WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019
Telephone: (212) 403-1000

KELLEY DRYE & WARREN LLP
101 Park Avenue
New York, New York 10178
Telephone: (212) 808-7800

Additional Counsel Listed on Signature Page

Attorneys for Members of Defendants' Steering Committee

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11 Case
MOTORS LIQUIDATION COMPANY, *et al.*,	Case No. 09-50026 (MG)
Debtors.	(Jointly Administered)
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)
vs.	
JPMORGAN CHASE BANK, N.A., individually and as Administrative Agent for Various Lenders Party to the Term Loan Agreement described herein, *et al.*,	
Defendants.	

PRELIMINARY LEGAL BRIEF OF DEFENDANTS' STEERING COMMITTEE REGARDING COLLATERAL IDENTIFICATION ISSUES

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PRELIMINARY STATEMENT

This preliminary legal brief addresses two discrete issues: (1) What is a fixture under relevant state law?, and (2) Which of the facilities owned by General Motors Corporation and Saturn Corporation (together, "GM") contain assets as to which defendants held a perfected security interest at the time their loans were repaid (the "Surviving Collateral")? At the Court's request, defendants address the first issue — What is a fixture? — under Michigan and Ohio law to help the Court understand "the contours of what each side believes that the applicable law is with respect to fixtures in those two states." Tr. of Hr'g at 83 (Apr. 18, 2016). As for the second issue, defendants show that their perfected security interest included not only the fixtures located at facilities named on Schedule 1 to the Collateral Agreement, but also any fixtures at additional facilities that are "related or appurtenant" to those named plants.[1]

The Surviving Collateral includes, for example, integrated manufacturing systems that link massive metal-milling machines, stretch hundreds of feet long, and are bolted to concrete foundations and integrated into GM's plants with piping and overhead superstructures. The Surviving Collateral also includes GM's metal-stamping presses, machines that are larger than most homes, sunk into trenches 25- to 30-feet deep, and annexed to the realty with engineered concrete foundations, bolts, and tons of support steel. Hermetically enclosed paint facilities (known as "paint booths"), welding systems, cranes, robots, cooling towers, metal furnaces, and scrap-metal removal systems are also among the disputed assets. At trial, defendants will show that these assets — which were intended to remain in place for their useful lives, are fully integrated into GM's plants, and are essential to its business operations — are clearly fixtures under the applicable state law standards.

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[1] The parties also dispute whether fixtures subject to leases are Surviving Collateral. GM has not yet produced the documents relevant to that issue. Accordingly, as permitted by the amended scheduling order, Dkt. 547, the parties will confer and submit a revised schedule that contains a later date for preliminary legal briefing of issues regarding the leased assets.

ARGUMENT

I. UNDER THE LAWS OF THE RELEVANT STATES, THE TERM LENDERS HAD A PERFECTED SECURITY INTEREST IN A BROAD RANGE OF ASSETS USED BY GM AND ESSENTIAL TO MANUFACTURE VEHICLES.

Article II(a) of the Term Loan Collateral Agreement (the "Collateral Agreement") grants JPMorgan, as Administrative Agent, for the benefit of the Term Lenders, a security interest in "Fixtures" located at certain GM facilities. Dkt. 37. Section 1.01 of the Collateral Agreement defines "Fixtures" by reference to Section 9-102 of the Uniform Commercial Code (the "U.C.C."). The U.C.C., in turn, defines "Fixtures" as "goods that have become so related to particular real property that an interest in them arises under real property law." U.C.C. § 9-102. It is well established that the applicable "real property law" for any given asset is the law of the state where that asset is located. *See, e.g.*, Restatement (First) of Conflict of Laws § 208 (2016) ("Whether an interest in a tangible thing is classified as real or personal property is determined by the law of the state where the thing is."); *In re Del Drago's Estate*, 38 N.E.2d 131, 137 (N.Y. 1941) ("the law of the state in which the land is situated" governs "alienation" and "transfer" of real property).[2]

In this case, more than 121,700 of the 170,600 disputed assets were located in seven states (Michigan, Texas, Indiana, Wisconsin, Delaware, Kansas, and New York) that define fixtures using nearly identical tests. Given these similarities, and the fact that Michigan contains the largest percentage of the disputed assets, defendants address Michigan law as representative of the other six jurisdictions.[3] Separately, defendants also discuss the fixture law of Ohio. Defendants submit that, as applied to the types of fixtures at issue here, in the context of a lien dispute, the result that would be reached by the Ohio courts is substantially similar to the result in other states.[4]

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[2] Under Section 7.10 of the Collateral Agreement, the agreement "shall be governed by, and construed and interpreted in accordance with, the law of the State of New York."

[3] The disputed assets by number are allocated among the nine relevant states as follows: Michigan – 49%; Ohio – 24%; Indiana – 7%; Kansas – 6%; Louisiana 5%; Texas – 4%; Wisconsin – 3%; New York – 2%; and Delaware – less than 1%.

[4] In addition, 8,260 of the disputed assets are in a closed plant in Louisiana. Defendants believe that the relevant test for fixtures under Louisiana law would yield the same results as

(footnote continued)

A. Michigan courts apply a three-part test to define assets as fixtures.

"The term 'fixture' necessarily implies something having a possible existence apart from realty, but which may, by annexation, be assimilated into the realty." *Wayne Cty.* v. *Britton Trust*, 563 N.W.2d 674, 678 (Mich. 1997) (citation omitted). In Michigan, as in most states, a three-part test governs whether assets (such as machinery and equipment) have been "assimilated into the realty." *Id.* "Property is a fixture if (1) it is annexed to the realty, whether the annexation is actual or constructive; (2) its adaptation or application to the realty being used is appropriate; and (3) there is an intention to make the property a permanent accession to the realty." *Id.* at 676.[5] Of these three factors, intent is "often of controlling influence," *People* v. *Jones*, 79 N.W. 177, 177 (Mich. 1899),

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(footnote continued)

those reached for similar assets in Michigan. Nonetheless, because the legal framework in Louisiana is somewhat unique, defendants do not address Louisiana law in this brief.

[5] Substantially identical three-part tests are applied by the highest courts of Texas, Kansas, Wisconsin, Indiana, and Ohio. *See Logan* v. *Mullis*, 686 S.W.2d 605, 607 (Tex. 1985) ("(1) the mode and sufficiency of annexation, either real or constructive; (2) the adaptation of the article to the use or purpose of the realty; and (3) the intention of the party who annexed the chattel to the realty."); *Kansas City Millwright Co., Inc.* v. *Kalb*, 562 P.2d 65, 70 (Kan. 1977) ("(1) Annexation to the realty; (2) adaptation to the use of that part of the realty with which it is connected; and (3) the intention of the party making the annexation to make the article a permanent annexation to the freehold."); *Premonstratensian Fathers* v. *Badger Mut. Ins. Co.*, 175 N.W.2d 237, 239, 240 (Wis. 1970) ((1) "annexation," either "actually or constructively," (2) "adaptation," and (3) "intent"); *State* ex rel. *Green* v. *Gibson Circuit Court*, 206 N.E.2d 135, 138 (Ind. 1965) ("(1) Annexation of the article to the land; (2) adaptation of the article to the use of the land; and (3) an intention that the article become a permanent part of the freehold."); *In re Szerwinski*, 467 B.R. 893, 902 (B.A.P. 6th Cir. 2012) (citing *Teaff* v. *Hewitt*, 1 Ohio St. 511, 530 (Ohio 1853)) ("1st. Actual annexation to the realty, or something appurtenant thereto. 2d. Appropriation to the use or purpose of the part of the realty with which it is connected. 3d. The intention of the party making the annexation, to make the article a permanent accession to the freehold . . . ."). The highest courts of New York and Delaware have articulated similar tests. *See Rose* v. *State*, 246 N.E.2d 735, 739 (N.Y. 1969) (describing New York's "broad view" that "machinery" is a fixture if "removal will result in material injury to it or the realty," *or* "the building in which it is placed was specially designed to house it," *or* "there is other evidence that its installation was of a permanent nature," *or* it is "used for business purposes and . . . would lose substantial value if removed"); *Wilmington Hous. Auth.* v. *Parcel of Land*, 219 A.2d 148, 150 (Del. 1966) ("The controlling test is the intention of the party making the annexation as disclosed by the surrounding circumstances.").

and, in fact, the degree to which the first two factors are present is often regarded as evidence of intent to make an asset a permanent addition to the realty. Applying this standard, Michigan courts have found a wide range of industrial assets to be fixtures.

1. Fixtures must be actually or constructively "annexed" to the realty.

The first element of the three-part fixture test, "annexation," has been broadly construed by Michigan courts. Under the controlling rule set forth in *Britton Trust*, an asset is deemed "annexed to the realty" if it is "attached or affixed" to real property in *any* manner — "actual or constructive." 563 N.W.2d at 678, 679.

"Actual" annexation occurs when an item, like much of the Surviving Collateral currently at issue, is affixed to real property with cement, bolts, or through any other physical means. *See, e.g.*, *Mich. Nat'l Bank, Lansing* v. *City of Lansing*, 293 N.W.2d 626, 627 (Mich. Ct. App. 1980) (bank depository equipment, vault doors, and drive-through interface were "cemented into place" and therefore "physically annexed to the realty"), *aff'd* 322 N.W.2d 173 (Mich. 1982); *Pierce* v. *City of Lansing*, 694 N.W.2d 65, 69 (Mich. App. Ct. 2005) (elevator was "bolted to" parking garage and thus "physically attached to and annexed to" realty); *Jackson Lodge No. 113, B.P.O.E.* v. *Camp*, 6 N.W.2d 549, 550, 551 (Mich. 1942) (bowling lanes were "part of the realty" once "affixed thereto by means of long lag screws").

The concept of "annexation" is not limited to direct physical attachment, however. Instead, "it is without dispute that Michigan, like other jurisdictions, recognizes the law of *constructive* annexation." *Britton Trust*, 563 N.W.2d at 680 (emphasis added). Assets that are not directly attached to real property may be constructively annexed in many different ways.

Typically, constructive annexation occurs when "articles which are not themselves actually or directly annexed to the realty" become "part of, or accessory to, articles which are so annexed." *Id.* (citation omitted). For example, in *In re Mahon Industrial Corp.*, the court held that 23 overhead cranes that were "not actually attached to the real estate but instead r[ode] upon or [were] attached to rails" were fixtures constructively annexed to an industrial building. 20 B.R. 836, 839 (Bankr. E.D. Mich. 1982). Thus, an asset that is attached to a fixture may, itself, be a

fixture. *Accord In re Joseph*, 450 B.R. 679, 693 (Bankr. E.D. Mich. 2011) (window blinds were "'accessory to' the brackets that held them" and thus "constructively annexed").[6]

The Michigan Supreme Court also has held that assets may be "constructively attached by [their] weight" alone. *Velmer* v. *Baraga Area Sch.*, 424 N.W.2d 770, 775 (Mich. 1988). In *Velmer*, the court considered whether a 1,000-pound milling machine in a shop classroom was "part of the [school] building." *Id.* at 771. The lower court held that since the milling machine was "not bolted or permanently affixed to the floor," it could not be treated as a fixture. *Id.* at 772. The Michigan Supreme Court reversed, rejecting the claim that there is a distinction between assets that were "actually" or "constructively" annexed. *Id.* at 775. *Accord Dehring* v. *Beck*, 110 N.W. 56, 56, 57 (Mich. 1906) (50-barrel tanks of beer that were annexed to brewery only "by their own great weight" were nonetheless "part of the mortgaged premises").[7]

Finally, assets may be "constructively annexed" if "their removal from the realty would impair both their value and the value of the realty." *Britton Trust*, 563 N.W.2d at 679 (citing *Colton* v. *Mich. Lafayette Bldg. Co.*, 255 N.W. 433 (Mich. 1934)). This is because "where the principal part of the machinery is [a] fixture due to actual annexation to the realty, the parts of it, although not actually annexed to the freehold, are fixture[s] where they would, if removed, leave the principal part unfit for use, and where of themselves they are not capable of general use elsewhere."

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[6] Plaintiff has suggested in correspondence with the Court that certain disputed assets, such as cranes, robots, and similar items, are not fixtures because those assets are "installed into a framework that, in turn, is permanently installed into the factory floor." Dkt. 485 at 4. Under the controlling case law, that characterization actually supports the conclusion that these assets are fixtures.

[7] In its April 15 letter to the Court, Dkt. 485 at 4 n.4, plaintiff cited a Sixth Circuit case, *In re Voight-Pros't Brewing Co.*, for the proposition that an item is not a fixture under Michigan law if it "rests on the floor with its own weight only." 115 F.2d 733, 735 (6th Cir. 1940). That, however, is not what the Sixth Circuit held in *Voight*. The issue in *Voight* was whether assets sold to a debtor under a "conditional sale contract" constituted "property of the debtor" in bankruptcy. *Id.* at 734. The *Voight* court ruled that the terms of the conditional sale contract in that case "clearly indicated" that the parties intended the asset to "remain personalty" of the seller. *Id.* at 735. In any event, even if *Voight* stood for plaintiff's stated proposition, the *Velmer* and *Dehring* cases are the controlling authorities of the Michigan Supreme Court.

Id. at 680 (citation omitted). Thus, removal may "impair" the "value" of fixtures and realty even if no physical damage to the asset or the building would result from the removal of the asset.

For example, in *Colton*, the Michigan Supreme Court addressed whether assets that were not affixed to the real estate at all — including elevator rugs, entrance mats, window shades, mirrors, and clocks — were constructively annexed to an office building. 255 N.W. at 434; *see Britton Trust*, 563 N.W.2d at 679 (noting that *Colton*'s "focus" was whether assets "were constructively annexed"). The *Colton* court emphasized that the office building had been "erected for the purpose of renting stores and offices to the public, and, in order to be rentable, must have various articles or accessories such as those listed above." 255 N.W. at 434. Because these assets could not be "removed from the building or transported from place to place without impairing their value as well as the value of the building," the articles were constructively annexed and deemed fixtures. *Id.*[8]

Here, the disputed assets are actually and constructively attached in multiple ways. For example, a typical Danly press, used to test metal-stamping dies before they are put into the production line presses, weighs approximately 200 tons and is attached to a reinforced concrete foundation with bolts and press mounting pads. A photo of a Danly press from a recent plant inspection is attached as Exhibit A. A typical AA Transfer Press, used for stamping sheet metal door panels and hoods, weighs more than 2,800 tons and is attached to a specialized poured concrete foundation with bolts and tons of support steel. *See* Dkt. 484-2 (representative

[8] Accordingly, plaintiff was simply wrong to suggest in its April 15 letter to the Court that determining the scope of defendants' security interest will depend on the Court analyzing "diverse modes of installation, varying by asset type," including whether "removal" would "damage . . . the asset or the real estate." Dkt. 485 at 4. As a legal matter, even "slight" physical attachment is enough to demonstrate "annexation." *Britton Trust*, 563 N.W. 2d at 678; *see, e.g.*, *In re Joseph*, 450 B.R. at 692 (mailbox "simply hung on two screws similar to how a picture hangs on a wall" was fixture "annexed to the realty"). Plaintiff was also incorrect in asserting that "unattached" property cannot be a fixture. Dkt. 485 at 4. In any event, a large majority of the disputed assets are in fact annexed to the real property through attachment.

photo). And a typical CNC machine (computer controlled lathing machine), used for manufacturing components like engine blocks and cam shafts, weighs about 20 tons and is bolted to the floor. *See* Dkt. 484-3 (representative photo of CNC machines integrated into a CNC transfer line). Under the controlling test, these assets are clearly "annexed" to the realty.

2. Fixtures must be "adapted" to the use of the realty.

The second element of the fixture test is "adaptation or application to the realty." *Britton Trust*, 563 N.W.2d at 676. This straightforward inquiry is focused on "the relationship between the chattel and the use which is made of the realty to which the chattel is annexed." *Id.* at 680. A fixture is sufficiently adapted or applied to real property if it is "a necessary or at least a useful adjunct to the realty, considering the purposes to which the latter is devoted." *Id*. In other words, "[t]he test here is not the adaptability to the *building*, but the adaptability to the *use* to which the building is put." *Premonstratensian Fathers* v. *Badger Mut. Ins. Co.*, 175 N.W.2d 237, 241 (Wis. 1970) (emphases added); *see Britton Trust*, 563 N.W.2d at 680 (describing *Premonstratensian Fathers* as "a useful guide in developing [Michigan's] jurisprudence in this area"). Accordingly, in this case, the question under the adaptation prong is whether the asset is necessary or useful to the automobile manufacturing being conducted at GM's facilities.

Because adaptation is present where an asset is "a necessary or useful supplement to the realty in light of the realty's purpose," *Pal-O-Mar Bar, IV, Inc.* v. *Badger Mut. Ins. Co.*, 2013 WL 6182640, at *2 (Mich. Ct. App. Nov. 26, 2013), an asset may satisfy the "adaptation" test where it is used in the regular course of the building-owner's business. For example, in *Cincinnati Ins. Co.* v. *Fed. Ins. Co.*, the court held that a 200-ton milling machine used by a manufacturer of automobile and aerospace parts "in the regular course of its business" was a fixture adapted to the realty. 166 F. Supp. 2d 1172, 1180 (E.D. Mich. 2001). Similarly, in *Smith* v. *Blake*, the court held that a metal lathe and a "cupola furnace" used in a foundry and manufacturing business were "adapted" to the realty because the building at issue had been "erected many years [before] for a foundry and machine shop," and the assets were adapted to the "business for which the building was erected." 55 N.W. 978, 979 (Mich. 1893). Likewise, in *Mahon*, the court found that overhead cranes were adapted to

the realty because, "[s]ince 1975 and before, the plant space of the main building containing the cranes was used and adapted for industrial and manufacturing purposes." 20 B.R. at 840.[9]

Here, GM used all of the Surviving Collateral in the regular course of its business in facilities designed and operated for that business. The disputed assets were therefore employed in the automobile manufacturing conducted by GM at the facilities, and as such, they were "adapted" or "applied" to the realty. Indeed, while not necessary to establish "adaptation," defendants note that, in many circumstances, GM customized the physical structure of its facilities to accommodate some of the most valuable assets at the center of this litigation. For example, to install its 2,800-ton AA Transfer Presses, *see* Dkt. 484-2, GM dug pits approximately 25- to 30-feet deep in the floors of its facilities. It then poured specialized concrete foundations into these pits and installed many tons of girders and support steel to stabilize the machines. GM also installed tracks into the floor, as well as overhead cranes, to facilitate the movement of dies (which themselves often weigh thousands of pounds) into the presses. There can be no real question that these assets were adapted to the realty.

3. Fixtures are assets that were intended to become permanent accessions to the realty.

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

Importantly, the "permanence" required by Michigan's fixture test "is not equated with perpetuity." *Tuinier* v. *Bedford Charter Twp.*, 599 N.W.2d 116, 119 (Mich. Ct. App. 1999).

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[9] *Accord Peninsular Stove Co.* v. *Young*, 226 N.W. 225, 226 (Mich. 1929) (gas ranges used by residents in building "erected for use as an apartment house" were fixtures adapted to the realty); *see also Ottaco, Inc.* v. *Gauze*, 574 N.W.2d 393, 396 (Mich. Ct. App. 1997) (mobile home was "adapted to the use" of land that had been "zoned for single-family residential use").

Rather, it is "sufficient if the item is intended to remain where affixed [1] until worn out, [2] until the purpose to which the realty is devoted is accomplished or [3] until the item is superseded by another item more suitable for the purpose." *Id.*

a. Assets installed by the owner of land are presumed to be fixtures under Michigan law.

"[I]nstallation" of an asset "by the owner of the land raises a presumption under Michigan law that the accession was intended to be permanent." *Wilson* v. *Union Guardian Tr. Co.*, 88 F.2d 520, 521 (6th Cir. 1937); *see, e.g.*, *In re Cliff's Ridge Skiing Corp.*, 123 B.R. 753, 759 (Bankr. W.D. Mich. 1991) (ski-chairlifts installed by landowner were "presumed to be permanent"); *Mahon*, 20 B.R. at 839 ("[A]ttachment by the owner raises a presumption under Michigan law that the accession is to be permanent."); *Coleman* v. *Stearns Mfg. Co.*, 38 Mich. 30, 32, 38 (Mich. 1878) ("engine, boiler, saw-mill and incident machinery" installed by landowners were fixtures based on "the whole proof, actual and presumptive"). This is because "[t]he act of an owner of a building in annexing a fixture manifests his intention of whether it is to remain a chattel or become an accession to the realty." *Kent Storage Co.* v. *Grand Rapids Lumber Co.*, 214 N.W. 111, 112-13 (Mich. 1927). Thus, it is presumed that "whatever is affixed to a building by an owner in complement, to facilitate its use and occupation in general, becomes a part of the realty, though capable of removal without injury to the building." *Id.*

GM owned all of the facilities at issue in this litigation, and it installed the disputed assets in those facilities in order to manufacture vehicles. Under Michigan law, this Court should therefore presume that the disputed assets were intended to become "permanent accession[s] to the realty." *Britton Trust*, 563 N.W.2d at 676.[10]

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[10] This presumption is not unique to Michigan. *See, e.g., In re Lincoln Square Slum Clearance Project*, 201 N.Y.S.2d 443, 452 (N.Y. Co. 1959) ("[I]ntention to make a permanent annexation . . . is readily presumed in the case of an owner where . . . he installs machinery in a building which is especially suited for that purpose, and with the object of carrying on his business therein."), *aff'd*, 15 A.D.2d 153 (1st Dep't 1961), *aff'd*, 190 N.E.2d 423 (N.Y. 1963); *Clark* v. *Clark*, 107 S.W.2d 421, 424 (Tex. Civ. App. 1937) ("[T]he presumption obtains in this state that

(footnote continued)

b. The nature, purpose, and manner of annexation also support the conclusion that the disputed assets are fixtures.

The other factors that courts evaluate in determining whether assets were intended to become "permanent accessions to the realty" — including "the nature of the article affixed, the purpose for which it was affixed, and the manner of annexation," *Britton Trust*, 563 N.W.2d at 680 — likewise support characterizing the disputed assets as fixtures.

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

Second, courts infer intent where an asset has been integrated with other on-site machinery or utilities. In *Wilson*, for instance, the Sixth Circuit held that a contractor intended to permanently affix a lathe to the realty where the lathe was "an integral part of the plant" and "derive[d] its power from belts attached to overhead pulleys." 88 F.2d at 522. Similarly, in *Michigan National*, the court concluded that a bank "inten[ded] to permanently affix" drive-up teller equipment because it had been "physically integrated" with a "pneumatic tube system," "roof-type canopy," and "specially constructed concrete island." 293 N.W.2d at 628; *accord Tuinier*, 599 N.W.2d at 121 (greenhouses were "permanent enough to hold large fans and gas heaters" and were therefore "intended to be permanent accessions"); *Ottaco*, 574 N.W.2d at 396 (inferring intent to permanently affix mobile home from "connections to gas, electric, sewer, and

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(footnote continued)

when the owner places improvements . . . upon his land, he intends it to become a fixture."); *Ott* v. *Specht*, 12 A. 721, 723 (Del. 1887) ("[I]t is presumed that [intention to create a fixture] was the intention of the owner . . . when he so put it into the building.").

water lines"); *Cincinnati*, 166 F. Supp. 2d at 1179, 1180 ("difficult[y] [of] determin[ing] where the machine begins and the [plant] begins" was "pertinent characteristic" of milling machine).

Third, courts infer intent where either the asset has been customized to fit within the particular realty or the realty has been customized to house the asset. For example, in *In re Joseph*, the court held that "custom-sized" window blinds were intended to be permanent, as was a refrigerator that was "designed to blend with, and appear to be part of, the kitchen cabinetry." 450 B.R. at 696, 697.

Fourth, intent may be inferred from "the purpose for which [the asset] was affixed," *Britton Trust*, 563 N.W.2d at 680, particularly where an asset is "necessary to the purpose to which the realty [is] adapted." *Atl. Die Casting Co.* v. *Whiting Tubular Prods., Inc.*, 60 N.W.2d 174, 179 (Mich. 1953). In *Lord* v. *Detroit Savings Bank*, for example, the court found the requisite intent to permanently affix a "cupola and crane" where "without them the building in which they were would not be in condition for immediate use." 93 N.W. 1063, 1064 (Mich. 1903). And in *Michigan National Bank*, the court held that the drive-up teller equipment was intended to be "permanent" because "the present use of these [bank] buildings [was] dependent on the presence of these items." 322 N.W.2d at 628; *accord Mahon*, 20 B.R. at 840 (cranes were intended as fixtures because "[w]ithout the cranes[,] the value of the building as a manufacturing and industrial piece of property is . . . considerably lessened since any successor purchaser would be required to install cranes to carry on manufacturing processes").

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

Similarly, the use of bolts and screws is also indicative of intent to make a permanent accession to the realty. *See, e.g.*, *Mich. Nat'l Bank*, 293 N.W.2d at 628 ("steel bolts" were evidence of annexor's intent to create a fixture); *Pierce*, 694 N.W.2d at 69 (elevator was "not intended to be removed" from parking garage because it was "bolted to the structure"); *Wilson*, 88 F.2d at 522 (lathe was intended to be "part of the realty" because it was "bolted to the floor"); *Cincinnati*, 166 F. Supp. 2d at 1180 (inferring intent from, *inter alia*, fact that "38 different bolts and anchors were used to secure the machine into the cement foundation").

Here, many of the most valuable of the disputed assets in GM's facilities are very large, complex machines that are necessary to the production of vehicles at GM's facilities, integrated into GM's production process, customized with the building to fit within the space designated for them, and often affixed by concrete, welding, and/or bolts. For example, the Phosphate Machine in the paint shop at GM Lansing Delta Township (Exhibit B), used to coat sheet metal components, stands two stories high, weighs several thousand tons, and measures over 1,500 feet in length. The machine is held in place by steel girders that are attached to the concrete floor by several hundred bolts. The four concrete stories of the paint shop building are built around the Phosphate Machine, allowing it to stand on the ground floor and protrude through a large gap in the first floor, rising to the bottom of the second floor. Electric, hydraulic, and chemical lines are all connected to the asset, and an overhead conveyor carries parts from the prior stage of the painting process, through the various stages of the Phosphate Machine, and on to the next stage of the process.

Similarly, a "BS Robot" that the parties also recently inspected at the Lansing Delta Township plant (Exhibit C), along with 10 to 15 other robots, is integrated into an "outer framing system" that applies spot welds to vehicle shells. Each robot is attached by bolts to an overhead structure or a base plate on the floor, connected to electronic controls, and integrated with a floor conveyor, various other robots, and a framing gate mechanism. The foundation for this system is composed of one-meter-deep reinforced concrete. Air, hydraulic, and electric lines are attached to the system to power it. The component parts of these highly sophisticated, integrated systems, including the BS Robot, were clearly intended to become part of the realty.

c. The fact that assets can be removed from a building is not determinative of their status as fixtures under Michigan law.

Plaintiff has argued that an asset that can be removed from a building without damage is by definition *not* a fixture. Dkt. 485 at 4. Not true. Courts have never "intended to limit the rule [defining fixtures] to cases where that factor is present." *Wood Hydraulic Hoist & Body Co.* v. *Norton*, 257 N.W. 836, 838 (Mich. 1934). Rather, Michigan courts have held that "[g]enerally, fixtures may be removed *without* material injury to the premises." *Pal-O-Mar Bar*, 2013 WL 6182640, at *2 (emphasis added) (coolers, sink, griddle, fan, booths, and washers were fixtures in bar). How readily an asset can be removed from realty is merely one factor that courts have looked to in characterizing assets as fixtures; it is neither necessary nor determinative of whether an asset is a fixture. This is evident from the cases that plaintiff itself cited in its April 15 letter to the Court. *See, e.g.*, *174 Second Equities, Corp.* v. *Hee Nam Bae*, 57 A.D.3d 319, 320 (1st Dep't 2008) (machinery is a fixture if "it is installed in such manner that removal would result in material damage to it or the realty, *or* the building in which it is housed was specially designed for that purpose, *or* there is other evidence that its installation was of a permanent nature") (emphases added).

Indeed, when determining that an asset *is* a fixture, Michigan courts have found it significant that an asset must be disassembled in order to be moved. Once again, in the *Cincinnati Insurance* case, a milling machine that "could be removed" was held to be a fixture in part because it could only be removed if "taken apart and removed in pieces." 166 F. Supp. 2d at 1180. Likewise, in *Dehring*, the court found that brewery equipment was intended to be permanent because it "could not be removed except by being taken to pieces." 110 N.W. at 57; *accord Tuinier*, 599 N.W.2d at 120 (permanence depended on "the amount of time necessary to construct or disassemble the greenhouses"); *see also W. Shore Servs., Inc.* v. *Dep't of Treasury*, 2015 WL 4469666, at *4 (Mich. Ct. App. July 21, 2015) (sirens and poles were intended to be permanent because "removing the poles requires the assistance of a crane and trained workers to do the job"); *Sondreal* v. *Bishop Int'l Airport Auth.*, 2005 WL 599752, at *3 (Mich. Ct. App. Mar. 15, 2005) (jetway was "clearly intended to remain in place" where removal required "barricade[s]").

But even relatively "easily removable" assets that "possibly" could "be used elsewhere" nonetheless have been held to be fixtures. *Mahon*, 20 B.R. at 839 (cranes). In *Tuinier*, the court held that a greenhouse bay was a fixture, notwithstanding "the ease with which [it] could be dismantled." 599 N.W. at 120. And in *Colton*, the court held that floor mats, rugs, and other items were fixtures in the office building, even though they could be removed at any time. 255 N.W. at 434; *accord Wood*, 257 N.W. at 837 (oil burner, boiler, tank, and aquastat that "could easily be removed by the use of a wrench, without damage to the realty" were fixtures); *First Mortg. Bond Co.* v. *London*, 244 N.W. 203, 203 (Mich. 1932) (stoves, Murphy beds, radiator shields, ice boxes, and refrigerator were fixtures, notwithstanding that each could "be easily removed without damage").

In fact, an asset may be characterized as a fixture even if it actually *has* been moved from time to time. In its 2015 decision in *Williams* v. *Grand Ledge High School*, for example, the Michigan Court of Appeals held that choir risers were fixtures in a school, even though they "had been disassembled two or three times" and had been moved, "albeit infrequently, within the choir room when [staff] refinished the floor." 2015 WL 3980517, at *1 (Mich. Ct. App. June 30, 2015). The risers' sheer "size, permanence to the choir room, and function" were "objective, visible facts show[ing] that the controlling intention was that the risers were to be fixtures." *Id.* at *4.

Importantly, the removal of an asset from a debtor's realty post-bankruptcy does not mean that the asset is not a fixture. *See, e.g.*, *In re Joseph*, 450 B.R. at 694 ("The fact that Debtors removed . . . items from the home . . . when the home was sold against their will" by Chapter 7 trustee was not "evidence about what Debtors may have believed and intended" when items were affixed "several years earlier."). Nor does the fact that assets may be replaced by newer assets at the end of their useful lives indicate that they are not fixtures. *See Tuinier*, 599 N.W.2d at 119 ("It is sufficient if the item is intended to remain where affixed until worn out . . . or until the item is superseded by another item more suitable for the purpose.") (citation omitted).

Rather, courts have focused primarily on the removability of assets only in more extreme circumstances. For example, "property [that] cannot be removed without practically destroying it," *Schellenberg* v. *Detroit Heating & Lighting Co.*, 90 N.W. 47, 49 (Mich. 1902), is

of course a fixture. While, on the other hand, items that are actually "disassembled and moved on a regular basis," *Cincinnati*, 166 F. Supp. 2d at 1180-81 (citing *Tuinier*, 599 N.W.2d at 120)), are not. Notably, however, the disputed assets in this case are nothing like the objects for which courts have found frequent removal to dictate the outcome. *See, e.g.*, *Carmack* v. *Macomb Cty. Comm. College*, 502 N.W.2d 746, 747 (Mich. Ct. App. 1993) (gymnastic equipment "was removed on an almost daily basis" and therefore "was not part of the building"); *Hemphill* v. *State*, 433 N.W.2d 826, 828 (Mich. Ct. App. 1988) (foam mattress was not a fixture).

B. The result from applying Ohio law is not materially different.

In Ohio, as in Michigan, a "fixture" is an "article which was a chattel, but which by being physically annexed or affixed to the realty, became an accessory to it and part and parcel of it." *In re Szerwinski*, 467 B.R at 901. Ohio courts, like those in Michigan, examine three factors to characterize property as a fixture: (1) "annexation to the realty, or something appurtenant thereto"; (2) "[a]ppropriation to the use or purpose of the part of the realty with which it is connected"; and (3) the "intention of the party making the annexation, to make the article a permanent accession to the freehold." *Id.* at 902. While Michigan and Ohio courts apply the first and third factors — annexation and intent — in the same way, some Ohio courts in tax disputes have adopted a unique interpretation of the "adaptation" factor, under which assets that are useful to a particular business but not to the land generally are not considered fixtures. *See, e.g.*, *Zangerle* v. *Republic Steel Corp.*, 60 N.E.2d 170 (Ohio 1945). Nevertheless, because the rationale of these tax cases is not applicable in the context of a lien dispute such as this, applying Ohio law to the disputed assets yields the same results as in Michigan and the other relevant states.

1. Courts in Ohio have construed the "annexation" and "intent" factors in essentially the same manner as Michigan courts.

There is nothing unique about Ohio's application of the "annexation" element of the standard test. As in Michigan, Ohio courts have held that "annexation" requires only "very slight" attachment to the realty or something appurtenant to the realty. *Holland Furnace Co.* v. *Trumbull Sav. & Loan Co.*, 19 N.E.2d 273, 275 (Ohio 1939); *accord In re Szerwinski*, 467 B.R.

at 902 ("Slight or constructive attachment is all that is required as long as the other two elements are established."). Fixtures, accordingly, may be annexed to the realty in many different ways.

In *Whitaker-Glessner Co.* v. *Ohio Savings Bank & Trust Co.*, for example, machines in a vegetable-canning plant were characterized as fixtures in part because they were annexed "by bolts or screws and connected together." 22 F.2d 773, 773 (6th Cir. 1927). In *Holland*, a furnace that was attached to "warm-air registers or pipes" only "with metallic sleeves or sections of pipe" was deemed a fixture in a home. 19 N.E.2d at 275. And in *In re Kerr*, cabinets and appliances were fixtures, even though some of them were merely "attached to . . . something attached to the real property." 383 B.R. 337, 342 (N.D. Ohio 2008).

Similarly, Ohio law follows the same general principles applicable in other states in evaluating "intention" to make a permanent accession to the realty. "It is not necessarily the real intention of the owner of the chattel which governs," because it is often impossible to determine subjective intent reliably. *Holland*, 19 N.E. at 275. Rather, the owner's "apparent or legal intention to make [the asset] a fixture is sufficient," and this intent "may be inferred from," among other things, "the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, the purpose and use for which the annexation is made, [and] the utility in use or the indispensability of the [asset] . . . in the use of the whole." *Id.* In short, the same factors demonstrate intent to make permanent in Michigan and Ohio, and an asset deemed "permanent" under Michigan law would be considered "permanent" in Ohio too.

Applying this familiar test, the Ohio Court of Appeals recently held that a "paint line [which] applies high-tech coatings to car bumpers" was a fixture subject to a mechanic's lien. *Mid-Ohio Mech., Inc.* v. *Carden Metal Fabricators, Inc.*, 862 N.E.2d 543, 545 (Ohio Ct. App. 2006), *appeal denied*, 862 N.E.2d 118 (Ohio 2007). The court was satisfied that the paint line was intended to be permanent, given that it had been installed at the building-owner's request by "welding and bolting items, including structural steel, to the building, so that the owner [could] produce the parts it need[ed] to conduct its business." *Id.* at 547. Likewise, here, the disputed assets located in Ohio include GM paint-shop assets, among other assets, that were integrated into

GM's facilities, and without which GM could not "produce the parts it need[ed] to conduct its business." *Id.* Under *Mid-Ohio,* those disputed assets were clearly intended to be permanent.

Notably, the *Mid-Ohio* court inferred the requisite intent "to make a permanent accession to the freehold" even though the paint line "could be detached from the factory." *Id.* at 546, 547. This holding is consistent with a long line of Ohio precedent emphasizing that the term "permanent accession" encompasses assets that nonetheless are moveable and, indeed, have been moved. *See, e.g.*, *Willis* v. *Beeler*, 90 F.2d 538, 541 (6th Cir. 1937) ("fact that some of the machinery [in a plant] was detachably connected" is "not determinative" of fixture status); *Whitaker-Glessner*, 22 F.2d at 774 (machines that "could be and occasionally [were] removed to meet the exigencies of the business" were fixtures).

2. In Ohio, industrial assets are "adapted" to the use of the realty if they are installed in facilities built expressly for an industrial purpose.

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

Ohio courts have applied this test to characterize special-purpose industrial assets as fixtures adapted to the realty. Under Ohio law, manufacturing assets are "indispensable" to the premises if the realty was originally designed for the industrial use to which the property is dedicated. For example, in *Brennan* v. *Whitaker*, the Ohio Supreme Court held that a "mill shafting," "drum," "balance wheel," "muley saw," and "gearing" were fixtures in a building that "was erected for a saw-mill, and, in the form and nature of its structure, was adapted to the business of a mill of that description." 15 Ohio St. 446, 452 (Ohio 1864). The assets in *Brennan* "could not be removed without leaving the saw-mill incomplete," and "[t]he building, itself, for any other purpose, would, without material alterations and additions, be comparatively of little value." *Id.*

Likewise, in *Whitaker-Glessner*, the Sixth Circuit held that vegetable-canning machines were "devoted to the use to which the real estate was appropriated" because the building-owner "had acquired these properties for the sole purpose of establishing canning plants; and the buildings were thereafter constructed, or reconstructed, so that the machinery could be placed in them and used for the purpose for which they were acquired." 22 F.2d at 774; *accord Willis*, 90 F.2d at 541 (machines were fixtures because property-owner "assembled the plant" for "the business in which the machinery was to be employed," and equipment was a "necessary factor" for business "operations").

In this case, as noted, GM used all of the Surviving Collateral in facilities that it built or assembled expressly for its automobile manufacturing business. At trial, defendants will also present evidence that GM's facilities would "be comparatively of little value" for any purpose other than auto manufacturing. *Brennan*, 15 Ohio St. at 452; *cf. Pine Creek Farms* v. *Hershey Equip. Co., Inc.*, 1997 WL 392767, at *2-3 (Ohio Ct. App. July 7, 1997) (chicken-caging system was *not* adapted to use of real property where farm-owner presented *no* evidence showing that "[w]ithout the caging system, the buildings on Pine Creek's property have no purpose"). Indeed, because large portions of GM's facilities are heavily customized to its manufacturing process, they would not be useable for another purpose without the expenditure of significant funds for refitting. Accordingly, the disputed assets were appropriated to the use of GM's realty under Ohio law.[11]

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[11] In *Teaff*, the "business of manufacturing" was described as "a pursuit personal in its character and not strictly subservient to real estate, or essential to the enjoyment of the freehold." 1 Ohio St. at 535. The Ohio Supreme Court made clear, however, that it was not establishing a bright-line rule defining all "manufacturing" assets as non-fixtures. *See id.* (the "use to which . . . [manufacturing] property in controversy . . . [is] applied" is not "decisive of its legal character"). Rather, as shown by the cases discussed above, where realty is dedicated to manufacturing, assets therein which are specialized for that type of manufacturing (and meet the other two factors) are treated as fixtures. Otherwise, the slippery-slope argument that all manufacturing assets are *ipso facto* personal property "could be extended to the entire building, because [a] factory is devoted to a particular business and could be demolished and the real estate used for some other purpose." *Mid-Ohio*, 862 N.E.2d at 547.

To be sure, in cases arising under the Ohio Tax Code, which taxes personal property at a lower rate than "fixtures," the Ohio Supreme Court has been more reluctant to classify assets as fixtures, and has thus construed the "appropriation" factor more strictly. Accordingly, in the tax context, the "*decisive* test of appropriation is whether the chattel under consideration in any case is devoted primarily to the business conducted on the premises, or whether it is devoted primarily to the use of the land upon which the business is conducted." *Zangerle* v. *Standard Oil Co. of Ohio*, 60 N.E.2d 52, 57 (Ohio 1945) (emphasis added).

That line of cases, however, is not applicable to this lien dispute governed by the U.C.C. — a model code that, by definition, strives to achieve a common set of legal principles across the 50 states — for two reasons. First, as the Ohio Supreme Court explained in a separate *Zangerle* opinion, where "rights of lienholders or innocent third parties who have parted with value, are concerned," the analysis of whether "a manufacturing business becomes accessory to the land" differs from the analysis in tax cases. 60 N.E.2d at 178.[12] As the court explained, when "determining what the security was that was to be covered," courts consider "equities" that are not present in tax cases. *Id.* And second, the Ohio Supreme Court's particularly stringent test for fixtures in tax cases is driven by the express provisions of the Ohio Tax Code, which contains statutory definitions that are inapplicable here. Unlike the U.C.C. (which Ohio has adopted, *see* O.R.C.A. § 1309.102(A)(41)), the Ohio Tax Code expressly defines "personal property" to include "business fixtures." *Id*. § 5701.03(A). A "business fixture" is "tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the business conducted by the occupant on the premises and not the realty." *Id.* § 5701.03(B). Thus, for tax purposes, the Ohio legislature has codified the strict "fixture" test set forth by the Ohio Supreme Court in its tax jurisprudence.

[12] The Ohio Supreme Court has also used a strict formulation in the eminent domain context, but recognized that the test "applies differently in appropriation cases than in other situations." *Masheter* v. *Boehm*, 307 N.E.2d 533, 538-39 (Ohio 1974) (citing *Zangerle*, 60 N.E.2d at 171).

For these reasons, in the present dispute, which involves the "rights of lienholders . . . who have parted with value," this Court should apply the "appropriation" test set forth in *Brennan* and similar cases, rather than the stricter version of "appropriation" applied in Ohio tax disputes.

II. THE TERM LENDERS HAD A PERFECTED SECURITY INTEREST IN ALL OF THE FIXTURES LOCATED AT 35 GM FACILITIES.

The parties agree (with one exception) that defendants held a perfected security interest in the fixtures located at 26 GM facilities (the "Undisputed Plants") that were (i) specifically named on Schedule 1 to the Collateral Agreement and (ii) identified by name on one of 26 UCC-1 "fixture filings" that were recorded in the relevant states (the "Fixture Filings").[13] In addition to these Undisputed Plants, there are nine other facilities (the "Additional Facilities") about which the parties disagree as to whether a perfected security interest existed. Three of these facilities were specifically named on Schedule 1 to the Collateral Agreement and sit on land covered by a Fixture Filing, but were not themselves identified by name on a Fixture Filing.[14] The other six

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[13] On May 19, 2016, nearly seven years after it commenced this action, plaintiff informed the Court for the first time that it will seek to challenge the effectiveness of the Fixture Filing for GM Assembly Lansing Delta Township (the "Lansing Fixture Filing"). Dkt. 613. In short, plaintiff has said that it intends to argue that the metes-and-bounds description and street address in the Lansing Fixture Filing do not cover the integrated Lansing stamping and assembly plant. The Court has permitted the parties to address this issue at a later date. At that time, defendants will show that, even if plaintiff's challenge were timely (and it is not), *see* 11 U.S.C. § 546(a), and even if plaintiff had authority to make that challenge (it does not), *see* DIP Order ¶ 19, any such challenge fails on the merits. Exhibit A to the Lansing Fixture Filing, which describes the covered real estate, includes a stamp that references "GM Assembly Lansing Delta." At the least, this stamp put any searcher on "constructive notice" of defendants' security interest in the fixtures at (i) the Lansing Delta Township assembly plant and (ii) any related or appurtenant facilities, and therefore perfected the Term Lenders' security interest under Michigan law. M.C.L.A. § 440.9502(2)(c); *see Tuthill* v. *Katz*, 128 N.W. 757 (Mich. 1910) (deed describing property "known as the William Rowley farm" put subsequent purchaser on notice that the property had been conveyed, notwithstanding erroneous metes-and-bounds description). For simplicity, the Lansing assembly plant is treated as an "Undisputed Plant" in this brief.

[14] The three Additional Facilities named on Schedule 1 are: (1) GM MFD (short for Metal Fabricating Division) Flint; (2) GM MFD Lansing Regional Stamping; and (3) GM MFD Lordstown.

Additional Facilities were not listed on Schedule 1, but are nonetheless "related or appurtenant" to the Undisputed Plants, and are located on property described by a Fixture Filing.[15]

Whether the Additional Facilities include assets in which defendants held a perfected security interest turns on two questions: (1) whether the Additional Facilities were included within the scope of the security interest granted by the Collateral Agreement; and (2) if so, whether the Fixture Filings perfected this security interest. The answer to both questions is "yes."

A. The Collateral Agreement granted defendants a security interest in all of the fixtures at the Undisputed Plants and the Additional Facilities.

The threshold question is whether the Collateral Agreement granted a security interest in fixtures at the Additional Facilities. As noted above, Article II(a) of the Collateral Agreement grants defendants a security interest in "all Fixtures, other than Excluded . . . Fixtures," located at GM's "U.S. Manufacturing Facilities."[16] A "U.S. Manufacturing Facility," in turn, is defined as "any plant or facility of [GM] listed on Schedule 1, *including all related or appurtenant land, buildings, Equipment and Fixtures*." Collateral Agreement § 1.01 (emphasis added).

Under Section 9-108(a) of the New York U.C.C., a "description" of collateral in a security agreement "is sufficient, whether or not it is specific, if it reasonably identifies what is described."[17] This provision expressly "rejects any requirement that a description is insufficient unless it is exact and detailed." N.Y.U.C.C. § 9-108 cmt. 2. Instead, the relevant collateral is

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[15] The six "related or appurtenant" Additional Facilities are: (1) GM MFD Fairfax; (2) Powertrain Engineering Building; (3) Powertrain Engineering Pontiac; (4) Powertrain Headquarters; (5) SPO Pontiac; and (6) Powertrain Moraine Engine. Each of these was covered by a Fixture Filing for an Undisputed Plant. For example, in the Fixture Filing for GM Assembly Fairfax (an Undisputed Plant), the metes-and-bounds portion of the property description also describes the land where GM MFD Fairfax is located.

[16] "Excluded . . . Fixtures" are all "Fixtures, now owned or at any time hereafter acquired by [GM], which are not located at U.S. Manufacturing Facilities." Collateral Agreement § 1.01.

[17] Under Section 7.10 of the Collateral Agreement, the Collateral Agreement is "governed by, and construed and interpreted in accordance with, the law of the state of New York."

reasonably identified if the applicable agreement describes the assets by "any . . . method, if the identity of the collateral is objectively determinable." N.Y.U.C.C. § 9-108(b)(6).

Under this rule, as a threshold matter, defendants clearly had a security interest in the fixtures located at the 26 Undisputed Plants and the three Additional Facilities that were named on Schedule 1. In addition, defendants also had a security interest in (1) all fixtures (2) that were "located at" (3) any "land or buildings" (4) that were "related or appurtenant" to (5) "any plant or facility of [GM] listed on Schedule 1." Thus, with respect to the other six Additional Facilities, the determinative question is whether they were "related or appurtenant" to the Undisputed Plants.

A "thing 'appurtenant' is defined to be a thing used with and related to or dependent upon another thing more worthy, and agreeing, in its nature and quality, with the thing whereunto it is appendant or 'appurtenant.'" *Woodhull* v. *Rosenthal*, 61 N.Y. 382, 390 (N.Y. 1875) (emphasis omitted); *accord Nassau Point Prop. Owners Ass'n, Inc.* v. *Tirado*, 29 A.D.3d 754, 757 (2d Dep't 2006) (defining "appurtenant" to mean "accessory to"). Here, many of the Additional Facilities were clearly "accessory to" the Undisputed Plants. For example, several of the Additional Facilities contain metal-stamping presses that prepare metal panels for assembly at the adjoining Undisputed Plants. In some cases, GM transferred these materials from the Additional Facilities to the corresponding Undisputed Plants on an hourly basis.

The Additional Facilities were also "related" to the Undisputed Plants. "In various contexts, courts have recognized that the term 'relate to' has a 'broad' meaning, including merely having 'a connection with' the designated item." *Allied Irish Banks, P.L.C.* v. *Bank of America, N.A.*, 875 F. Supp. 2d 352, 356 (S.D.N.Y. 2012); *accord Morales* v. *Trans World Airlines*, 504 U.S. 374, 383 (1992) ("relating to" means "to stand in some relation"); *Black's Law Dictionary* (10th ed. 2014) (defining "related" to mean "[c]onnected in some way").

New York courts have applied this broad definition to explain that "related" property is a broader concept than "appurtenant" property. As noted, in *Woodhull*, the New York Court of Appeals explained that "appurtenant" property is property that is "used with *and* related to . . . *and* agreeing, in its nature and quality, with the thing whereunto it is appendant or 'appurtenant.'" 61

N.Y. at 390 (emphases added); *accord In re Phillips*, 101 A.D.3d 1706, 1708 (4th Dep't 2012). In other words, under New York law, "appurtenant" means "related" *plus* "used with" *plus* "agreeing in its nature and quality." Thus, by specifying in the *disjunctive* that defendants had a security interest in fixtures located anywhere "related *or* appurtenant" to the Undisputed Plants, GM expressly granted defendants a security interest in fixtures located on land that was "related to" but *not* necessarily "used with" *or* "agreeing in . . . nature and quality" with the Undisputed Plants. Otherwise, the word "related" would be read out of the Collateral Agreement.

The evidence at trial will show that every Additional Facility is, at a minimum, "related" to an Undisputed Plant. Each one is adjacent or proximate to an Undisputed Plant; indeed, the facilities are so physically "related" that the property descriptions in the Fixture Filings cover the Additional Facilities *and* the Undisputed Plants. Moreover, GM often groups the Additional Facilities together with their corresponding Undisputed Plants for purposes of government affairs and public relations. In addition, among other things, the production timing and shutdown schedules for some of the Additional Facilities are coordinated with the operations of the Undisputed Plants, and several of the Additional Facilities share site management, utilities, tools, storage space, and other support services with the Undisputed Plants.

B. The Fixture Filings perfected defendants' security interest in all fixtures located at the Additional Facilities.

Because the Collateral Agreement clearly granted a security interest in the fixtures located in the Additional Facilities, the remaining question is whether the Fixture Filings perfected this security interest. They did.[18]

Six of the Additional Facilities are located in Michigan, two are located in Ohio, and one is located in Kansas. Under Michigan law, which is representative of Ohio law and Kansas law

[18] Like its challenge to the Lansing Fixture Filing, plaintiff's challenge to the perfection of defendant's fixture liens on the Additional Facilities — coming only now, seven years after filing this litigation — is untimely and unauthorized. *See* note 13, *supra*.

on this issue, a fixture filing perfects a security interest in fixtures if that filing satisfies the statutory requirements set forth in M.C.L.A. § 440.9502. *Accord* O.R.C.A. § 1309.502; K.S.A. § 84-9-502. Pursuant to M.C.L.A. § 440.9502(1), every financing statement must identify: (a) the debtor, (b) the secured party, and (c) the "collateral covered by the financing statement." Under M.C.L.A. § 440.9502(2), a "financing statement . . . that is filed as a *fixture filing* and covers goods that are or are to become fixtures" must *also*: (a) "Indicate that it covers [fixtures]," (b) "Indicate that it is to be recorded in the real property records," and (c) "Provide a description of the real property to which the collateral is related sufficient to give constructive notice of a mortgage under the law of [Michigan] if the description were contained in a record of the mortgage of the real property."

The issue for the Court is thus whether the collateral descriptions in the Fixture Filings were sufficient to provide constructive notice of defendants' lien on fixtures at the Additional Facilities under M.C.L.A. § 440.9502(1)(c) and M.C.L.A. § 440.9502(2)(c).

The Fixture Filings clearly satisfied M.C.L.A. § 440.9502(1)(c)'s mandate to "indicate[] the collateral covered by the financing statement." Under the U.C.C., "a financing statement sufficiently indicates the collateral that it covers" if it provides "[a] description of the collateral pursuant to section 9108." M.C.L.A. § 440.9504; *accord* O.R.C.A. § 1309.504; K.S.A. § 84-9-504. M.C.L.A. § 440.9108, in turn, explains that "a description of collateral reasonably identifies the collateral if it identifies the collateral" as "a type of collateral defined in the uniform commercial code" or "any other method, if the identity of the collateral is objectively determinable." *Accord* O.R.C.A. § 1309.108; K.S.A. § 84-9-108. Each of the Fixture Filings indicates that it covers "all fixtures located on the real estate described in Exhibit A attached hereto."

With respect to the fixtures at the Additional Facilities, the Fixture Filings also satisfied the additional requirements of M.C.L.A.§ 440.9502(2)(c). The "proper test" for compliance with that section "is that a description of real property must be sufficient so that the financing statement will fit into the real-property search system and be found by a real-property searcher." *Id.* cmt. 5; *accord* O.R.C.A. § 1309.502 cmt. 5; K.S.A. § 84-9-502 cmt. 5. In the relevant states, this "real-property search system" is a county-specific grantor-grantee index,

which is searched with reference to the names of the parties to instruments recorded in the county real estate records. *See* M.C.L.A. § 565.28; O.R.C.A. § 317.18; K.S.A. § 19-1205.

Thus, the evidence will show, *inter alia*, that if a real-property searcher were to have searched for encumbrances on the Additional Facilities in 2009, the searcher would have input "General Motors Corporation" or "GM" into the grantor-grantee index for each county where an Additional Facility is located. Because the Fixture Filings were filed with GM as the "grantor" of record, this ordinary search would have uncovered the Fixture Filings in every relevant county.

The evidence will also show that having discovered the Fixture Filings, the real property searcher then would have examined the real property descriptions contained in each filing. Each property description in a Fixture Filing identifies an Undisputed Plant by name and further describes the covered real estate by metes-and-bounds and street address. As defendants will show at trial, the nine Additional Facilities are located on land that was covered by the real property descriptions set forth on six of the Fixture Filings. Accordingly, in 2009, these six Fixture Filings would have put a real property searcher on notice of defendants' security interest in all of the fixtures at the Additional Facilities. Nothing more is required.[19]

CONCLUSION

In Michigan and the other relevant states, a three-part test governs whether property has become a fixture. At trial, defendants will show that the representative assets are clearly fixtures under this test. In addition, at trial, defendants will demonstrate that they had a perfected security interest in fixtures located not only at the Undisputed Plants, but also at the nine Additional Facilities.

[19] Pursuant to a valid Delaware UCC-1 financing statement, defendants also had a perfected security interest in non-fixture "equipment" owned by Saturn. There is no meaningful dispute as to which Saturn assets are "equipment" subject to defendants' perfected lien.

Dated: New York, New York
June 15, 2016

Respectfully submitted,

WACHTELL, LIPTON, ROSEN & KATZ

By: */s/ Marc Wolinsky*

Harold S. Novikoff
Marc Wolinsky
Amy R. Wolf
Douglas K. Mayer
Emil A. Kleinhaus
51 West 52nd Street
New York, NY 10019
(212) 403-1322
Email: HSNovikoff@wlrk.com
Email: MWolinsky@wlrk.com
Email: ARWolf@wlrk.com
Email: DKMayer@wlrk.com
Email: EAKleinhaus@wlrk.com

KELLEY DRYE & WARREN LLP

John M. Callagy
Nicholas J. Panarella
Martin A. Krolewski
101 Park Avenue
New York, NY 10178
(212) 808-7800
Email: jcallagy@kelleydrye.com
Email: npanarella@kelleydrye.com
Email: mkrolewski@kelleydrye.com

Attorneys for Defendant JPMorgan Chase Bank, N.A.

JONES DAY

By: */s/ Bruce Bennett*

Bruce Bennett
Erin L. Burke
555 South Flower Street, 50th Floor
Los Angeles, CA 90071
(213) 489-3939
Email: bbennett@jonesday.com
Email: eburke@jonesday.com

Gregory M. Shumaker
Christopher J. DiPompeo
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939
Email: gshumaker@jonesday.com
Email: cdipompeo@mto.com

MUNGER, TOLLES & OLSON LLP
John W. Spiegel
George M. Garvey
Todd J. Rosen
Matthew A. Macdonald
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071
(213) 683-9100
Email: john.spiegel@mto.com
Email: george.garvey@mto.com
Email: matthew.macdonald@mto.com

Kristin Linsley Myles
560 Mission Street, 27th Floor
San Francisco, CA 94105
(415) 512-4000
Email: kristin.linsley@mto.com

Attorneys for the Term Loan Lenders Listed on Appendix A to Dkt. No. 241

KASOWITZ, BENSON, TORRES & FRIEDMAN LLP

By: */s/ Andrew K. Glenn*

Mark E. Kasowitz
Andrew K. Glenn
Paul M. O'Connor III
Frank S. DiCarlo
Joshua N. Paul
1633 Broadway
New York, NY 10019
(212) 506-1700
Email: mkasowitz@kasowitz.com
Email: aglenn@kasowitz.com
Email: poconnor@kasowitz.com
Email: fdicarlo@kasowitz.com

Email: jpaul@kasowitz.com

Attorneys for the Ad Hoc Group of Term Lenders listed in Appendix A to Dkt. No. 467

DAVIS POLK & WARDWELL LLP

By: */s/ Elliot Moskowitz*

Elliot Moskowitz
Marc J. Tobak
M. Nick Sage
450 Lexington Avenue
New York, NY 10017
(212) 450-4000
Email: elliot.moskowitz@davispolk.com
Email: marc.tobak@davispolk.com
Email: nick.sage@davispolk.com

Attorneys for Arrowgrass Master Fund Ltd.; Bank of America, N.A.; Merrill Lynch Capital Services, Inc.; Baltic Funding LLC; Diamond Springs Trading LLC; Barclays Bank PLC; Grand Central Asset Trust, WAM Series; Grand Central Asset Trust, SIL Series; Citibank, N.A.; Citigroup Financial Products Inc.; Loan Funding XI LLC; Bismark CBNA Loan Funding LLC; Deutsche Bank AG; Deutsche Bank AG Cayman Island Branch; TRS SVCO LLC; Goldman Sachs – ABS Loans 2007 LTD; Goldman Sachs Lending Partners LLC; Marathon CLO I Ltd.; Marathon CLO II Ltd.; Marathon Financing I., B.V.; Meritage Fund LLC; Morgan Stanley Senior Funding Inc.; Muzinich & Company (Ireland) Ltd. for the Account of Muzinich Loan Fund Plus; The Royal Bank of Scotland PLC; and Carbonado LLC

HAHN & HESSEN LLP

By: */s/ Mark T. Power*

Mark T. Power
Alison M. Ladd
488 Madison Avenue
New York, NY 10022
(212) 478-7200
Email: mpower@hahnhessen.com
Email: aladd@hahnhessen.com

Attorneys for Certain Term Loan Investor Defendants listed in Appendix B to Dkt. No. 341