherwise "almost certain liquidation" in the context of the "worst economic crisis in three-quarters of a century." FOF ¶ 1941. On cross-examination, Prof. Hubbard was forced to admit that the language quoted from Mr. Bloom—the only source of the phrase "commercial manner" in all of Prof. Hubbard's direct testimony—did not support his view that the U.S. Treasury expected to be repaid in full. FOF ¶ 1942.

Trying a different tack, Prof. Hubbard also opined on cross-examination that the U.S. Treasury's finding that New GM's revised business plan was "viable" itself "necessarily implies" that the U.S. Treasury expected to be repaid in full on the DIP financing. FOF ¶ 1943. Prof. Hubbard offers no support for his peculiar reading of the term "viability," or for his view that, with respect to the DIP financing, the Government changed course entirely and "acted as if it were a private investor," with no regard for policy goals. FOF ¶ 1944. That New GM's revised business plan was deemed "viable" by the U.S. Treasury is most naturally understood to mean that the U.S. Treasury believed New GM had reasonable chance of surviving, not, as Prof.

Hubbard contends, that New GM would necessarily repay every penny of DIP financing. FOF ¶ 1943.

Prof. Hubbard's assertion that the Government acted as a private investor is, moreover, contradicted by numerous statements from Government officials who confirmed that the Government had bailed out the auto industry for non-commercial motives, not in the expectation of a full return on their investment. FOF ¶ 1945. Steven Rattner stated that the "President did not approach this decision solely as if he were a private investor" and that the Government "never anticipated a full recovery" on its "capital infusions into GM." FOF ¶¶ 207, 224. As Matt Feldman explained, the Government was not a private equity firm or "a JPMorgan," and its decision-making process went beyond issues considered by ordinary market participant. FOF ¶ 227. Mr. Feldman understood that repayment was "subject to a lot of variables . . . including, most importantly, how the Government chose to sell the stock and ultimately yield the proceeds from that sale." FOF ¶ 226.

(d) The Extent of the Government Subsidy Is Not Probative of the Value of the Surviving Collateral

Prof. Hubbard's "purchase price-based valuation" fails not only because the subsidy cost associated with the U.S. Treasury's investment in New GM cannot credibly be extrapolated from the two statements that Prof. Hubbard has selected, but also, and more fundamentally, because the amount of the subsidy sheds no light on the value of the Representative Assets in the hands of *Old GM* as of June 30, 2009. Indeed, it is the very fact that a Government subsidy was required to sustain operations that establishes that Old GM was not a going concern as of June 30, 2009 absent the subsidy, and thus that the assets should not be valued on a going concern basis. FOF ¶ 1948.

Prof. Fischel has testified that the calculation of the subsidy cost has no relevance to the value of the Representative Assets and that in any event the available evidence simply did not permit a reliable estimate of the subsidy cost as of any date. FOF ¶ 1947. However, when asked by the Court for a way to estimate the subsidy, Prof. Fischel testified that by subtracting the total value of what the U.S. Treasury received from the total amount that the U.S. Treasury invested, an *ex post* proxy estimate for the subsidy cost can be derived, without recourse to ambiguous statements from the public record. FOF ¶ 1949. Prof. Fischel performed this exercise—based on the value of New GM's common equity, preferred equity, and notes—and arrived at an approximate subsidy cost of approximately $28 billion. FOF ¶ 1950. Applying that $28 billion estimated subsidy cost to Prof. Hubbard's equation (*Value of 100 percent of New GM's Common Equity* = ($39.7 billion - *P*) / 0.608), in place of the $15.3 or $19.4 billion values proposed for *P* by Prof. Hubbard, returns a common equity value broadly consistent with KPMG's $19.9 billion valuation. FOF ¶¶ 1916, 1951.

b. Prof. Hubbard's Purported Opinion Regarding the WACC of GMNA Should Be Accorded No Weight

Prof. Hubbard takes particular issue with the WACC used by KPMG in its DCF valuation of GMNA, opining that KPMG's "unreasonably high" value (23%) resulted in a "depressed" estimate of GMNA's TIC and common equity values. FOF ¶ 1952. Prof. Hubbard purports to compute a more "reasonable range" for GMNA's WACC (8.3%-11.5%), FOF ¶ 1953, and he opines that had KPMG valued GMNA using a WACC in this range, KPMG would have arrived at an equity value of $18.7 billion for GMNA and a TIC value of $44.6 billion for GMNA, with the result that "no TIC adjustment would be needed for GMNA." FOF ¶ 1954. But Prof. Hubbard computes WACC for the wrong business as of the wrong date, a fundamental misstep that renders his opinion irrelevant from the outset. Moreover, as discussed below, Prof.

Hubbard's criticisms of KPMG's analysis are unfounded, and the WACC range that Prof. Hubbard proposes as an alternative has the absurd implication that General Motors—by all accounts on its deathbed in mid-2009—in fact had no need of Government support. In addition, because New GM reported WACC values in its SEC filings, Prof. Hubbard's opinion about the WACC necessarily implies that New GM submitted false and misleading financial statements to the SEC. FOF ¶ 1955.

i. Prof. Hubbard Computed WACC for the Wrong Business

The Term Lenders cannot meet their burden of establishing the relevance of Prof. Hubbard's WACC analysis, for the simple reason that Prof. Hubbard computed WACC *for the wrong business*. On cross-examination, Prof. Hubbard admitted—contrary to his direct testimony—that he never actually computed a WACC for GMNA. FOF ¶ 1956. What Prof. Hubbard in fact computed was a WACC for *New GM*, not GMNA. FOF ¶ 1957. Prof. Hubbard stated that he "assumed" that GMNA and New GM shared the "same WACC"—an assumption that Prof. Fischel rejected as unsound—because GMNA was the "vast bulk" of New GM. FOF ¶ 1958. Prof. Hubbard's opinion is at odds with evidence demonstrating that with respect to one element of fair value after another—inventory, PP&E, brands, technology, dealer network, etc.—GMNA represented a mere fraction of the value of New GM. FOF ¶ 1959. Indeed, KPMG estimated New GM's common equity at almost $20 billion, whereas GMNA's common equity was estimated at *negative $4 billion*. FOF ¶ 1960.

Prof. Hubbard sought to brush these facts aside, testifying that his assumption that GMNA and New GM shared the same WACC rested on his finding that GMNA accounted for the "vast majority" of New GM's projected "free cash flows." FOF ¶ 1961. Prof. Hubbard

testified that GMNA accounted for 95.5% of New GM's free cash flows. FOF ¶ 1962.[56] However, the analysis by which Prof. Hubbard arrived at this figure is deeply flawed, because the 95.5% figure is obtained by focusing selectively on projected nominal free cash flows for the years 2009-2014 and, critically, by omitting cash flows associated with the terminal year. FOF ¶ 1964. As Prof. Fischel explained, any complete analysis of the relative cash flows of GMNA and New GM must include the terminal year, because the terminal year cash flow determines the value of cash flow in all years after 2014. FOF ¶ 1965. In fact, from 2009 to the terminal year, GMNA's cash flow was projected to *decrease* as a percentage of New GM's cash flows, and in the terminal year, GMNA's projected cash flows accounted for only 56.5% of New GM's projected cash flows, markedly lower than the 95.5% Prof. Hubbard misleadingly cites. FOF ¶ 1966. A comparison of the terminal values for New GM and GMNA, "reflect[ing] the present value of free cash follow occurring after the explicit forecast period," discloses a similar ratio of approximately 50%. FOF ¶ 1967. Thus, Prof. Hubbard's claim that GMNA accounted for over 95% of New GM's free cash flows is based on an arbitrary selection of projected cash flows and, therefore, is grossly misleading.

Prof. Hubbard computed the WACC of New GM, not GMNA, and his belated rationalization that these entities share the "same WACC" is unsupportable. Indeed, the very "handbook for practitioners" upon which Prof. Hubbard so often relies, ranks Prof. Hubbard's misstep among the "common errors" committed by practitioners. FOF ¶ 1968. As that text stresses, the "risks of each of the businesses owned by the diversified company need to be

[56] On cross-examination, Prof. Hubbard retreated from the 95.5% figure, stating that while GMNA represented 95.5% of New GM's free cash flows from 2009-2014, GMNA represented only approximately 82% of the present value of free cash flows. FOF ¶ 1963. This 82% figure appears nowhere in Prof. Hubbard's direct testimony and, as Prof. Fischel testified, is misleading because it was computed in reliance on the very WACC figures that Prof. Hubbard contends are unreasonable. FOF ¶ 1963.

reflected in a unique cost of capital." FOF ¶ 1969. KPMG, for one, did not fall into this error; as Prof. Hubbard notes, "KPMG calculated a different WACC for each of the New GM business units." FOF ¶ 1970. Prof. Hubbard's failure to calculate a WACC for GMNA renders his WACC analysis irrelevant and unreliable at the starting gate.

ii. Prof. Hubbard Computed WACC as of the Wrong Date

Prof. Hubbard's WACC analysis focuses not only on the wrong business, but also on the wrong date. Prof. Hubbard proposes a WACC that he claims is appropriate for New GM as of July 10, 2009, when the 363 Sale closed, rather than June 30, 2009, the Valuation Date here. FOF ¶ 1971. Prof. Hubbard's WACC analysis thus focuses on a date days after the approval of the 363 Sale and more than a week after the Valuation Date, when hundreds of objections were pending and there was no guarantee that the 363 Sale would successfully close. FOF ¶ 1972; *In re Gen. Motors Corp.*, 407 B.R. at 520. Even if one were to credit Prof. Hubbard's claim that a WACC analysis for New GM serves just as well for GMNA, Prof. Hubbard makes no attempt to demonstrate that the analysis is relevant *as of the Valuation Date*, yet another reason why his WACC analysis is not probative of the value of the Representative Assets. FOF ¶ 1973.

iii. Prof. Hubbard's WACC Analysis Is Irrelevant And Unreliable

Prof. Hubbard's WACC analysis also has no probative value on its own terms. According to Prof. Hubbard, re-running KPMG's calculations with a reduced WACC of 8.3%-11.5%, while leaving all else equal, would have resulted in higher values for GMNA's common equity and TIC. FOF ¶ 1974. But Prof. Hubbard does not adopt these higher values as his own and expresses no opinion as to whether these values would be the *correct* values for GMNA's common equity and TIC. FOF ¶ 1975. Prof. Hubbard simply assumed that KPMG's calculations were correct in all other respects and did not consider whether KPMG's analysis

contained any errors beyond WACC value, including any countervailing errors that may have tended toward a lower equity valuation. FOF ¶ 1976. At bottom, Prof. Hubbard opines that KPMG's analysis contains *at least* one error (an overstated WACC), but his proposed correction for that purported error (an over 50% reduction of the WACC) has no implications for the value of GMNA's equity or TIC that he is willing or able to stand behind. Prof. Hubbard's opinion thus has no probative value for the valuation of the Representative Assets.

Moreover, Prof. Hubbard's criticisms of KPMG's approach are neither well-informed nor well-founded. According to Prof. Hubbard, the WACC value assigned to GMNA by KPMG was "driven largely" by the Company-Specific Risk Premium ("**CSRP**") that KPMG computed for GMNA. FOF ¶ 1977. Prof. Hubbard contends that KPMG's use of a CSRP was categorically improper, opining that a CSRP has "no basis in financial theory." FOF ¶ 1978. However, as KPMG observed, CSRPs are in fact "commonly utilized in financial reporting valuations," and KPMG had itself used CSRPs in "numerous valuations for financial reporting purposes" that "passed the scrutiny of various reviewers including the SEC." FOF ¶ 1979. Indeed, according to a textbook cited repeatedly by Prof. Hubbard, the "pure" form of CAPM to which Prof. Hubbard subscribes—which excludes size premia and CSRPs—is "fraught with empirical problems." FOF ¶ 1981. In light of the empirical deficiencies, a "modified CAPM" of the sort employed by KPMG, which "includes adjustments for size and specific company risks," is "generally accepted." FOF ¶ 1982.

Prof. Hubbard's objection to KPMG's use of a "size premium" is likewise misguided. Prof. Hubbard stated in direct testimony that it was "unclear whether the size premium even exists as a matter of financial theory," but the text that he cites for this proposition in fact endorses the size premium as an "empirically derived correction to the pure CAPM."

FOF ¶ 1983. Prof. Hubbard further suggests that KPMG's use of a size premium in computing the cost of equity for GMNA was a "misapplication of the CAPM," because GMNA was in the "top decile" of the size distribution. FOF ¶ 1984. However, as Pratt & Grabowski explain, market value of equity is the standard measure of size for purposes of computing a size premium, and GMNA's equity value was determined by KPMG to be *negative*. FOF ¶ 1985.

KPMG determined that a CSRP was appropriate for GMNA after extensive consideration of the relevant risks, including the "additional risk associated with financial distress" and the risk that management's forecasts would not be met. FOF ¶ 1986. As Prof. Hubbard acknowledges, practitioners are often provided with management-prepared forecasts that are more "aspirational" than "expectational." FOF ¶ 1988. Indeed, the practitioner's textbook relied upon by Prof. Hubbard cautions that only "[r]arely are the projections tempered for possible downside outcomes." FOF ¶ 1989. Use of a CSRP allowed KPMG, among other things, to account for its view that New GM's projections were optimistic, not by adjusting the projections, but by increasing the WACC. FOF ¶ 1987.

Prof. Hubbard condemns the approach taken by KPMG as "never acceptable, in theory or in practice," FOF ¶ 1990, but according to the "handbook for practitioners" relied upon by Prof. Hubbard, increasing WACC is in fact a "commonly applied method used by practitioners to account for the overly optimistic forecasts provided to the analyst." FOF ¶ 1991. Prof. Richard Ruback of Harvard Business School, whom Prof. Hubbard also acknowledges as an authority, similarly recognizes that increasing WACC in light of optimistic management forecasts is a practice not only "generally accepted by valuation professionals" but in fact endorsed by both the American Society of Appraisers and the American Institute of Certified Public Accountants. FOF ¶ 1992.

Prof. Hubbard nevertheless insists that the "proper way to value a company" with "questionable management forecasts" is not to increase the WACC, but to "adjust the forecasts, or to add weights to forecast scenarios." FOF ¶ 1993. Prof. Hubbard's position reflects a recognized divide between academics and practitioners: "Practitioners typically account for these down-sides by increasing the discount rate beyond the market-based cost of capital whereas academics generally prefer adjustments to the cash flow forecasts themselves." FOF ¶ 1994. Prof. Hubbard's preference for one approach over the other does not change the fact that use of a CSRP is in fact a state of the art practice among valuation professionals. FOF ¶ 1980.

Although Prof. Hubbard believes that skepticism about management forecasts should be met by adjusting the forecasts, the reality is that KPMG did not adjust the forecasts, but adjusted the WACC instead. Critically, Prof. Hubbard does not suggest how KPMG would have or should have adjusted the forecasts to reflect its view that the forecasts were optimistic, or what effect such adjustments would have had on the equity or TIC value of GMNA. Prof. Hubbard simply observes that had KPMG not adjusted the WACC, and *also not adjusted the forecasts*, then the mathematical result would have been higher TIC and common equity values for GMNA. But if KPMG had not accounted for its concerns about the forecasts by adjusting GMNA's WACC, it would have accounted for those concerns in some other way, *e.g.*, by making the kinds of forecast adjustments that Prof. Hubbard allows are appropriate to reflect uncertainty about financial projections. Because Prof. Hubbard ignores this plain fact, his analysis is materially incomplete and should not be credited.

iv. Prof. Hubbard's WACC Analysis Is Inconsistent With Prof. Hubbard's Own Valuation Opinion And Yields Paradoxical Results

In addition, Prof. Hubbard's method for deriving an implied equity value for GMNA, if applied to New GM, would result in a common equity value inconsistent with his own conclusions regarding the value of New GM's common equity, a common equity value so high that it leads necessarily to the conclusion that, as of July 10, 2009, New GM would not have required the DIP financing provided by the U.S. Treasury. FOF ¶ 1995.

As described above, Prof, Hubbard concluded that the highest reasonable WACC for New GM is 11.5%. FOF ¶ 1996. By mechanically applying this WACC value to KPMG's TIC calculations, and leaving all else equal, Prof. Hubbard derived a TIC value for GMNA of $44.6 billion and a common equity value for GMNA of $18.7 billion. FOF ¶ 1997. Significantly, however, it is *not* Prof. Hubbard's opinion that these are *correct* values for GMNA's TIC and common equity. FOF ¶ 1998.

Prof. Hubbard's reluctance to credit his own implied TIC and common equity values is well-founded. The same methodology that Prof. Hubbard used to derive these implied values for GMNA can be applied just as easily to New GM, and the results are telling. Prof. Fischel has performed this exercise, applying the same methodology used by Prof. Hubbard to the entirety of New GM and, using a WACC of 11.5%, arrived at an implied common equity value for New GM, as of July 10, 2009, of $62.5 billion. FOF ¶ 1999. Using a WACC of 8.3%, the lower bound of Prof. Hubbard's proposed range, yields an even more extravagant valuation of $108 billion. FOF ¶ 2000. These figures are astonishingly high. Indeed, if New GM's equity value really had been anywhere near $62.5 billion to $108 billion, then New GM would have been solvent *even without the DIP financing*. FOF ¶ 2001. In other words, under Prof. Hubbard's assumptions, the DIP financing extended by the Government to New GM was completely

unnecessary. FOF ¶ 2001. This result demonstrates that Prof. Hubbard's WACC analysis—the same analysis applied to derive the implied equity value of GMNA—is fundamentally unsound. FOF ¶ 2002.

Moreover, the $62.5 billion to $108 billion figure arrived at using Prof. Hubbard's approach is more than $20 billion higher than the highest equity value estimate obtained by Prof. Hubbard through his "purchase price-based valuation." FOF ¶ 2003. Prof. Hubbard responds that a "DCF-based valuation" cannot be meaningfully compared with a "purchase price-based valuation," but Prof. Hubbard's own opinion turns on just such a comparison, for Prof. Hubbard sets out to contrast his "purchase price-based valuation" with KPMG's DCF-based valuation. FOF ¶ 2004. Prof. Hubbard cannot have it both ways: If comparing a "purchase price-based valuation" with a "DCF-based valuation" is improper, then Prof. Hubbard's "purchase price-based valuation" of New GM has no meaningful implications for KPMG's "DCF-based valuation." FOF ¶ 2005. And if such a comparison is *not* improper, then it cannot be ignored that Prof. Hubbard's own DCF-based methodology, when applied to New GM, results in an implied common equity value that is billions of dollars removed from the common equity value he purports to have obtained through his "purchase price-based valuation."

3. Ms. Keller's Opinions Are Unreliable and Not Relevant

Defendants also offer the opinion of Ms. Maryann Keller in support of their effort to rewrite the KPMG Report. Ms. Keller's task was focused on one specific facet of KPMG's analysis, KPMG's assessment of GMNA's company-specific risks in determining the company's CSRP. Ms. Keller was retained in particular to comment on the "reasonableness" of certain projections—dubbed the "Fresh Start Projections" by Ms. Keller—relied upon by KPMG in

assessing GMNA's company-specific risk, and also to comment on the "reasonableness" of KPMG's "stated basis" for applying a "company-specific risk premium." FOF ¶ 2006.

Ms. Keller concluded that New GM's forecast projections for GMNA were reasonable, and that KPMG's risk assessments were not. Keller Decl. ¶¶ 10-11. Neither opinion should be accorded any weight by the Court, as Ms. Keller's conclusions are pure *ipse dixit*, ungrounded in any methodology.

a. Ms. Keller Employed No Methodology to Analyze the Reasonableness of the "Fresh Start Projections"

Ms. Keller is an automotive industry analyst. FOF ¶ 2007. She provides no direct opinion on the value of the Representative Assets, as she has no experience in asset valuations or appraisals. FOF ¶¶ 2007-08. Instead, she purports to analyze certain "Fresh Start Projections" of New GM, but Ms. Keller has never been involved with a valuation of a company for purposes of that company's preparation of its fresh start financial statements and has no experience assessing the reliability of a company's projections in connection with that company preparing its fresh start balance sheet. FOF ¶¶ 2010-11.

Ms. Keller also criticizes KPMG's "stated basis" for applying a company-specific risk premium to its WACC calculation but, again, Ms. Keller has no experience calculating a company's WACC, assessing the reasonableness of a company's WACC, calculating a company specific risk premium, or determining whether it is appropriate to apply a company specific risk premium. FOF ¶¶ 2011-15. Given her lack of expertise, it is not surprising that she also expresses no opinion whether a company specific risk premium should have been applied in calculating the WACC for New GM in connection with New GM's fresh-start accounting. FOF ¶ 2016.

Ms. Keller's source for the "Fresh Start Projections" was not New GM, or even the KPMG Report, but a "work paper" prepared by Deloitte that Ms. Keller believed had been "used by KPMG." FOF ¶ 2018. Tellingly, Ms. Keller never spoke to anyone at Deloitte about the preparation of this "work paper," though it is the centerpiece of her analysis, nor did Ms. Keller communicate with anyone at New GM or KPMG about the projections. FOF ¶¶ 2019-20. In assessing the "reasonableness" of the "Fresh Start Projections," Ms. Keller did not undertake to examine the data used to develop the forecasts; indeed, Ms. Keller had no access to this data and acknowledged at trial that she had simply accepted many of the forecast figures at "face value," not even inquiring into whether New GM itself had done anything to assess the accuracy of the underlying data. FOF ¶¶ 2021-22. Ms. Keller certainly never made any effort herself to confirm the accuracy of the data underlying the projections and did not analyze what methodology, if any, was employed in developing the projections. FOF ¶ 2023.

In addition, Ms. Keller never subjected the forecasts to anything like a quantitative analysis and perceived no need to do so, testifying that the projections appeared to her to be reasonable "on their face." FOF ¶ 2024. Indeed, Ms. Keller provides no analysis whatever to support her conclusion that the "Fresh Start Projections" were "reasonable," beyond retelling the many promised benefits that she believed New GM could expect to enjoy as a result of the bankruptcy process—including the shedding of "legacy costs and burdensome labor contracts," Keller Decl. ¶¶ 55-57, reduced labor costs, Keller Decl. ¶¶ 59-63, elimination of "excess assembly capacity" and underperforming dealers, Keller Decl. ¶¶ 64-70, decommissioning of "stale" and unpopular brands, Keller Decl. ¶¶ 71-72, promotion of a "product renaissance," Keller Decl. ¶¶ 73-74, improved net revenues, Keller Decl. ¶¶ 75-83, and greater adaptability, Keller Decl. ¶ 84. FOF ¶ 2025. At bottom, Ms. Keller's verdict on the "reasonableness" of the

projections appears to be grounded in nothing more than her enthusiasm about New GM's prospects following the 363 Sale, her conviction that the rebound of the automotive market was "only a matter of time," Keller Decl. ¶ 10 (notwithstanding her concession that the end date of the recession could not have been known in 2009, Keller Test. 2080:3-9), and her perception that the "Fresh Start Projections" reflected a generally favorable outlook. What she offers, in short, is little better than a gut feeling, fortified by hindsight, which she conclusorily avers is grounded in her experience in the auto industry. Such *ipse dixit* should be given no weight by the Court.

b. Ms. Keller's Analysis of KPMG's Risk Factors Is Unreliable and Lacks Probative Value

Ms. Keller additionally purports to disagree with every one of the risk factors considered by KPMG in applying a company-specific risk premium to GMNA. Keller Test. 2087:23-2088:4; Keller Decl. ¶ 11. However, the basis of her disagreement is elusive. Ms. Keller admitted that she had no experience in calculating a company-specific risk premium and had never previously analyzed the reasonableness of a company-specific risk premium or reviewed the risks considered in determining a company-specific risk premium. FOF ¶¶ 2015-17.

Moreover, Ms. Keller did not communicate with anyone at KPMG or New GM about KPMG's risk assessments and she conceded at trial that she did not know how KPMG had arrived at its risk assessments, did not know what information or materials KPMG had reviewed, did not know what methodology, if any, KPMG had applied, did not know what relative weights KPMG had assigned to each risk factor, and did not know what risks, other than those related to GMNA's forecasts, may have been considered by KPMG in coming to its conclusions. FOF ¶¶ 2027-31; *see* Keller Test. 2086:23-2087:3, 2089:5-8, 2090:18-2091:6, 2091:7-2092:10 ("I have no idea how they aggregated all of this to come up with a number."). In light of Ms.

Keller's ignorance of KPMG's risk analytic process and its results, her assumptions with respect to KPMG's risk assessments should be accorded no weight.

In fact, Ms. Keller's trial testimony affirmatively undercuts her credibility to opine on KPMG's risk assessments, for Ms. Keller candidly admitted that she could not understand the meaning of some of the risk factors described by KPMG. FOF ¶ 2032; *see* Keller Test. 2090:8-17, 2141:22-2144:9 ("[T]he wording is very confusing"); *see also* Keller Decl. ¶¶ 121 ("[I]t is unclear to me exactly what KPMG meant by its statement."), 123 ("It is unclear what KPMG was trying to get at . . . ."). And while Ms. Keller opined in her direct testimony that KPMG had overstated the risk that GMNA would not meet its forecasts, she disclosed in cross-examination that KPMG had in fact *omitted* a key risk, one she regarded as "far greater" than any considered by KPMG: The risk that the corporate culture that had existed at Old GM would remain at New GM, allowing New GM to fall into the same patterns of mismanagement that had dragged down Old GM. FOF ¶ 2033; *see* Keller Test. 2101:12-2103:18 ("[T]hat, to me, was the biggest problem."). Tellingly, Ms. Keller never disclosed this risk in either her expert report or in her direct testimony, and she has never ventured any opinion as to what upward adjustment to GMNA's company-specific risk premium would have been merited had KPMG taken this "biggest" risk into account.

Ms. Keller offers no methodology to support her conclusions. For these reasons, Defendants fail to establish that the projections she analyzed were reasonable and that KPMG's company-specific risk premium was somehow inappropriately applied.

H. Mr. Chrappa's Appraisal Is Neither Probative Nor Reliable

1. Mr. Chrappa's Premise of Value is Built Upon Incorrect Assumptions

Defendants' appraiser, Mr. Chrappa, offers a valuation of 38 of the Representative Assets using the FMVICU with Assumed Earnings premise, a premise of value that Mr. Chrappa has never employed in any valuation he has done in the bankruptcy context and cannot recall ever applying in the context of appraising automotive assets. FOF ¶¶ 2037, 2039.

Mr. Chrappa determined this premise was appropriate by reaching the conclusion that Old GM was a willing seller that was under no compulsion to sell the Representative Assets. FOF ¶ 2040. However, the evidence at trial showed that Old GM *was* under compulsion to sell, and therefore Mr. Chrappa's analysis rests on a faulty premise. Mr. Chrappa admitted that he was not aware of any market participant willing to buy GMNA's manufacturing plants. FOF ¶ 2043. He also conceded that if the Government had forgone the 363 Sale and there were no market participants willing to purchase Old GM's assets on a going-concern basis, then the appropriate premise of value for the Representative Assets would be Orderly Liquidation Value in Place, the same premise of value used by Mr. Goesling in his alternative valuation. FOF ¶ 2041.

Further, Mr. Chrappa concluded that it was appropriate to assume that Old GM's earnings were sufficient to support its operations without conducting any sort of earnings analysis whatsoever. FOF ¶ 2044. He did so in the face of undisputed evidence that Old GM was failing as of the Valuation Date. Mr. Chrappa also made clear at trial that if there had been no market as of June 30, 2009, that could absorb GMNA's manufacturing plants with machinery and equipment in place, then the appropriate valuation premise would be piecemeal sale, the valuation premise used by Mr. Goesling. FOF ¶ 2042. That is precisely the situation faced by Old GM as of the Valuation Date.

Finally, Mr. Chrappa's appraisal is based on the assumption that KPMG's WACC was overstated. FOF ¶ 2045. He conceded that if KPMG's WACC is correct that his appraised values are inaccurate and need to be adjusted to account for KPMG's TIC-based adjustment that he failed to recognize. FOF ¶ 2046. For the reasons discussed above, Defendants assertion that KPMG's WACC should be replaced by Defendants' own WACC should be given no weight. As such, Mr. Chrappa's reliance on Defendants' surrogate WACC is improper, and his appraisal is fatally flawed.

For all of these reasons, Mr. Chrappa's premise of value of FMVICU with Assumed Earnings should not have been used and Mr. Chrappa's appraisal should be disregarded.

2. Mr. Chrappa Erred in Relying Entirely on the Cost Approach

Mr. Chrappa's relied entirely on the Cost Approach, ignoring significant market data and foregoing the necessary market approach analysis. He purportedly did so because he was unable to gather a significant amount of retrospective secondary market data based on market comparables. FOF ¶ 2048. However, it is improper to disregard the Market Approach for more commonly traded assets with active markets, like many of the Representative Assets, and certainly improper where, as here, the assets were commonly traded equipment with an active market as of the Valuation Date. FOF ¶¶ 2049-50.

Mr. Chrappa's failure to consider tens of thousands of relevant auction lots, resulting sales of GM equipment in the three years before and after the Valuation Date, and the actual market prices paid for two of the subject presses that were sold in a private treaty sale and at auction, FOF ¶¶ 2051-52, cannot stand. These errors resulted in a significant overstatement of the value of the Representative Assets. Mr. Chrappa's analysis is therefore not credible should be disregarded.

3. Mr. Chrappa Erroneously Calculated Economic Obsolescence

As discussed above, one of the most critical steps in applying the Cost Approach is the application of economic obsolescence to adjust for depreciation due to "external factors," including the economics of the industry, reduced demand for the product, increased competition, and other similar factors. FOF ¶ 2055. Mr. Chrappa failed to account properly for this crucial aspect of the Cost Approach.

Rather than incorporate (or even acknowledge) other forms of economic obsolescence, inutility was the *only* form of economic obsolescence Mr. Chrappa considered. FOF ¶ 2057. He did so despite specific guidance provided by the ASA that he should consider other external forms of economic obsolescence, which may require a detailed analysis. FOF ¶¶ 2059-62. Mr. Chrappa performed no such analysis and there is no evidence that he even considered these factors. FOF ¶ 2063. This error is particularly unjustified in light of the severe financial distress and poor state of the economy as of the Valuation Date.

Furthermore, the inutility penalty utilized by Mr. Chrappa to account for all economic obsolescence is also flawed. FOF ¶ 2064. Rather than measuring or considering utilization on an asset-by-asset basis, his calculation was developed based on a comparison of the forecasted production for 2009 through 2014 to capacity on a plant-by-plant basis for the plants where the Representative Assets were located. FOF ¶¶ 2065-66. Mr. Chrappa did so even where asset-specific data was available. FOF ¶ 2066. Not surprisingly, the broad-brush approach employed by Mr. Chrappa resulted in his application of utilization penalties that were demonstrably at odds sync with reality. While such an aggregate inutility penalty may be properly applied to determine the aggregate value of an entire group of assets used for a given process, that same inutility penalty when applied to individual assets results in unintentional distortion of individual asset values. FOF ¶¶ 2068-73.

Mr. Chrappa also used a -30% inutility penalty for the assets located at two plants that were not expected to be part of New GM and were planned for future shutdown and liquidation. FOF ¶ 2075. No plant-specific capacity and utilization information was available for these plants. FOF ¶ 2075. Mr. Chrappa deemed his -30% calculation "reasonable" without any support whatsoever. FOF ¶ 2075. This seemingly arbitrary and unsubstantiated calculation is not credible, particularly when values for assets at Defiance, which is an *ongoing* operation, were reduced by over double that amount for inutility. FOF ¶ 2076.

Mr. Chrappa also failed to consider utilization rates prior to 2009. FOF ¶ 2067. Even Mr. Chrappa conceded that there is no professional literature that suggests that future, rather than past, utilization rates are the more reliable rates to consider in conducting a utilization analysis. FOF ¶ 2067.

For these reasons, Mr. Chrappa's application of economic obsolescence is partial, unreliable, fails to meet professional standards, and ultimately results in a significant and improper overstatement of the values of the Representative Assets.

I. Net Book Value Is Not a Reliable Indicator of the Value of the Representative Assets

No party to this action contends that Old GM's net book value figures are an appropriate measure of the value of the Representative Assets, and for good reason. FOF ¶ 2080. Properly understood, net book value is not a valuation concept at all, but an accounting concept. As Patrick Furey explained at trial, net book value is simply the original cost of an asset, periodically adjusted for financial reporting purposes to reflect "accounting depreciation." FOF ¶ 2081; *see also* PX-0163-0014 (Am. Soc'y of Appraisers, Valuing Machinery: The Fundamentals of Appraising Machinery and Technical Assets 14 (3d ed. 2011)) (Net book value is the cost of an asset "less the accounting depreciation taken for financial reporting."). The

depreciation deduction is typically applied in a straight-line fashion, based on the asset's expected useful life (also an accounting concept). FOF ¶ 2082.

This "accounting depreciation process" is "not a method of valuation," and it is certainly not a method for measuring fair market value. FOF ¶ 2083; *see* PX-0163-0014 (Am. Soc'y of Appraisers, Valuing Machinery: The Fundamentals of Appraising Machinery and Technical Assets 14 (3d ed. 2011)) (Net book value is "typically derived through a cost allocation process, not a valuation process."). The Fifth Circuit Court of Appeals put the issue succinctly: "Book value is generally equal to the historical cost of an asset. Net book value is equal to book value less depreciation. *Neither book value nor net book value is the same as fair market value*." *Scottish Heritable Trust, PLC v. Peat Marwick Main & Co.*, 81 F.3d 606, 608 n.1 (5th Cir. 1996) (emphasis added); *see also In re Levitt & Sons, LLC*, 384 B.R. 630, 638-39 (Bankr. S.D. Fla. 2008) (net book value not "reflective of the true fair market value" of assets in "significantly distressed markets"). Though it is *possible* that net book value may approximate appraisal value, it will do so "only by chance." FOF ¶ 2085.

Indeed, the Term Loan Agreement at the heart of this action provided that the aggregate unpaid principal amount of the loans was never to exceed 40% of the aggregate net book value of the collateral, a strong indication that the parties understood that sale of the collateral was likely to realize only a small fraction of its net book value. *See* FOF ¶¶ 2086-87. In March 2009, the Term Loan Agreement was amended to decrease the percentage to just over 30%, reflecting an even greater variance between net book value and market value. FOF ¶ 2088. Moreover, one of the Term Loan Lenders in fact expressed concern that there could be a "major discrepancy" between net book value and fair market value. FOF ¶ 21. In response to the Term Loan Investor's inquiry, Mr. Duker, a JPMorgan managing director, confirmed that net book

value, as reflected in the collateral value certificates, was not intended to reflect fair market value. FOF ¶ 22.

Nevertheless, in their supplemental brief addressing the *Valuation Proceeding* decision, the Term Lenders have proposed "net book value" as a "useful 'check' on valuation." *See* Adv. Pro. Dkt. No. 992-1 (Term Lenders' Supplemental Brief at 2).[57] The Term Lenders maintain that Old GM's net book value figures, being "generally similar" both to KPMG's RCNLD values and to Mr. Chrappa's appraisal values, serve to "confirm the reliability and reasonableness" of the Term Lenders' proposed values. *Id*. at 9-10. But the Term Lenders have this exactly backwards: Any congruity between Old GM's net book values and the Term Lenders' proposed values only reinforces how far removed Term Lenders' values are from the fair market value of the Representative Assets. Net book value is, after all, an accounting measure that makes no provision for the functional and economic obsolescence that must be factored into a fair market valuation. FOF ¶¶ 1507, 1710. That the Term Lenders' proposed values approximate, *and often exceed*, the net book value of the Representative Assets is in fact a powerful confirmation that the Term Lenders' proposed values are not at all reflective of fair market value.

[57] The Term Lenders suggest that the Special Court recommended this approach, *see id*. at 2-3, 10, but what the Special Court actually proposed, as a "possible check" on *market* valuation, was "original cost subject to appropriate deductions," a concept that included deductions not only for depreciation, but also for "physical deterioration beyond the point provided by the normal depreciation allowances." *Valuation Proceedings*, 445 F. Supp. at 1030-31. Thus, the Special Court recognized the possibility that simple net book value could overstate the value of the assets in question and, consequently, that deductions beyond depreciation could be required to make original cost a reasonably acceptable proxy for market value where market valuation was not feasible.

J. Evercore's Valuation Is Inapplicable

The valuation conducted by Evercore in connection with its Fairness Opinion is not relevant to the valuation of the Representative Assets. At the outset, the valuation was conducted with a valuation date of July 31, 2009, and values the assets in the hands of New GM as a going concern, not Old GM; thus, Evercore's valuation is not probative of the value of the assets on June 30, 2009, in the hands of Old GM. FOF ¶¶ 2092-93. Moreover, Evercore expressly stated that it did not value individual assets of New GM or otherwise evaluate the fair value of New GM. FOF ¶¶ 2092; *see* JX-0003-0020 ("[Evercore] have not made nor assumed any responsibility for making any independent valuation or appraisal of the assets or liabilities of the Company."). The purpose of Evercore's valuation was limited to determining whether the 363 Sale was fair to Old GM. JX-0003-0020. It was not an exercise to determine the value of individual assets.[58]

[58] Evercore's valuation, including its WACC calculation, simply cannot be compared to or "plugged into" the valuation conducted by KPMG in connection with New GM's fresh-start accounting. The valuations were conducted under entirely different circumstances, varying in purposes and scope. For example, Evercore assumed the feasibility of achieving the projections it was provided by management and issued no opinion regarding their reasonableness. FOF ¶¶ 2094-97. KPMG, on the other hand, was tasked with evaluating New GM's projections and concluded they were risky. FOF ¶ 1987; DX-0141-0071. At bottom, there is no basis to conclude that Evercore's equity range or WACC for New GM, calculated in connection with its Fairness Opinion, bear any relationship to the valuation work prepared by KPMG.

CONCLUSION

For the reasons set out in the Trust's pre-trial and post-trial briefs, the Court should adopt Plaintiff's proposed findings of fact and conclusions of law.

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Respectfully submitted,

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