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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

Chapter 11

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

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

Debtors.

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

Adversary Proceeding

Plaintiff,

Case No. 09-00504 (MG)

against

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

Defendants.

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MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST'S MEMORANDUM OF LAW ON COLLATERAL IDENTIFICATION ISSUES

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Plaintiff Motors Liquidation Company Avoidance Action Trust respectfully submits this Memorandum of Law on Collateral Identification Issues pursuant to the *Order Amending the August 17, 2015 "Order Regarding Discovery and Scheduling" to Provide for Proceedings Concerning Characterization and Valuation of Representative Assets* (the "**Order**") entered by the Court on May 4, 2016 [Adv. Pro. Dkt. 547]. The Court requested preliminary overview legal briefs on (i) which assets at the facilities covered by fixture filings qualify as fixtures and (ii) whether assets qualifying as fixtures in nine additional facilities ("**Additional Facilities**")[1] identified by Defendants also constitute collateral in which Defendants had a perfected security interest as of June 1, 2009.[2] The Court requested briefing on these issues "under Michigan and Ohio law (and, to the extent each party deems appropriate, noting legal distinctions in other jurisdictions)." *Id*. at 3. This brief supplies the requested legal overview, to be later supplemented with briefing on the 40 specific assets on which the Court will initially rule.

INTRODUCTION

Defendants in this action ("**Defendants**") are parties to a syndicated term loan (the "**Term Loan**") of approximately $1.5 billion extended to General Motors Corporation ("**Old GM**") pursuant to a term loan agreement, dated as of November 29, 2006, as amended on March

[1] These additional facilities are: (i) GM MFD Flint; (ii) GM MFD Fairfax; (iii) GM MFD Lansing Regional Stamping; (iv) GM MFD Lordstown; (v) GM Powertrain Engineering Building (Pontiac); (vi) GM Powertrain Engineering Pontiac; (vii) GM Powertrain Headquarters (Pontiac); (viii) GM SPO Pontiac; and (ix) GM Powertrain Moraine Engine.

[2] This brief does not address the issue of whether fixtures subject to capital leases or sale/leasebacks (the "**Leased Assets**") constitute Surviving Collateral, defined infra at page 3. Defendants have requested additional documents related to this issue, which were not produced on or before May 16, 2016. Pursuant to the Order, the parties conferred and will submit to the Court a revised schedule for its approval that contains a later date for submitting a separate preliminary legal overview brief regarding whether the Leased Assets are Surviving Collateral and those assets' value.

4, 2009 (the "**Term Loan Agreement**"),[3] conventionally referred to by Defendants and Old GM as a "Machinery and Equipment" or "M&E" loan. *See*, *e.g.*, Adv. Pro. Dkt. 38 at 17. The Term Loan was secured by a large number of Old GM's assets, including all of Old GM's equipment and fixtures at the 42 domestic facilities listed on Schedule 1 of the Collateral Agreement, including Saturn equipment and fixtures at a facility in Delaware[4] (the "**Collateral**"). JPMorgan Chase Bank, N.A. ("**JPMorgan**"), the administrative and collateral agent for the Term Loan, took a security interest in the Collateral and caused the filing of a UCC-1 financing statement with the Delaware Secretary of State that perfected such security interest in all the equipment and fixtures at the 42 Old GM facilities other than the Saturn equipment and fixtures in Delaware (the "**Main Lien**"). JPMorgan was also required by the Term Loan Agreement to make fixture filings with respect to facilities deemed to have a net book value of at least $100,000,000 and listed in Schedule 3.12 to the Term Loan Agreement (the "**Fixture Filings**").[5] *See* Fisher Decl. Ex. A (Term Loan Agreement at 9). Accordingly, JPMorgan caused the filing of 26 Fixture Filings.

If the Main Lien had not been terminated, Defendants would have had a perfected security interest in all of the personal property *and* fixtures at all of the 42 facilities.[6] The

[3] The Term Loan Agreement, which is attached as Exhibit A to the Declaration of Eric. B. Fisher (the "**Fisher Decl.**") incorporated the terms of an accompanying collateral agreement between JPMorgan, Old GM, and Saturn, dated as of November 29, 2006 (the "**Collateral Agreement**"), attached as Exhibit B to the Fisher Decl.

[4] A separate UCC-1 financing statement covered Saturn equipment and fixtures at the Delaware facility and remained effective for the relevant time period.

[5] UCC § 9-102(a)(40) defines "Fixture Filing" as "the filing of a financing statement covering goods that are or are to become fixtures and satisfying Section 9-502(a) and (b)." UCC § 9-502(a) and (b) specify the information that all fixture filings must include.

[6] UCC-1 financing statements perfect security interests in goods regardless of whether they are or are to become fixtures. Fixture filings filed in the real property records of the location of the fixtures, by contrast, perfect security interests only in such fixtures. *See generally* UCC § 9-301 & cmt. 4; UCC § 9-310(a) & cmt. 2; UCC § 9-501(a) & cmt. 4. The two types of filings also differ in the priority they afford relative to persons with conflicting security interests. *See generally* UCC § 9-334 (c) & (e).

Second Circuit, however, concluded that the Main Lien in the equipment and fixtures at the 42 facilities had been terminated. The Defendants now have no security interest in any of the personal property at the 42 facilities or the fixtures at the facilities not covered by a Fixture Filing (except the Saturn equipment and fixtures at the Delaware facility covered by the separate UCC-1 financing statement). Moreover, the Defendants do not have – and never had – any security interest in land or real property at any of the facilities, or in any interest in the continued operations at any of those facilities, under the Term Loan Agreement. Defendants only have a perfected security in the fixtures covered by the Fixture Filings (and the Saturn equipment and fixtures at the Delaware facility) (the "**Surviving Collateral**").

Additionally, in interrogatory responses served on March 4, 2016, JPMorgan asserted for the first time its claim that the Fixture Filings extended to the Additional Facilities, which were not listed in Schedules 1 of the Collateral Agreement or 3.12 of the Term Loan Agreement. Fisher Decl. Ex. C (Interrogatory Resps. at 6 & Ex. A).[7] As explained below, in order for the fixtures at the Additional Facilities to be part of the Surviving Collateral, they must be within the group of assets both contractually pledged to secure the Term Loan and covered by the Fixture Filings.

Therefore, before the Court can determine the value of the Surviving Collateral, it must determine (i) what qualifies as a fixture at the facilities for which effective Fixture Filings were made and (ii) which facilities are covered by the Fixture Filings.[8]

[7] Of the three facilities from which the 40 assets are to be chosen, the only alleged Additional Facility is located in Lansing. As stated in the May 19, 2016 joint letter to the Court [Adv. Pro. Dkt. 613], Plaintiff asserts that the Fixture Filing for the Lansing GM facility covers no assets because it identifies a vacant parcel of land that does not contain the Lansing facility. The Plaintiff intends to brief this deficiency with the Lansing Fixture Filing as part of its pretrial brief and does not address this issue in this legal overview brief.

[8] The other central issue to be decided by the Court – the value to be assigned to those fixtures – will be addressed in later briefing. *See* Adv. Pro. Dkt. 547.

DISCUSSION

I. CLASSIFICATION OF ASSETS AS FIXTURES

The determination of what qualifies as a fixture here is particularly complex in light of the number of assets at the Old GM facilities: There are over 200,000 assets of various types with differing characteristics. Moreover, the sheer scale, scope, diversity, and technological qualities of the assets utilized in the modern automobile industry mean that the Court's assessment will be unlike any previously undertaken by any court. Until now, courts have typically assessed one or two assets under far less complex circumstances. As discussed below, the Court's assessment of what qualifies as a fixture at Old GM facilities will necessarily be guided by this context.

A. Fixtures Are an Intermediate Class Along the Spectrum from Real Property to Personal Property

"Fixtures," as they relate to secured transactions, fall on the spectrum between personal property (including goods), on the one hand, and real property, on the other. The UCC defines "goods" as "all things that are movable when a security interest attaches," UCC § 9-102(a)(44), and defines "fixtures" as "goods that have become so related to particular real property that an interest in them arises under real property law," UCC § 9-102(a)(41). The Term Loan Agreement offers no guidance on what, if anything, Old GM considered to be fixtures and instead identifies the fixtures that were the subject of the Fixture Filings only by reference to the definition in UCC § 9-102(a)(41), *see* Fisher Decl. Ex. B (Collateral Agreement at 2), despite well-known ambiguity in the related statutory and case law surrounding fixture identification.

In determining when goods have become "so related to particular real property that an interest in them arises under real property law" such that they qualify as fixtures under the UCC, courts are required to look to the real property law of the state in which the associated real

property is located. *See*, *e.g.*, *In re McCullum*, No. 07-54108, 2008 WL 9019930, at *5 (S.D. Ohio Sept. 23, 2008) (unpublished); *Farrier v. Old Republic Ins. Co. (In re Farrier)*, 61 B.R. 950, 952 (W.D. Pa. 1986); *In re Hammond*, 38 B.R. 548, 551 (Bankr. E.D. Tenn. 1984). State law treats fixtures as governed by the laws applicable to the real property to which they are annexed. *See*, *e.g.*, *Masheter v. Boehm*, 37 Ohio St. 2d 68, 74 (1974).

Because fixtures are treated under state law as part of the associated real property, conveyances of and encumbrances on the real property encompass its fixtures. Therefore, absent an agreement to the contrary, a sale of real property includes its fixtures and a mortgagee takes interest in the real property with its attached fixtures. *See generally* UCC § 9-334.[9] Although interests in real property are generally excluded from the scope of UCC Article 9, a limited exception is made for fixtures. UCC § 9-109(d)(11) & cmt. 10. Moreover, the entirety of UCC Article 9, including its provisions relating to perfection by Fixture Filings, is inapplicable to "ordinary building materials incorporated into an improvement on land." U.C.C. § 9-334(a) & cmt. 3. Such materials are considered real property beyond the scope of the intermediate fixture class discussed above.

B. Fixture Identification Under State Law

The facilities for which Fixture Filings were made are located in nine states: Ohio, Michigan, Louisiana, Texas, Indiana, Delaware, Kansas, Wisconsin, and New York. Of those, all but Louisiana have adopted a common law definition of fixture.[10] The common law states

[9] States have universally adopted UCC § 9-334(a). *See* Ind. Code § 26-1-9.1-334 (2016); Kan. Stat. Ann. § 84-9-334 (2016); La. Rev. Stat. § 10:9-334(a) (2016); Mich. Comp. Laws § 440.9334 (2016); N.Y. UCC § 9-334 (McKinney 2016); Ohio Rev. Code Ann. § 1309.334 (West 2016); Tex. Bus. & Com. Code Ann. § 9.334 (West 2016); Wis. Stat. Ann. § 409.334 (West 2016).

[10] Under Louisiana statute, fixtures are defined as "goods, other than consumer goods and manufactured homes, that after placement on or incorporation in an immovable have become a component part of such immovable . . . ." under certain statutory provisions. La. Rev. Stat. § 10:9-102(a)(41) (2016). Few cases have interpreted this statutory language after it was significantly amended in 2008. *See United States Envtl. Prot. Agency v. New Orleans Pub.*

have generally adopted a three-factor test, first set forth in *Teaff v. Hewitt*, 1 Ohio St. 511, 530 (1853), for determining whether an article is a fixture. Under this test, for a good to be treated as a fixture: (i) the article must be attached to the real estate, either actually or constructively; (ii) the article must be adapted to the particular use or purpose of the part of the realty to which the article is connected; and (iii) the annexing party must have intended to make the article a permanent part of the realty. *See*, *e.g.*, *In re City of N.Y. (Kaiser Woodcraft Corp.)*, 11 N.Y.3d 353, 360 (N.Y. 2008); *Pulsfus Poultry Farms, Inc. v. Town of Leeds*, 149 Wis. 2d 797, 812 (1989); *Cont'l Cablevision of Mich., Inc. v. City of Roseville*, 430 Mich. 727, 735-36 (1988); *Logan v. Mullis*, 686 S.W.2d 605, 607 (Tex. 1985); *Bd. of Educ., Unified Sch. Dist. No. 464 v. Porter*, 234 Kan. 690, 695 (1984); *Citizens Bank of Greenfield v. Mergenthaler Linotype Co.*, 216 Ind. 573, 580 (1940).[11]

When applying this test, courts emphasize the intent of the annexing party to make the annexation permanent, inferring this intent from such considerations as the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made. *See Gill v. Evansville Sheet Metal Works, Inc.*, 970 N.E.2d 633, 642 (Ind. 2012); *Kaiser Woodcraft Corp.*, 11 N.Y.3d at 360; *Cont'l Cablevision of Mich.*, 430 Mich. at 736-37 & n. 13; *Logan*, 686 S.W.2d at 607; *Masheter*, 37 Ohio St. 2d at 74-75. Some states – including Indiana, Kansas, and Texas – go so far as to analyze the first two factors as evidence of the intent factor. *See Citizens Bank of*

Serv., Inc., 826 F.2d 361, 365 (5th Cir. 1987) (stating that the current Article 466 "represents a fresh start" in the classification of component parts and applies regardless of the date of attachment).

[11] Delaware has not explicitly adopted the three-part test, but in practice the analysis in Delaware is the same: the controlling consideration is "the intention of the party making the annexation," and courts must look to "the nature of the chattel, the mode of its annexation to the real estate, the purpose or use for which the annexation has been made, and the relation of the person annexing the chattel to the property" to determine this intention. *Del-Tan Corp. v. Wilmington Hous. Auth.*, 269 A.2d 209, 210 (Del. 1970).

Greenfield, 216 Ind. at 581; *O'Neal v. Quilter*, 111 Tex. 345, 348 (1921); *Docking v. Frazell*, 38 Kan. 420 (1888).

Whether an asset qualifies as a fixture is a mixed question of law and fact, and courts emphasize the specific factual context of the assessment. *See*, *e.g.*, *J.K.S.P. Rest., Inc. v. Cnty. of Nassau*, 127 A.D.2d 121, 127 (N.Y. App. Div. 1987); *Nadolski v. Peters*, 332 Mich. 182, 187-88 (1952). Although certain specific types of personal property are sometimes categorically referred to as fixtures or non-fixtures, such generalization can be unhelpful. *Masheter*, 37 Ohio St. 2d at 75 (specifying how each determination must "stand on its own facts"). Courts reach different outcomes on the same types of assets depending on the facts of each situation. *Compare In re City of N.Y. (430 E. 59th St. Corp.)*, 278 N.Y. 276, 281 (N.Y. Ct. App. 1938) (looms bolted to the ground were not fixtures because equipment was moveable and had in fact been moved), *with McRea v. Ventral Nat'l Bank of Troy*, 66 N.Y. 489, 494-95 (N.Y. Ct. App. 1876) (twine equipment in a twine factory that was bolted to the ground were fixtures because of the understanding between the parties, even though the equipment was moveable and was bolted to the ground solely to prevent vibration).

Because of the dearth of relevant case law on this issue in any given state, when assessing how to characterize an asset state courts will frequently look to the courts of other states that have previously dealt with the particular type of asset in determining if that asset qualifies as a fixture. *See*, *e.g.*, *Tuiner v. Bedford Charter Twp.*, 235 Mich. App. 663, 669 (Mich. Ct. App. 1999) (discussing how greenhouses had been characterized by courts in three other states as fixtures). Although there is commonality and overlap in the considerations and treatment among the states, a court will of course apply in each instance the controlling authority unique to the state in which the associated real property is located. *Id.*

C. Factors Considered by the Courts

In determining intent, courts in all of the common law states consider objective facts, not the annexing's party subjective testimony about its actual intent. *See*, *e.g.*, *In re Joseph*, 450 B.R. 679, 690 (Bankr. E.D. Mich. 2011) (stating that after-the-fact testimony of personal intent by an owner is not relevant to determining whether a good has become a fixture). Courts consider the particular characteristics of a fixture and contemporaneous agreements made by the annexing party and its common understanding, crediting those facts that shed light on intent. *See*, *e.g.*, *In re Demay Int'l LLC*, 471 B.R. 510, 524 (S.D. Tex. 2012) (concluding that bankruptcy court correctly applied Texas law by focusing on the objective intent of the parties as expressed in their agreements); *Wis. Dep't of Revenue v. A.O. Smith Harvestore Prods., Inc.*, 72 Wis. 2d 60, 69 (1976) (stating that intent considered is not actual subjective intent but rather objective intent based on presumed intention of a hypothetical reasonable person). Even when courts are presented with affidavits from the annexing party, the affidavits are considered relevant only if they speak to objective intent. *See Controls Grp., Inc. v. Hometown Commc'ns Network, Inc.*, C.A. No. 266347, 2006 WL 1691346 (Mich. Ct. App. June 20, 2006) (unpublished)[12] (considering individual testimony because it revealed objective information, such as treatment of items as personal property for tax purposes). *But see Wilson v. Union Guardian Trust Co. (Petition of Johns-Manville Sales Corp.)*, 88 F.2d 520, 522 (6th Cir. 1937) (considering subjective testimony as part of the factual context).

[12] In light of the relatively small number of relevant Michigan cases addressing the classification of assets as fixtures, it is useful to consider unpublished decisions. *See* Mich. Ct. App. Rule 7.215(C)(1) (2016) (unpublished opinions are not "precedentially binding under the rule of stare decisis"). After 2002, courts in Delaware and Ohio – the other two states with courts whose unpublished decisions are cited in this brief – afford unpublished decisions precedential weight. *See* Ohio S. Ct. Reporting Op. Rule 3.4 (2012); Del. Sup. Ct. Rule 14(b)(vi)(B)(2) (2016). Unpublished Ohio Court of Appeals decisions prior to 2002 provide persuasive guidance only. *See Cleveland v. Carpenter*, 126 Ohio Misc. 2d 77, 82 (Ohio Misc. 2d 2003). Copies of all unpublished decisions are attached as Exhibits D through M to the Fisher Decl.

Because the determination of whether an asset is a fixture hinges primarily on the intent of the annexing party, courts give more weight to those factors that are most relevant to the annexing party's objective intent. Courts do not apply bright-line rules in determining the intent of the annexing party. Instead, courts consider and weigh all the facts and circumstances surrounding the attachment of the personal property to ascertain whether, viewed objectively, the party intended the attached asset to become a permanent part of the real property. *Gill*, 970 N.E.2d at 641 (courts adopt a "commonsense approach").

The relevant factors that the Court must assess in considering whether Old GM intended to make various assets part of the associated real property are discussed in turn.

1. The Movement of or Intention to Move the Asset

When assessing intent, a key inquiry is whether an asset has been moved or may be moved by the annexing party. For example, the Court of Appeals in Michigan has found evidence that machinery (printing presses) had been moved from a similar plant to the current plant undermined an intention of permanent annexation. *Controls Grp.*, 2006 WL 1691346. The court in that case found that the fact the defendant purchased the equipment at issue "from a similarly situated user of the equipment, had them moved to Michigan and installed in defendant['s] building" proved that the "presses are movable, saleable equipment," despite their large size and significant weight. *Id*; *see also In re N.Y. City Transit Auth. (Superior Reed & Rattan Furniture Co.)*, 160 A.D.2d 705, 706 (N.Y. App. Div. 1990) (finding evidence that machinery had been relocated from the company's former plant precluded a finding of intent to permanently annex); *Ochs v. Tilton*, 103 N.E. 837, 838-39 (Ind. 1914) (finding evidence that equipment used in a tobacco warehouse was not a fixture in part because it was moved within a particular facility, and between multiple facilities, at will); *cf. Cincinnati Ins. Co. v. Fed. Ins.*

Co., 166 F. Supp. 2d 1172, 1180-81 (E.D. Mich. 2001) (finding milling machines were fixtures based on their weight, the fact cemented to the facility, and lack of evidence of machines being ever moved). Thus, how a particular asset came to be located at a particular Old GM facility, the possibility of Old GM's moving it to another facility as its production needs changed, and whether these assets were actually moved between Old GM's facilities are important factors in objectively determining Old GM's intent.

Moreover, where the nature and role of an asset in a plant means that the annexing party when it annexed the object knew it would have a finite or short duration of use, courts will consider this evidence as cutting against finding an intent to make annexation permanent. *See Controls Grp.*, 2006 WL 1691346 (finding no intent to permanently annex because there could be a business reason to remove the equipment and no owner would leave so much valuable equipment with the building when sold); *Millers Mut. Fire Ins. Co. v. Jackson*, 359 S.W.2d 510, 512 (Tex. App. 1962) (considering the fact that machinery wore out often and was replaced from time to time to be indicative of lack of intent to make a permanent attachment). *But see Tuiner*, 599 N.W.2d at 119 (citing general language for the proposition that the intention of permanence does not require an intent of perpetuity); *Rollins Cablevue, Inc. v. McMahon*, 361 A.2d 243, 247 (Del. Sup. Ct. 1976) (finding that the possibility that cable television system could become obsolete was too speculative to undermine intent to permanently annex). To the extent that Old GM had the objective intent to relocate, redeploy, or decommission its equipment and machines as needed for its operations, this factor will suggest Old GM did not intend annexation to be permanent.

Courts also look to whether the annexing party has specifically maintained or installed an asset so as to retain portability. *See Dinsmore v. Lake Elec. Co., Inc.*, 719 N.E.2d 1282, 1287

(Ind. Ct. App. 1999) (finding an asset was not a fixture in part because equipment had been placed on a pallet to be moved more easily); *Zangerle v. Republic Steel Corp.*, 144 Ohio St. 529, 532 (1945) (finding machines assembled for ease of removal suggested no intent to permanently annex). Thus, to the extent Old GM used less than permanent attachment methods to preserve its ability to move an asset, this factor also suggests that Old GM did not intend the annexation to be permanent.

In considering the movement of personal property, courts also consider whether assets that could be removed have in fact been removed. *See In re Equalization Appeals of Total Petroleum, Inc.*, 28 Kan. App. 2d 295, 300-01 (Kan. Ct. App. 2000) (noting that refinery equipment remaining on premises even following cessation of refining operation was indicative of an intent to make a permanent attachment); *Stoneback Realty Co. v. Jones Refrigeration & Air Conditioning, Inc.*, No. Civ. A. 0024-07-85, 1986 WL 716910, at *3-5 (Del. C.P. April 2, 1986) (unpublished) (failure to remove condensing units at termination of a commercial property lease was evidence of an intent to permanently attach the units). However, if evidence establishes that removal of an item would be burdensome, costly, inefficient, or otherwise explainable, the failure to remove will not bear on the intent to make an annexation permanent. *See*, *e.g.*, *Metro. Cablevision, Inc. v. Cox Cable Cleveland Area*, 78 Ohio App. 3d 273, 277 (Ohio Ct. App. 1992) (maintaining cable hook-ups in residential homes after stopping service was not reflective of an intent to annex because of cost of removal); *Cont'l Cablevision of Mich.*, 430 Mich. at 741-43 (same).

In a similar vein, courts look to whether there is a secondary market for an article to determine whether an annexation was intended to be permanent. In *All City Communications Company, Inc. v. State Department of Revenue*, the Wisconsin Court of Appeals found that a

480-foot-tall broadcast tower was not a fixture because "a market existed for the sale and purchase of used towers, and that the tower could be disassembled and reassembled at another site." 263 Wis. 2d 394, 411 (Wis. Ct. App. 2003); *see also Controls Grp.*, 2006 WL 1691346 (considering that the printing presses at issue were saleable in reaching non-fixture determination); *430 E. 59th St. Corp.*, 278 N.Y. at 281 (finding that silk ribbon factory machinery was not a fixture in part because there was a secondary market for it). Thus, if there is a secondary market for a particular Old GM asset, this factor will indicate an absence of intent to permanently annex.

2. The Annexing Party's Own Designation of the Assets

When assessing intent, another key factor is how the annexing party has treated the asset for its own accounting, tax, insurance, and contractual purposes prior to litigation. Courts find that listing an asset as personal property on tax forms is persuasive objective evidence of the intent of the annexing party not to permanently annex the asset to the real estate. *See*, *e.g.*, *City of Wichita v. Denton*, 296 Kan. 244, 259-260 (2013) (finding tenant's election to treat billboard as personal property for tax purposes was indication of intent to retain status as personal property); *Controls Grp.*, 2006 WL 1691346 (finding that treating large printing presses as personal property, rather than real property, for tax purposes evidenced a lack of intent to permanently annex them to the property); *Gen. Elec. Co., Lighting Div. v. Amer. Mech. Contractors, Corp.*, No. 2000-L-211, 2001 WL 1647158, at *3 (Ohio Ct. App. Dec. 21, 2001) (unpublished) (reviewing evidence that furnaces were depreciated as personal property and listed as "equipment" on owner's business documents as evidence showing lack of intention to permanently annex); *Pine Creek Farms v. Hershey Equip. Co.*, No. 96CA2458, 1997 WL 392767, at *4 (Ohio Ct. App. July 7, 1997) (unpublished) (finding that testimony that equipment

was depreciated as personal property on income tax returns supported finding that equipment was not a fixture); *see also Tennine Corp. v. Mich. City of Grand Rapids*, No. 301124, 2012 WL 1231937, at *2 (Mich. Ct. App. April 12, 2012) (unpublished) (upholding tax court decision that cranes and other assets were properly assessed as personal property, not fixtures, because internal audit labeled the assets as "non-real property"); *Cont'l Cablevision of Mich.*, 430 Mich. at 735 (noting that under Michigan tax law, the definition of real property includes fixtures whereas personal property is limited strictly to goods).

Finally, courts look to contemporaneous agreements and accounting treatment in determining whether there was intent to permanently attach. *See Stalcup v. Detrich*, 27 Kan. App. 2d 880, 886-887 (Kan. Ct. App. 2000) (oral agreement that metal building attached to realty would remain personal property is evidence of no intent to permanently attach). For example, in *McTevia v. Pullman, Inc. (In re Mahon Industrial Corp.)*, the court found that a contemporaneous agreement between the parties to make moveable cranes part of the building was a critical factor in finding the cranes were fixtures. 20 B.R. 836, 840 (Bankr. E.D. Mich. 1982). The court held, "If the cranes were not fixtures prior to this Agreement because the intent to make them a permanent accession was lacking, then clearly after this Agreement they became fixtures." *Id*. at 841. *But see Petition of Johns-Manville Sales Corp.*, 88 F.2d at 522 (finding accounting entries unpersuasive because of inaccuracies in bookkeeping and other factors weighed strongly in the other direction).[13]

[13] Wisconsin courts, however, have cautioned that "subjective agreements between the annexor and other parties," will not control where the objective circumstances otherwise establish intent to make a permanent annexation. *A.O. Smith Harvestore Prods.*, 72 Wis. 2d at 70 (agreement to finance a silo as personal property did not negate the facts showing the intent to permanently affix to farm). But Wisconsin courts have not opposed considering this subjective intent in connection with objective factors, and other states have not endorsed Wisconsin's characterization of such evidence as subjective.

3. Physical Traits of the Asset and Method of Attachment

Courts also consider the physical attributes and methods of attachment in deciding whether an asset is a fixture. Courts find that the method of annexation can reveal whether the annexing party intended for the asset to become a fixture. The less permanent the method of annexation, the more likely a court is to find that the annexing party did not intend for the annexation to be permanent. *Compare J.C. Penney Co., Inc. v. Limbach*, 25 Ohio St. 3d 46, 49-50 (1986) (finding stacker crane and transport cars inside a J.C. Penney factory were not intended to become fixtures in part because they "were not physically attached to the property"), *and In re City of N.Y. (Aero-Chatillon Corp.)*, 54 Misc. 2d 424, 427 (N.Y. Sup. Ct. 1967) (finding an object was not a fixture when it was only attached by piping and wiring, as opposed to being affixed to the actual building itself, in part because to hold otherwise would be to categorize all machines as compensable fixtures), *with Abramo v. Ploener*, 394 A.2d 758, 762 (Del. Super. Ct. 1978) (finding indication of intent to annex personal property to real property when fence posts were set in concrete that had been poured into the post holes); *see also Cincinnati Ins. Co.*, 166 F. Supp. 2d at 1180 (finding milling machines to be fixtures in part because they are so connected to the cement foundation of building "it is difficult to determine where the machine begins and the . . . Building begins.").

The method of annexation, however, is not a bright-line rule, and depending on the other facts present, courts will find this fact insignificant. *Compare Controls Group, Inc.*, 2006 WL 1691346 (finding equipment not a fixture though very heavy and bolted to ground because other facts demonstrated intent not to permanently annex), *with Petition of Johns-Manville Sales Corp.*, 88 F.2d at 522 (finding heavy equipment was fixture even without more permanent attachment because intent was to permanently affix). Thus, even when the asset is securely

attached to the actual realty, courts will find no intention to make annexation permanent when the method of annexation does not indicate intent. Accordingly, courts recognize that machinery and equipment must often be bolted to the ground for safety and to prevent vibrations and thus the bolting does not indicate an intent to permanently attach. *See, e.g., Kaiser Woodcraft Corp.*, 11 N.Y.3d at 357; *Superior Reed & Rattan Furniture Co.*, 160 A.D.2d at 706; *Republic Steel Corp.*, 144 Ohio St. at 531; *State ex rel. Cramer v. Bodden, Tax. Comm'r*, 178 N.W. 242, 242 (Wis. 1920). Even very permanent annexation, such as in the case of a substantial concrete foundation attached to a 480-foot-tall cell tower, is not definitive when there is even stronger evidence of intent not to permanently annex. *See All City Commc'ns*, 263 Wis. 2d at 411.

Courts often find intent to annex is lacking when personal property is readily removable or portable. *See, e.g.*, *Controls Grp.*, 2006 WL 1691346 (emphasizing the removability and portability of a printing press despite its size and weight in finding that it was not a fixture); *All City Commc'ns*, 263 Wis. 2d at 411 (finding that despite its substantial size, a tall broadcast tower was not a fixture because it could be disassembled and reassembled at another site); *Litton Sys., Inc. v. Tracy*, 88 Ohio St. 3d 568, 573 (2000) (finding that equipment that could be removed, replaced, or reconfigured was not intended to be permanently annexed).

Courts in the common law states often assess this removability in relation to whether the removal of an object damages the article or the realty and find no permanent annexation if neither would be significantly damaged. In *Green Tree Servicing, LLC v. Random Antics, LLC*, the court found that there was no intent to permanently attach a mobile home where it could be removed without substantial damage to realty and improvements, even though the mobile home sat on concrete posts. 869 N.E.2d 464, 469 (Ind. Ct. App. 2007). Courts will also weigh the amount of damage and conclude that a small amount of damage is not indicative of an intent to

permanently annex. *See, e.g.*, *City of Wichita*, 296 Kan. at 259-260 (finding billboard was not a fixture where intent to use again was present, even if some structural components would be destroyed upon removal); *Scovill Mfg. Co., Nutone Div. v. Lindley*, No. C-810616, 1982 WL 8551, at *3 (Ohio Ct. App. June 2, 1982) (unpublished) (not a fixture because removal was easy and would not materially injure asset or building, despite holes left in the concrete floor from bolts); *Home Owners' Loan Corp. v. Eyanson*, 46 N.E.2d 711, 714 (Ind. Ct. App. 1943) (finding small holes in the floor was insufficient damage to suggest intent to permanently annex and warning that to hold otherwise would suggest all personal property affixed to property was a fixture).

In assessing moveability, courts weigh the particular circumstances of the annexing party and its relative ability to move the property. Thus, in *Pulsfus Poultry Farms*, the court found that a cage system was intended to be permanent because it would take the average farmer several weeks to disassemble it and such work would be very onerous on an ordinary person. 149 Wis. 2d at 813-14. When the annexing party is equipped to move large pieces of property, however, courts will find even very large and heavy objects to be readily movable. *See*, *e.g.*, *All City Commc'ns*, 263 Wis. 2d at 411 (finding cell tower not a fixture because company that installed tower could remove it). Thus, Old GM's size, manpower capabilities, and practices will be an important factor in determining whether its assets are in fact movable.

4. Essential to the Use of the Real Estate

If annexed property is not essential to the use of the real estate, a court will find this fact counts against finding an intent to permanently annex.

i. Ohio

In Ohio, for the annexing party to have intended for the personal property to become a fixture, the personal property must be necessary to the use and enjoyment of the realty for *any* purpose. *See Roseville Potter v. Bd. of Revision of Muskingum Cnty.*, 149 Ohio St. 89, 91-92 & 98 (1948) (265-feet long kilns that cannot be removed without destruction are not fixtures because only benefits tile business); *Zangerle v. Standard Oil Co. of Ohio*, 144 Ohio St. 506, 515-16 (1945) (heavy oil refinery machinery and equipment not fixtures because they benefited an industry and not the realty generally, regardless of size or method of attachment); *Republic Steel Corp.*, 144 Ohio St. at 544-45 (no machinery and equipment in steel plant were fixtures regardless of physical attributes because solely benefited steel business). Therefore, if personal property is brought onto real property to benefit a particular business but does not benefit the real estate generally, it will not qualify as a fixture. *See Funtime, Inc. v. Wilkins*, 105 Ohio St. 3d 74, 80 (2004) (amusement park rides not fixtures); *Pine Creek Farms*, 1997 WL 392767, at *4 (egg layering system custom designed, purchased, and integrated into an egg production facility not a fixture).

Based on this rule, Ohio courts regularly conclude that equipment and machinery located in a manufacturing plant that is dedicated to the operation of a specific business are not fixtures. *See*, *e.g.*, *Gen. Elec. Co., Lighting Div.,* 2001 WL 1647158, at *1 (specialized furnaces in quartz manufacturing facility housed in building retrofitted to accommodate them, where removal was very difficult and facility could not function without furnace, not fixtures); *Litton Sys.*, 88 Ohio St. 3d at 573 (machinery and equipment in retail distribution warehouse, including conveyors and material-handling systems, not fixtures); *J.C. Penney Co.*, 25 Ohio St. 3d at 46 (large assembly line cranes in building specially designed to accommodate them not fixtures).

Buckley Brothers, Inc. v. Clinton County Board of Revision is instructive. No. 294, 1974 WL 184314 (Ohio Ct. App. Oct. 15, 1974) (unpublished). There the Ohio Supreme Court found that grain storage tanks at a grist mill that were 105 feet high with a 350,000 bushels of grain capacity and were attached to the ground with reinforced concrete foundations were not fixtures. *Id.* at *1. Despite the size and difficulty of removal and that the grist mill itself was inoperable without the tanks, the court held the tanks were not fixtures because they benefited only the grist mill business and not the property for general use. *Id*. at *2-4. In contrast, in *Perez Bar & Grill v. Schneider*, the court found that a large air conditioning unit on the roof that was attached to the HVAC system and benefited the entire building was a fixture, even though it had been brought to the property by a tenant and was easily removable because it was fastened to the ductwork and not the rooftop. No. 11CA010076, 2012 WL 6105324, at *8 (Ohio Ct. App. Dec. 10, 2012) (unpublished). In reaching this conclusion, the court stressed that the unit had become part of the central air conditioning system for the entire building and thus benefited the realty as a whole for whatever purpose it was used, not just one particular tenant or industry. *Id*.

Although Ohio courts consider the annexing party's intent and assess all relevant facts as in the other common law states, the narrowness with which Ohio courts reads the requirement for personal property to benefit the realty as a whole often means this factor is outcome determinative. *See*, *e.g.*, *Gen. Elec. Co., Lighting Div.*, 2001 WL 1647158, at *2-3 (considering complete factual context of a manufacturing furnace but emphasizing that furnace benefitted the use of only one specific industry when finding asset not a fixture). Thus, to the extent assets located in Ohio benefit a particular use of a piece of real estate – and not the real estate more generally – courts often find the assets are not fixtures without reaching other indicators of

intent. Only when assets located in Ohio benefit the real estate more generally does the Court need to consider the other intent factors.[14]

ii. Michigan and Other Common Law States

As in Ohio, the courts in other common law jurisdictions generally find that when equipment is beneficial for all uses of the realty that fact tends to show intent to make a permanent annexation. *See*, *e.g.*, *Logan*, 686 S.W.2d at 607-08 (rail car installed to build culvert over creek to provide access to landlocked property was intended to be permanently annexed); *Cole v. Roach*, 37 Tex. 413, 418-19 (1872) (cistern annexed to dwelling house that was necessary to supply water to inhabitants and was intended to be permanently annexed).

Courts in Michigan and the other common law states also look to whether real estate is adapted to the exclusive use of a particular industry and whether the asset in question is necessary for this particular use. For example, in *Autowhirl Auto Washers v. Tazmania Group*, a Michigan court determined that car wash equipment were fixtures because the car wash building was uniquely designed for the purpose of being a car wash and had no other use, and the car wash equipment was necessary to the continued use of the real estate for that purpose. No. 267359, 2006 WL 2270523, at *3 (Mich. Ct. App. Aug. 8, 2006) (unpublished); *see also Petition of Johns-Manville Sales Corp.*, 88 F.2d at 521 (finding that certain key parts of an asphalt plant, such as the smokestack, oil tanks, and a boilerhouse, were fixtures because the real estate was

[14] Louisiana's statutory scheme is similar to Ohio's common law interpretation in that it requires that an asset benefit the real estate generally to be considered a fixture, without regard to the particular business that inhabits the real estate. La. Civ. Code Ann. § 466 (2016). Thus, in *Willis-Knighton Med. Ctr. v. Caddo-Shreveport Sales*, 862 So.2d 358, 365 (La. Ct. App. 2003), the court found that a nuclear camera installed in a hospital was not a fixture because societal expectations are that such a building would not have such a specialized camera. Significantly, the court looked to societal expectations for commercial buildings generally, as opposed to hospitals specifically. *Id.*; *see also Showboat Star P'ship v. Slaughter*, 789 So.2d 554, 558-59 (La. 2001). However, in Louisiana, personal property that is specific to a particular business use (and not beneficial to the realty generally) may be considered a fixture if it cannot be removed "without substantial damage to themselves or to the building or other construction," La. Civ. Code Ann. § 466, with damage being measured in relation to the value of the article and the realty and whether the damage would be permanent, *see Coulter v. Texaco, Inc*., 117 F.3d 909, 917 (5th Cir. 1997).

particularly adapted to being an asphalt plant and that such a plant was inoperable without these parts); *Peninsular Stove Co. v. Young*, 247 Mich. 580, 582-83 (1929) (finding that gas ranges were fixtures because the building was specifically designed to be an apartment building and gas ranges were necessary to this purpose). Notably, courts have not defined the industry so narrowly as to be coextensive with the company's own particular manufacturing process or unique use of the realty. Thus, even when a building is adapted for use in a particular industry, items that only benefit a particular company's unique industrial process would not be considered fixtures.

When a building could have multiple uses, courts find that an asset is a fixture only if it is necessary to all possible uses of the building. In *In re Mahon Industrial Corp.*, a Michigan Bankruptcy Court, applying Michigan law, looked at the characteristics of particular real estate and its historical use to find the building was adapted for industrial and manufacturing use generally, not a particular industry, and that movable cranes were fixtures in part because the use of the building as a manufacturing plant required use of the cranes. 20 B.R. at 840. Critical to this decision was the finding that successive users of the manufacturing building had all used the same cranes for manufacturing regardless of their particular company's unique business and removal of the cranes would have considerably lessened the value of the building. *Id*. Similarly, in *Controls Group*, the Michigan court found that very heavy printing presses were not fixtures, in part because the building had not been specially adapted to the newspaper business and printing presses were not needed for all potential users of the building. 2006 WL 1691346. The court found that unlike a building "designed specifically to serve as an apartment house," the newspaper building "might have varied industrial or commercial uses not related to printing presses." *Id*. (contrasting facts to those of *Peninsular Stove Co.*, 247 Mich. at 580).

Even if the annexing party is also the owner of the real estate where the asset is located and the asset benefits the owner's own industry, courts will not presume an intent to permanently annex if there are other facts showing lack of intent. *See*, *e.g.*, *Controls Grp.*, 2006 WL 1691346 (finding that printing presses were not fixtures even though installed by building owner's subsidiary company); *Superior Reed & Rattan Furniture Co.*, 160 A.D.2d at 706 (finding that equipment installed by factory owner were not fixtures because the equipment was moveable, had come from a different plant, and was not securely attached to the real estate). *But see In re Mahon Industrial Corp.*, 20 B.R. at 839 (stating that when an owner attaches equipment to real estate "to facilitate its use and occupation in general," there is a presumption that attachment was meant to be permanent). Thus, whether Old GM owned the facilities in question is not dispositive of its intention to make annexation permanent.

In assessing whether the real estate is adapted to a particular use and the assets adapted to this use of the real estate, courts consider whether a particular facility has multiple potential uses or was adapted for a particular use, how narrowly or broadly to define this use, and whether the particular assets are essential to this use. Thus, if certain assets only benefited Old GM's manufacturing process, this factor will point to finding the assets are not fixtures even if they were essential to that process.

II. ADDITIONAL FACILITIES

Defendants have not stated their basis for claiming that the Additional Facilities are covered by the Fixture Filings. Other than JPMorgan including the Additional Facilities in its interrogatory responses in its list of facilities with Surviving Collateral, as described above, Defendants have provided no information about these Additional Facilities, including their physical location, how they relate (if at all) to the facilities covered by the Fixture Filings, or the

nature of the assets within them. Therefore, this brief provides a legal overview of the law governing the scope of assets covered by the Fixture Filings generally and is submitted with the understanding that additional briefing will be needed to address the factual context of each particular facility and the specific arguments advanced by Defendants.

A. Scope of Defendants' Security Interest

The Term Loan Agreement, together with the Collateral Agreement, define the security interest in Old GM's facilities that Old GM granted to the Defendants. The Fixture Filings JPMorgan caused to be filed, at most, can perfect this specific, contractually defined security interest and nothing more. The Term Loan Agreement granted the Defendants, in part, a security interest in fixtures located at a "U.S. Manufacturing Facility," defined as:

> (a) any plant or facility of a Grantor listed on Schedule 1, including all related appurtenant land, buildings, Equipment and Fixtures, and (b) any plant or facility of a Grantor, including all related or appurtenant land, buildings, Equipment and Fixtures, acquired or leased by a grantor after the date hereof which is located within the continental United States of America and at which manufacturing, production, assembly or proceeding activities are conducted.

Fisher Decl. Ex. B (Collateral Agreement at 3). Regardless of their scope, the Fixture Filings cannot enhance or expand the security interest granted to Defendants under the Term Loan Agreement. *See generally* UCC § 9-502 & cmt. 2.

In interpreting the scope of the security interest granted to Defendants under the Term Loan Agreement, the Court must "give effect to the intent of the parties as revealed by the language of their agreement." *Compagnie Financiere de CIC et de L'Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 232 F.3d 153, 157 (2d Cir. 2000). "The question of whether the language of a contract is clear or ambiguous is a question of law to be decided by the court." *Id*. at 158. To give effect to the intent of the parties, a court must interpret a contract by considering all of its provisions, and "words and phrases . . . should be given their plain

meaning." *LaSalle Bank Nat'l Ass'n v. Nomura Asset Capital Corp.,* 424 F.3d 195, 206 (2d Cir. 2005) (internal quotations omitted). "A written agreement that is clear, complete and subject to only one reasonable interpretation must be enforced according to the plain meaning of the language chosen by the contracting parties." *Dev. Specialists, Inc. v. Peabody Energy Corp. (In re Coudert Bros.)*, 487 B.R. 375, 389 (S.D.N.Y. 2013) (internal quotations omitted).

B. Scope of the Fixture Filings

For the Fixture Filings to be valid and sufficient, they must meet the requirements of UCC § 9-502(a) and (b). These requirements include "a description of the real property to which the collateral is related [sufficient to give constructive notice of a mortgage under the law of this State if the description were contained in a record of the mortgage of the real property]." UCC § 9-502(b)(3) (alteration in original).[15] Moreover, the description of the real property in a fixture filing is considered "sufficient, whether or not it is specific, if it reasonably identifies what is described." UCC § 9-108(a). Accordingly, the Court must assess the scope of the descriptions contained in the Fixture Filings to determine whether they are broad enough to include the Additional Facilities.

The key inquiry is whether the description provides a bona fide purchaser with constructive notice of the interest. For example, a bankruptcy court applying Michigan law found the recorded mortgage at issue in *Moyer v. Edlund (In re Vandenbosch)*, 405 B.R. 253, 264 (Bankr. W.D. Mich. 2009), to be avoidable by the debtor's trustee because the mortgage described a neighboring vacant lot instead of the property itself. Because the legal description on

[15] Subsection 3 includes additional optional language in brackets, which not all states have adopted. The 9 Additional Facilities appear to be located in Michigan, Ohio, and Kansas. Michigan and Ohio have adopted the optional UCC language contained in the brackets whereas Kansas has not. *Compare* Mich. Comp. Laws Ann. § 440.9502(2)(c) (West 2016), *and* Ohio Rev. Code Ann. § 1309.502(B)(3) (West 2016), *with* Kan. Stat. Ann. § 84-9-502(b)(3) (2016).

the mortgage was wrong, the court found it unenforceable because "no amount of inquiry" into the chain of title would have revealed it. *Id*. at 265.

Similarly, in *Sutherland Lumber Co. v. Due*, the Kansas Supreme Court found a mortgage inadequate because the description was insufficiently specific and thus would not have provided notice to a bona fide purchaser. 212 Kan. 658, 660 (1973). Because the owners had multiple parcels of land in the area, the court found the description "(O)ne barn and the surrounding tract of land belonging to Mr. and Mrs. L. E. Due of Rural Route, 1, Centerville, Kansas," inadequate because a potential buyer would not know which of the owners' parcels was encumbered. *Id*. (alteration in original); *see also Luthi v. Evans*, 223 Kan. 622, 629 (1978) (stating that "[a] description of the real property conveyed should be considered sufficient if it identifies the property or affords the means of identification within the instrument itself or by specific reference to other instruments recorded in the office of the register of deed"); *Roebuck v. Columbia Gas Transmission Corp.*, 57 Ohio App. 2d 217, 119-220 (Ohio Ct. App. 1977) (stating that the real property description is sufficient if it indicates the land intended to be conveyed such that it can be identified without the aid of extraneous testimony). To the extent the descriptions in the Fixture Filings do not provide constructive notice of an interest in the Additional Facilities (and, in Michigan and Ohio, constructive notice of a mortgage), the Fixture Filings do not cover these Additional Facilities.

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Respectfully submitted,

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