UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 09-50026-reg
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In the Matter of:

MOTORS LIQUIDATION COMPANY, ET AL.,
f/k/a GENERAL MOTORS CORPORATION, ET AL.,

Debtors.

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U.S. Bankruptcy Court
One Bowling Green
New York, New York

April 12, 2011
9:47 AM

B E F O R E:
HON. ROBERT E. GERBER
U.S. BANKRUPTCY JUDGE

**Hearing re: Valuation Methodology Issues Related to the Motion of the TPC Lenders**

**Transcribed by: Dena Page**

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P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Good morning.

Now, have a seat, please.

We're here on GM's dispute with the TPC lenders. And what I want to do is get appearances by each of you sitting down, and then I have some preliminary comments. First, for the TPC Lenders?

MR. BIERMAN: Steven Bierman, Sidley Austin.

THE COURT: All right, Mr. Bierman.

MR. BIERMAN: With me are Nicholas Lagemann and Kenneth Kansa --

THE COURT: Okay.

MR. BIERMAN: -- also from Sidley. Thank you.

MR. STEINBERG: Good morning, Your Honor. Arthur Steinberg from King & Spalding on behalf of New GM. To my right is my colleague Scott Davidson, as well as my colleague Slate Dabney.

THE COURT: Okay, thank you, gentlemen.

Gentlemen, I have problems with both sides' positions, but especially with New GM's. Subject to your rights to be heard, and I've read all your briefs, it seems to me that I have to construe a cause that has three separate components: fair market value, under 506, and as the date of the filing. And I would like each of you, when it's your turn to speak, to

address my instinct which is that I have to give each of those three separate components meaning, and that I have to construe the clause as an entirety and in a fashion that gives each one of those three clauses a role in life. I would like each of you to expressly address whether you disagree with that assumption.

Now, it seems to me that fair market value, those three words or that clause is actually subject to a double entendre. Mr. Steinberg, when it's your turn, I'll need you to help me understand whether you're contending in substance that it's a word of art that also defines the valuation mechanism, at least in this context.

If I understand the lenders' position, they're contending that it's more of a generic term that takes its meaning from the purpose for which the fair market value determination is to be used.

I have seen the many, many references to Rash, and also have read it. I have some material difficulty in seeing how the valuation of a truck for Chapter 13 purposes where the debtor uses his truck has very much factual relevance to this case. And what I need both sides to address is the extent to which Rash sets forth principles that apply beyond a Chapter 13 context and beyond a situation in which a debtor is going to be continuing to use its truck going forward. Putting it differently, I want you to slice and dice what Rash says to

separate principles of general application on the one hand to those that don't make much sense outside of a Chapter 13 context on the other.

Also, when we talk about value and use, which is my preferred method of describing the lenders' valuation doctrine, or preferred valuation doctrine, I have big time problems with the use of the word "replacement value" because I think that, too, is at best subject to a double entendre, and I mean, I don't want to speak disrespectfully of anybody, but I don't think that really captures the concept or at least the concept that I would be interested in because subject to your rights to be heard, it appears to me that even if I were to agree with the lenders on other aspects, we wouldn't be talking about replacement value in the sense that replacement value is normally thought of, like the replacement value in the insurance on my house where they're going to pay for getting me a new house whatever it costs to rebuild it, but instead is what a third party purchaser would pay for the property to use it for the same purpose for which it's being used now. To the extent that the lenders want to digress from that understanding, you'd have to give me some greater comfort that that could ever be appropriate. I have considerable problems with that.

With that said, I don't care who goes first. It's my understanding that you submitted a first wave of briefs

simultaneously and then did supplemental briefs simultaneously, and I'm going to give both sides an opportunity to reply. And if it's technically considered a surreply, so be it. So with that said, who -- do you have an understanding as to who's going to go first?

MR. STEINBERG: I'm happy to go first.

THE COURT: Okay, Mr. Steinberg, I'll hear from you.

MR. STEINBERG: Your Honor, if I can address the questions that you asked first to frame the argument, and then hopefully, if I don't lose track too much, I'll go back to what I had planned to say.

Your Honor had focused in on the language of the order and had focused in on three separate clauses and asked whether you had to separately construe each one of them and has indicated that your leanings was to do that, and we agree. And the three --

THE COURT: Well, actually, what I was thinking was trying to derive a meaning from the unified whole from the totality of those three clauses.

MR. STEINBERG: Sure.

THE COURT: I don't know if that's the same thing you're saying or something different.

MR. STEINBERG: No, I think it's the same thing. And I think they all are integrated in the following respects. This clause was written as a compromise to an objection to a

sale motion. It spans six or seven pages of an appropriate compromise to settle an objection that was raised in connection with that sale motion. The sale motion objection raised things like the ability of the TPC lenders to credit bid, and it had raised issues as to whether they should be able to sell pursuant to Section 363(f) of the Bankruptcy Code free and clear of their liens. So what you see as a result of the resolution of that objection and was the use of -- was this clause that you focused on. And they're all integrated.

The term "fair market value" was a term of art. It was used in the agreement that way, and even if people didn't clearly focus that way, that would've been the natural result of what was happening before Your Honor in the summer of -- when this -- in the summer of '09. There was a sale from Old GM to New GM. When someone sells assets in the context of a Chapter 11, a debtor to a third party, the issue is usually that the general standard is fair market value. Someone may quibble as to whether you should be doing it as a going concern value versus a liquidation value, meaning whether it was on a rush circumstances or not, and I think the parties agreed that we would use a going concern value, fair market value in the context of this sale that was taking place.

Now, the reference to Section 506 is, as the Rash case focus in as to the second sentence of 506. You have to look at what the purpose of the valuation is and look at the

disposition or the use of the property that's in question. Here, there wasn't a use. There wasn't a continued retention. There was a disposition. The disposition reflected in a sale, the purpose of the valuation was to value property in the context of the sale. And that's what happened here.

The third element to focus on was as of the date of the petition, that was when people were going to value the fair market value of this property. It wasn't going to be whenever this thing came up to be litigated. It was deemed to be as of that date, and that's why you see no confusion on this issue in the appraisals that were prepared because the parties tried to negotiate this resolution, the parties both agreed to prepare appraisals, and both appraisals were prepared as of the petition date. So people understood what that was about. And people also understood what fair market value was about. So there was an appraisal that was prepared by the TPC lenders and New GM. And both appraisals have the term "fair market value" and both define fair market value exactly the same way.

The TPC lenders, in addition to the fair market value, added at the request of the TPC lenders, asked their appraiser to prepare something called a value and use concept, something that I don't think in any way applies but has a way of ratcheting up the number.

And why does the value and use number differ from the fair market value number? And the reason is, if you look at

the appraisal, there's two basic components there. There is a term called functional obsolescence and external obsolescence. And when doing a fair market value appraisal, you deduct functional obsolescence, things like in the context of the Tennessee facility, that there was an air conditioning facility that was built in that most buyers would not value when they're looking to buy the property, and therefore, there was a deduction for functional obsolescence, and external obsolescence, the cost of, in effect, replacing the facility and what would be the construction costs, et cetera.

And fundamentally, when you look at the appraisals, you see that when you do a fair market value approach -- and they both did it the same way, both our appraiser and their appraiser did it the same way -- when you do a fair market value, you look at a combination of the cost, the sales factor, and an income capitalization approach. And each of the appraisals go through those three approaches. It's not my attempt to try to argue the specifics of it, but I wanted to illustrate the difference between value and use and fair market value.

THE COURT: Pause please, Mr. Steinberg, because the examples you gave for functional obsolescence diverged a little bit from what my layman's instincts had told me, which is that functional obsolescence would deal with the extent to which it wouldn't be usable for the particular function that either Old

GM, New GM, or some alternative buyer might want to use it for and that the distinction between value and use and fair market value might turn on the difference between what a strategic purchaser might want to use the property for on the one hand and a financial purchaser would, on the other.

MR. STEINBERG: No, that's not it. The functional obsolescence as used in the appraisal is actually defined and discusses why they made a deduction. It gives an example of the functional obsolescence that they're talking about.

The other obsolescence, the external obsolescence, is economic conditions, et cetera. Those are ignored when you're doing a value and use concept because it's deemed that the entity is, in effect, going to retain the use, and therefore, they don't care what the market would value it at. And those points are illustrated by the appraisal itself. And what's interesting when you actually go through the appraisal -- and I apologize because this aspect was not as well-briefed as I would have liked to see it, so I'd like to be able to take you through it -- is that when you do the market value, you have the three tests, and then you balance the three tests: costs, sales, and income capitalization. And when you do the value and use, you only focus on the cost factor. It's the same test, but you're ignoring -- you're only looking at the cost, and you're not looking at the sales and the income cap for purposes of determining market value. And when you actually

look at the appraisal, you see that --

THE COURT: Pause please. I'm not going to put a sock in your mouth, Mr. Steinberg, but it seems to me that I thought my purpose on this hearing was to determine legal principles upon which the appraisals would later proceed, rather than doing kind of like a bottom's up thing where I try to take the appraisals and determine the legal principles. It would seem to me that whatever the appraisers did up to this point is irrelevant to my legal decision.

MR. STEINBERG: No, Your Honor, I think that I can tie it in in a very short order. When you look at the appraisals and they say what's the appropriate test for establishing the market value of these properties, they say, in the case of the Tennessee property, the best test is the sales test. And in connection with the Maryland property, they say the best test is the income capitalization test. That's their appraisals.

Both the sales test and the income capitalization test are not part of the test for purposes of value and use. They're only used for purposes of doing the market valuation tests. So my point of illustrating the appraisals is that their own appraisal recognizes itself that there's a way to market value and that an overreliance on the cost factor, which is the premise of the value and use concept, should not be used in this case, and that in one property it's the sales and in one property it's the income cap.

So I'm not trying to argue what -- whether they did it right or whether they did it wrong. All I'm saying to you is that their appraiser themselves made the determination that in order to do value and use, the only factor you look at is cost, and the cost factor is the least significant factor in this case for purposes of valuing the market value of the property. And that's the point I'm trying to illustrate, which is that value and use is used for a specialized purpose for a specific buyer. It is not the test for what the market will test for as a general basis for the case. And I could point to the specific sections of the appraisal if Your Honor would find it helpful to look at to illustrate what I just said as to the emphasis on the sale and the income cap and the underreliance and the improper-to-rely-on, the cost factor. And that the cost factor is the premise of the value and use.

And the cost factor starts with replacement value. When you do the cost factor test, you start with replacement value, and then you make deductions. And the sole issue here, as in the difference in value and use versus market value, is that you're not deducting for the two types of obsolescences that I referred to before when calculating the value and use test. You're leaving it higher. And that is not what the appraiser, their appraiser says the market looks at for purposes of determining market value.

THE COURT: Mr. Steinberg, to what extent does case

law support using cost for value and use?

MR. STEINBERG: Oh, I don't think it supports it at all.

THE COURT: Well, that's kind of what's troubling me. I had another case early in my tenure, about ten years ago, Global Crossing, where Global Crossing spent billions of dollars to create a fiber network that would be used for telecommunications. And when the whole company, including the totality of that fiber network was sold, the going concern value of the entire company, shorn, by the way, of its liabilities, was about a billion dollars. And any valuation method that placed material, much less excessive weight on cost to create the asset would reward somebody who was careless in running up expenses and building the facility and would have no relation to what the marketplace would pay for the asset, even for the particular use of -- let's take that example -- sending communications underneath the Atlantic Ocean.

Now, you're nodding. I don't know whether I'm arguing your position --

MR. STEINBERG: You are --

THE COURT: -- down the road, but I still see this as having little if any relevance to the legal issue that I'm asked to decide, today, at least.

MR. STEINBERG: Well, but that is what value and -- that is what they're arguing value and use is, and I'm agreeing

with you that it doesn't have any relevance. And in the example that you gave, an overbuild of the fiber optic network would have been the type of obsolescence which would be additional functional obsolescence which would be deducted from a fair market value appraisal but would not be deducted in a value and use appraisal. And that is exactly why when parties bargain for the standard in the sale order, they bargain for the fair market value standard, what a willing buyer and a willing seller would buy under the circumstance.

And in the context of Section 506 which talks about use or disposition -- in this case, a disposition -- and we can't try to take a square peg and try to put it into a round hold and try to dream that this is a case like in Rash where the debtor retained the property and you were trying to value it for purposes of a secured creditor cramdown as to what it meant when the debtor was continuing to use the property because in this particular case, there was no debtor continuing to use the property. This was a third party sale to New General Motors. It was the kind of sale that had a specific 363(m) good faith purchaser findings. Their briefing in this case tried to meld GM and New GM, but clearly the premise of the case in the sale order, that there was a sale to a distinct entity. And it was a purchase, and then therefore, in the context of a sale in a bankruptcy case under Section 363, the valuation standard, even if they had not specified it in the

order, would have been fair market value. When you sell an asset, it's the fair market value of that asset. The only distinction would have been if it would have been liquidation value versus going concern value, and I'm prepared to say that it's a going concern value that should be valued for purposes of the TPC lenders' position.

The Rash case that Your Honor talked about, we have argued that the Rash case specifically doesn't have much application here because Rash -- the primary holding of Rash was should the Court have used a liquidation value versus a going concern value for purposes of a valuation. When Rash ultimately got to saying that it was a replacement value, then looked at the Ninth Circuit case and said, you know, in this context, replacement value is very close to fair market value. So Rash was really focused on going concern versus liquidation value in the context of a cramdown. We do not have a cramdown here. We have a sale. They do not cite one case, and I'm not aware of any case that would say you would use a liquidation -- that you would use a value and use concept for purposes of valuing a sale in a Section 363 context because it's not important what a particular buyer's use was. They don't look at it that way. In fact, Rash said that I'm trying --

THE COURT: Excuse me. I don't need body language from the other side as Mr. Steinberg argues.

MR. STEINBERG: In fact Rash says, I'm not trying to

do -- we're going to try to establish a firm rule for the facts of this case. We're not going to try to, in effect, create a situation where the lower courts can fashion their remedy in our particular circumstance based on what they see are the facts and circumstances. We want to set, in effect, a bright line for the issue that we're ruling upon.

And we cite into our case the Bell case which came out of the Bankruptcy Court for the Northern District of Indiana, and it said there that Rash says nothing about a setting of value based on the use which may be of use to a particular debtor. In fact, in Bell, the issue that came up there was that the debtor was, in effect, a farmer, and it had, like, twenty acres of vacant land. And when they did the valuation battle, they were trying to tell the court we're not using the land -- it's not being used for the purposes of farming, and therefore put a negligible value on the land. And the secured creditor was arguing but the land would have a value for an alternative use.

And certainly, when you value our interest, you have to look at what is not from the debtors' perspective its use but what the market would value its use for, and therefore, you needed to assess it not by how the debtor was going to use it but how the market would treat it and what people would pay for it. And in --

THE COURT: Pause please, Mr. Steinberg. You said

Bell?

MR. STEINBERG: Bell. In re: Bell, 304 B.R. 878.

THE COURT: What's the name of the case?

MR. STEINBERG: In re: Bell, B-E-L-L.

THE COURT: Oh. Oh, I see. Okay.

MR. STEINBERG: And there, they reiterated the concept that I had just talked about before, in citing to Rash, they said that the Supreme Court rejected a ruleless approach to value based on the facts and circumstances of individual cases that a higher or better use of property than what the debtor was using it for must be taken into account when valuing the replacement value called for in Rash.

And then in the Perez case, P-E-R-E-Z, which is also cited by us, they, interpreting Rash, said that Rash did not set their standard for using replacement value in a nondebtor retention situation. So Rash had limited utility for the cramdown where the debtor is holding the property but otherwise, it's going to be a different circumstance.

And here, we think that the Rash case generally is a sort of a side show, that he parties actually contracted for what the standard should be, which is the fair market value which is built into the order. But even if the parties had not contracted for it, that would be the standard for a Section 363 sale. That is the standard called for under Section 506 which talks about what is the purpose of the valuation and in what

context are we doing the valuation. Here, it's a 363 sale in the context of a disposition. And the date would be we're valuing it as of the deemed sale date which would be the petition date.

So to sum up, Your Honor, and thank you for letting me speak longer than I thought I would, here, we believe that what Your Honor will ultimately be asked to do is to value these properties as what a third party in the marketplace would have paid for it, and that would be the equivalent of allocating the amount that GM paid. And it's not going to be based on what the particularized use that Old GM had for the property or even what New GM may want for the property. It's the best price that could be obtained for this property in the general market.

And that standard is something that everybody understood. It's not a vague concept. The appraisals were both done that way. The tests that were done to establish that were all done the same way. It's just a matter that people varied a little on the two particular properties. And the variance in the fair market value approach is eleven million dollars over two properties. The variance, when you put in the value and use concept, is thirty-four million dollars. And the primary thing, the twenty-three million dollar delta, twenty-one million dollars is simply because they deducted the two types of obsolescence they had before, which their own appraisals recognize is not relevant and not appropriate to do

when you're trying to measure the market value of property.

THE COURT: Okay. Thank you.

For the lenders?

MR. KANSA: Good morning, Your Honor. Ken Kansa of Sidley Austin on behalf of the TPC lenders. I will address the points the Court has raised respecting the various positions of the lenders on the matters that have been raised in our briefs.

With respect, Your Honor, to the Court's first point as to how we believe the sale order should be read, we agree entirely with the Court. There are three components of the relevant clause of the sale order that need to be sussed out and given meaning here, and they need to be given meaning as a unified whole in their entirety: fair market value, under Section 506 of the Bankruptcy Code, and as of the date of the filing.

I don't believe there is disagreement between either ourselves or New GM that the relevant date here is the commencement date of June 1st, 2009.

I believe there is disagreement between ourselves and New GM on the point of fair market value. Your Honor has summed it up accurately, I believe, in saying that our view of fair market value is that it is a term of art. Collier's makes very clear that the court is always seeking to determine, in the context of a 506 valuation, fair market value. The question is how does one get to determining fair market value.

And that goes through the analysis in Section 506 of the Bankruptcy Code where first the court determines the purpose of the valuation, which is, here, to value the TPC properties for the purposes of sizing the TPC lenders' secured claim, and then if that is something less than the 90.7 million face dollars of the claim, sizing the TPC lenders' unsecured deficiency claim to be paid from the bankruptcy estate.

The court then looks from the purpose to determine the -- the court then looks from the purpose of the valuation to determine -- excuse me; I'm just going through my notes, here. The court goes from the purpose of the valuation to determine the intended disposition or use of the property under Section 506 of the Bankruptcy Code. I think we have a fundamental disagreement with New GM on that point where they say there was a disposition, and they simply stop the analysis. We say there was a disposition, but the Court needs to take account of a disposition to whom and for what purpose.

New GM has made very clear their view that this was a sale to a distinct entity as counsel articulated at the podium. We agree with that. There was a sale of this property from Old GM to New GM. No one disputes that point. The purpose of that sale was so that New GM could continue using these facilities for precisely the same purpose in its business that Old GM had used the facilities in its business. The Court does not need to be, and there is nothing in the term "fair market value" or

any other term that requires the Court to be willfully blind to that notion. The Court can and indeed should take account of it under the prevailing case law interpreting Section 506 of the Code and under the plain language of the second sentence of 506 of the Code.

THE COURT: Mr. Kansa, of course, the Court can't be willfully blind, but doesn't that argument focusing on the particular purchaser prove too much? To take the silly or obvious example, if you have a sale to an insider who's going to continue the operation of the business previously engaged in by the deadbeat debtor and it's at a less than arm's length price, surely you wouldn't agree that that purchase can be a benchmark, or conversely, if the price is as the result of an old-fashioned 1980-style tender offer battle in which a white knight comes in to take the property and pays too much for it, I would have difficulties in seeing how that could be regarded as determinative, either.

It seems to me that at most you're entitled to is a legal principle that says that the value is to be measured as to what a particular purchaser would be willing to pay for that kind of asset for that kind of use in a transaction with an otherwise willing buyer and willing seller in an unmanipulated market.

MR. KANSA: I think we agree with all of those points, and if I can flesh that out, where what we would agree with is

that the TPC lenders are entitled, here, to what a willing buyer and a willing seller engaged in this business would pay for a facility to manufacture the transmissions and the electric motors that are being manufactured in White Marsh or conduct the warehousing operations that are being conducted at the Memphis facility. There is an inherent value to that that comes to any purchaser that was willing, in effect, to step into that business and avoid the disruption of having to start afresh with a vacant facility as the New GM definition of fair market value would have us do. Here, there is a clear value for a purchaser coming into this business. Both of the parties are involved in the same business. We don't have to speculate to that; it's fact. And the real determination is now how do we set that price. That wasn't done at the time of the sale hearing, at least not with respect to these two facilities but as to the undifferentiated whole. Now we need to allocate that portion.

THE COURT: Mr. Kansa, it's increasingly rare in the cases on my watch, and I think in the cases on my colleagues' watch, that we have situations like this one where a secured lender has a lien on only a small subset of the debtor's assets. More commonly, secured lenders have a lien on everything the debtor's got. And sometimes, people bid in that environment; sometimes they credit bid in that environment. How does your analysis work when the secured lender has a lien

on everything the debtor's got?

MR. KANSA: Your Honor, if the -- the answer, I think, in this context, Your Honor, is that the question would not arise in that context. If the secured lender, if the TPC lenders had had a lien on all of the assets of Old GM at the time that the sale order was being considered, all or whatever percentage of the purchase price allocable to all of the assets of Old GM would have come to the TPC lenders. There would have been a price that we could have looked to to say that is the value, and either we object to the sale, as secured lenders do, or we acquiesce in the sale and we take the allocable portion of the proceeds.

That wasn't done here. As Your Honor points out, we have a lien on only a small portion of the assets. It's not that we didn't try to get a value from Old GM and New GM as to what is that number so we can determine whether a credit bid, for example, would be feasible or whether we need to continue pressing our objections to the sale. Here, that factual situation simply didn't arise. And as a result, we have no price to shoot at, and the parties put that issue, if you will, in the refrigerator for two years, and now we have come back to this Court a couple years after the sale to hand the Court, if you will, the unenviable task of putting Humpty back together again, a bit, and trying to get a determination of what New GM should have paid Old GM for these facilities in 2009 knowing

what New GM and Old GM and everyone in the room knew at the time, which is that these facilities were going to continue to be used as part of the New GM business.

Your Honor, if I may turn to the discussion of fair market value, I think we have largely subsumed that in our colloquy, but our view is that that is more of a term of art than the specific dictionary definition that counsel for New GM has referred to. The statement that everyone was, when they were drafting the sale order in July of 2009, looking to a dictionary definition to determine what the definition of fair market value for use in that order was is fantasy. It is not true. The parties were looking to, as bankruptcy lawyers, standard bankruptcy concepts of fair market value. And courts uniformly say under 506, we are looking to determine the fair market value of that transaction.

The question remains how and what valuation methodology should this Court apply to reach that valuation. And I think the Court has hit it on the head in saying we are looking to establish a valuation as to what a willing buyer would pay a willing seller when both of them are engaged in this business for the purposes of this transaction. And that is what we are asking the Court to ascertain as the valuation standard for this property so we can determine our claims.

THE COURT: Mr. Kansa, neither side asked me for an evidentiary hearing. And that would seemingly be appropriate

for one of two leading contender reasons -- there may be another -- one being that you don't perceive fair market value as ambiguous, or the other being that neither side said anything out of its mouth that could be used as evidence in parol evidence context or perhaps some reason that I didn't think of. Which of those is it, and would you confirm for me that you're not asking me to conduct an evidentiary hearing?

MR. KANSA: I confirm that I'm not asking you to conduct an evidentiary hearing, Your Honor, and there is nothing that I seek to introduce here by way of saying that any party made any admission of what fair market value was or wasn't. I'm simply endeavoring to respond to the contentions of counsel for New GM that everyone had a particular value in mind or had a particular definition of fair market value in mind at the time of the sale hearing. I just don't think that's the case, Your Honor.

THE COURT: Well, I assume that consistent with what we learn in first year contracts, you're not relying on anything that wasn't expressed to the other side?

MR. KANSA: Absolutely not, Your Honor.

THE COURT: Okay.

MR. KANSA: Your Honor, if I may, I'd like to turn next to the Court's questions on how does Rash apply, and I think our briefing makes, perhaps not as plain as it should have, but our purpose in relying on Rash is for the general

principles that this Court should be looking to the actual transaction that took place, rather than a hypothetical or a possible transaction that could take place which is, I submit, what New GM is looking to put the Court to. We are asking the Court to value the sale of these two facilities from Old GM to New GM as of June 1st, 2009, and nothing more. There's no real dispute that that was the disposition here.

Rash makes plain that a court is to look at that transaction and not the transaction taking place between this particular seller and a hypothetical generic purchaser, to use the term that New GM has used for their purposes. We are not, I think, arguing that Rash and -- or that there was an implied retention by the debtor in this case. We recognize that there was a sale, and I don't think that's seriously disputed. We are very cognizant of that. And what we are saying here is when the Court looks to the disposition that took place here for its 506 analysis, it needs to look at what actually happened. And we steer the Court towards the actual transaction that took place, and New GM looks to steer the Court away from that towards a transaction that took place between this seller and some party that was never involved in the transaction for the purpose of not -- not for the purpose of continued automotive manufacture or auto parts manufacture but for some unspecified generic industrial purpose. I think Rash, for that proposition, is not -- is applicable not just in

Chapter 13 cases but Chapter 11 cases, and I don't think there is very serious question as to the applicability in that scenario.

The one case that we have put into our papers from the District of New Hampshire, the Clarkeies decision, makes clear that the logic of Rash applies where you have a, in that case, a transfer of secured creditor A's collateral to secured creditor B but with the acquiescence, if you will, of secured creditor A, or at least the nonobjection. The valuation of that collateral could have been done at the lower liquidation value or the higher going concern value, and the court held that it was appropriate to value that property at the higher going concern value precisely because the property had not been liquidated by secured creditor B but had been used by secured creditor B in continuing to operate the debtor's business after that relief from the stay was granted by the bankruptcy court. That is the sort of scenario where we envision Rash being applicable, Your Honor. Look to the transaction that actually occurred rather than a hypothetical possible transaction that we know, here, never did, in fact, occur.

Your Honor, I then come back to the Court's last point at the outset, which is the definition of value and use. I think we've covered that in large measure in our colloquy, but the TPC lenders are looking, here, to get a valuation that measures what a willing buyer would pay a willing seller in

this business under the circumstances of this transaction. What is the price that New GM should have paid Old GM here on June 1st of 2009 or what -- under the transaction that was contemplated as of June 1st, 2009. That is what we are asking the Court to value here, and that is what we submit is the appropriate legal standard.

THE COURT: Okay. Anything else, Mr. Kansa?

MR. KANSA: Your Honor, the only thing I would do is apologize to the Court and Mr. Steinberg for my body language earlier. I do apologize for that and regret that.

THE COURT: Okay, thank you.

Mr. Steinberg?

MR. STEINBERG: Your Honor, the concept of value and use which is where the big swing is, is based on the cost test. The predicate for the cost test, the opening element of the cost test is replacement value. It's not a market value test. It's based on the cost of, in effect, rebuilding the asset. And then there's some deductions that are made.

The standard that my colleague is talking about, which is that people had to look at what the market would test as to this sale, is the fair market value test. And in particular, its primary focus is the sales comparison component of the fair market value test as reflected both in our appraisal and their appraisal.

And the definition of fair market value -- and I was

trying to figure out how to say this -- if something is a term of art and is referenced generally in a dictionary, then whether people had a discussion about it or not, when they write it in an order, it has a meaning. It has a generalized meaning that both people understand. In the appraisal, and remember, we're trying to distinguish between market value and value and use, in their appraisal, when defining what market value is, it says the most probable price which a party should bring in a competitive and open market under all conditions requisite to a fair sale. He's arguing -- he's using the word "value and use", but his entire argument is a market value, a fair market value construct.

Your Honor, in almost all ca -- I can't think of a case where someone would ask you to value an asset from the buyer's perspective as compared to from the market's perspective. If a buyer is in -- a financial buyer versus a specialized buyer, a strategic buyer in the industry, and the fact that they can achieve certain synergies by buying the asset and therefore, they have a competitive advantage. All of that is reflected when people do a sales comparison test as to what the market would pay from either a strategic buyer or a financial buyer. And that's the sales market test, that's part of fair market value, and it's distinctly not pat of value and use. A market, the marketplace, would've test the fact that something was overbuilt, whether it's Global Crossing

overbuilding its fiber optic network, whether it's New GM recognizing that in the prior context, it maybe shouldn't have put air conditioning in the Tennessee distribution unit. That would be reflected in the value. That's a fair market value test. Under a value and use concept, they just cross that out.

The market, whether it's a person who's a strategic or a financial buyer would have tested what the economic conditions were at the time of the sale. That kind of obsolescence, that economic obsolescence test, is not built into the value and use concept, and it has to. No bankruptcy judge that I'm aware of would look at an asset sale and say you know what, I'm ignoring what it means from the marketplace, I'm ignoring what it means from the debtor, I'm only going to focus as to what the buyer can do with this property, and that is how I'm going to value something. That's not a test. That's not something that's grounded in law. But that's what they're asking you to do. And when reality is that when one looks at the transcript here, one will see that every once in a while, he drifts back into saying, Judge, what I'm really asking to you is what a willing buyer and a willing seller in the industry would pay for this, and that's the fair market value test. I will say that it's not limited to the industry. I think that the fair market value test is not what someone in the industry would pay; it's what someone in the marketplace would buy. It may be that this distribution center sits on top

of an oil well and that you're better off knocking it down as a distribution center and building it for production of what's inside the ground. And then someone should pay for that, and that's what the appropriate valuation is. It's not limited to what's in the industry.

But in either event, it's based on the market test. And I think when Your Honor took the bench, you were saying, shouldn't I take into account what this thing is being dealt with, and I think the answer is yes. All of that are factors for purpose of determining what the market will perceive what the value is. And that's what we were -- that was the only way you can test it. That's the only way that you can have a trial in this thing.

And therefore, my general comment is that you can't predicate this valuation based on a cost concept which is predicated solely on replacement value which is discredited by their own appraiser. You have to be able to do it on what the appraiser said is the most important factor for purposes of valuing the property, which is either a sales context in the context of one property and maybe even an income capitalization test where they thought there was a -- there could be a robust market to, in effect, lease out the facility. But that's what the market test is, and that's what we think we were being asked to measure when the objection to the sale was finessed. That's it.

THE COURT: Before you sit down, remember the questions I asked Mr. Kansa? You're not looking for an evidentiary hearing either?

MR. STEINBERG: No, I'm not, Your Honor.

THE COURT: And you're not seeking to rely in any way on parol evidence?

MR. STEINBERG: That's correct, Your Honor.

THE COURT: Okay. Mr. Kansa, any surreply?

MR. KANSA: Your Honor, I'd offer only one brief rebuttal point, and that's that the appraisals in this matter don't drive the legal standard. We are here at the request of New GM to determine what the effective legal standard is for valuing this property, and what New GM, I think, has done here is come in and said the legal standard is we have an appraisal that we believe is more accurate, and we believe that the definition of fair market value from that appraisal should be the standard that is applied by the Court. It's not within the capacity of the appraisers to make the point to the parties or to this Court as to what the legal standard of fair market value in the context of a 506 sale is. We have the statute and we have the case law to do that, and I urge the Court to view the appraisals, in essence, as a red herring at this point. If we're due to have a future evidentiary hearing on the appraisals, we can have those; we can the valuation hearing. That is -- that was the subject of our initial motion that

kicked this process off. But the appraisals themselves should not be driving the Court's decision today of what the appropriate legal standard is. That's really an issue for another day.

THE COURT: All right, thank you.

MR. KANSA: Thank you, Your Honor.

THE COURT: Okay, gentlemen, I'm going to take this under submission, and I'll get you a decision as soon as circumstances permit. We're adjourned.

(Whereupon these proceedings were concluded at 10:40 AM)

C E R T I F I C A T I O N

I, Dena Page, certify that the foregoing transcript is a true and accurate record of the proceedings.

Dena Page

Digitally signed by Dena Page
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