

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:

HAYES LEMMERZ INTERNATIONAL,  
INC., et al.,

Reorganized Debtors.

Chapter 11

Case No. 01-11490 (MFW)

Jointly Administered

(Relates to Docket No. 3813 and 3842)

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**GENERAL ELECTRIC CAPITAL CORPORATION'S PROPOSED FINDINGS OF  
FACT AND CONCLUSIONS OF LAW**

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GENERAL ELECTRIC CAPITAL CORPORATION ("GECC"), the movant in the above-captioned Chapter 11 case of HAYES LEMMERZ INTERNATIONAL, INC., et al. ("Hayes"), respectfully submits its proposed findings of fact and conclusions of law with respect to GECC's applications for allowance and payment of administrative expense claims, and Hayes's objections thereto, which were heard by the Court on January 12-14, 31 and February 1, 2005:

**FINDINGS OF FACT**

**Introduction**

1. On December 5, 2001 (the "Petition Date"), the Hayes companies each filed voluntary petitions under 11 U.S.C. §§ 101 et seq. See "Joint Pre-Trial Stipulation By General Electric Capital Corporation And Reorganized Debtors Relating To Applications For Allowance And Payment Of Administrative Expenses" (the "Joint Pre-Trial Statement") at p. 1, ¶1.

2. The Hayes chapter 11 cases are being jointly administered by this Court for procedural purposes as case number 01-11490 (MFW) (the “Case”). See Joint Pre-Trial Statement at p. 1, ¶1.

3. On May 14, 2003, the Court confirmed Hayes’s Modified First Amended Joint Plan of Reorganization (the “Plan”), and the Effective Date of the Plan occurred on June 3, 2003. See Case Docket No. 2403.

4. Since the Effective Date of the Plan, Hayes has been operating as the reorganized debtor.

5. The Plan provides that the Distribution Date shall occur no more than twenty (20) days after the Effective Date and Periodic Distribution Dates shall occur every one hundred and twenty (120) days thereafter. See Plan at §1.88.

6. The Plan provides that Allowed Administrative Claims shall be paid on “the first Periodic Distribution Date occurring after the later of (a) the date an Administrative Claim becomes an Allowed Administrative Claim or (b) the date an Administrative Claim becomes payable pursuant to any agreement between a Debtor (or Reorganized Debtor) and the holder of such Administrative Claim...” See Plan at §2.1.

**The Agreements Between GECC and Hayes And the Nature of the Equipment**

7. GECC is in the business of, among other things, making equipment acquisition loans and leasing new equipment to end users. See 1/13/2005 Transcript at p. 73:07-10.

8. GECC and Hayes are parties to an unexpired Master Lease Agreement dated December 28, 1992 (the “Master Lease Agreement”). See Joint Pre-Trial Statement at p. 4, ¶1. Ex. M-1.

9. At various times after December 28, 1992, in conjunction with the Master Lease Agreement, GECC and Hayes executed various schedules pertaining to certain pieces of equipment leased by GECC to Hayes. See Exs. M 1-21.

10. Hereinafter when the Master Lease Agreement and the equipment schedules are referred to collectively, they will be referred to as the “Lease” and when a particular or individual equipment schedule to the Lease is referred to, it will be referred to as a “Schedule” or “Schedules”.

11. Pursuant to the Master Lease Agreement and the Schedules, GECC leased various computer numerical controlled or “CNC” manufacturing machines (each a “Machine” and collectively, the “Machines”) to Hayes. See Joint Pre-Trial Statement at p. 4-5, ¶¶ 1, 3.

12. The Machines were used by Hayes at its manufacturing facilities located in La Mirada, CA; Somerset, KY; Gainesville, GA; Sedalia, MO; Huntington, IN; and Howell, MI. See “Reorganized Debtors’ Pre-Trial Brief” at pp. 2-3.

13. Certain Schedules which were a part of the Master Lease Agreement were assumed by Hayes during the Case and are not at issue in this matter.

14. This matter involves certain Schedules that were rejected pursuant to 11 U.S.C. § 365 during the course of the Case.

15. The rights and obligations of Hayes and GECC with respect to the Machines are contained in the Lease (which includes the Schedules), which are the only documents governing those rights and obligations. See Exs. M 1-21.

16. The Lease imposed various obligations on Hayes, as Lessee, which are relevant to GECC’s applications for administrative expense. See Exs. M 1-21.

17. Those obligations include:

A. Section V(d) of the Master Lease Agreement provides that:

(d) Lessee will keep the Equipment at the Equipment Location (specified in the applicable Schedule) and will promptly notify Lessor of any relocation of Equipment. Upon the written request of Lessor, Lessee will notify Lessor forthwith in writing of the location of any Equipment as of the date of such notification.

See Ex. M 1, Bates No. GE000194.

B. Section V(e) of the Master Lease Agreement provides that:

(e) Lessee will promptly and fully report to Lessor in writing if any Equipment is lost or damaged (where the estimated repair costs would exceed ten percent (10%) of its then fair market value), or is otherwise involved in an accident causing personal injury or property damage.

See Ex. M 1, Bates No. GE000194.

C. Section VII(a) of the Master Lease Agreement provides that:

(a) Lessee will, at its sole expense, maintain each unit of Equipment in good operating order, repair, condition, and appearance in accordance with manufacturer's recommendations, normal wear and tear excepted. Lessee shall, if at any time requested by Lessor, affix in a prominent position on each unit of Equipment plates, tags or other identifying labels showing ownership thereof by Lessor.

See Ex. M 1, Bates No. GE000194.

D. Section VII(b) of the Master Lease Agreement provides that:

Lessee will not, without the prior consent of Lessor, affix or install any accessory, equipment or device on any Equipment if such addition will impair the originally intended function or use of such Equipment. All additions, repairs, parts, supplies, accessories, equipment, and devices furnished, attached or affixed to any Equipment which are not readily removable shall be made only in compliance with applicable law, including Internal Revenue Service guidelines, and shall become the property of Lessor. Lessee will not, without the prior written consent of Lessor and subject to such conditions as Lessor may impose for its protection, affix or install any Equipment to or in any other personal or real property.

See Ex. M 1, Bates No. GE000194.

E. Section VIII of the Master Lease Agreement provides that:

Lessee shall promptly and fully notify Lessor in writing if any unit of Equipment shall be or become worn out, lost, stolen, destroyed, irreparably damaged in the reasonable determination of Lessee, or permanently rendered unfit for use from any cause whatsoever (such occurrences being hereinafter called "Casualty Occurrences"). On the rental payment date next succeeding a Casualty Occurrence (the "Payment Date"), Lessee shall pay Lessor the sum of (x) the Stipulated Loss Value of such unit calculated as of the rental next preceding such Casualty Occurrence ("Calculation Date"); and (y) all rental and other amounts which are due hereunder as of the Payment Date. Upon payment of all sums due hereunder, the term of this lease as to such unit shall terminate and (except in the case of loss, theft or complete destruction of such unit) Lessor shall be entitled to recover possession of such unit.

See Ex. M 1, Bates No. GE000194.

F. Section IX of the Master Lease Agreement provides that:

Lessee hereby assumes and shall bear the entire risk of loss, theft, damage to, or destruction of, any unit of Equipment from any cause whatsoever from the time the Equipment is shipped to Lessee.

See Ex. M 1, Bates No. GE000194.

G. Section XI of the Master Lease Agreement provides that:

(a) Upon any expiration or termination of this Agreement or any Schedule, Lessee shall promptly, at its own cost and expense: (i) perform any testing and repairs required to place the affected units of Equipment in the same condition and appearance as when received by Lessee (reasonable wear and tear excepted) and in good working order for their originally intended purpose; (ii) if deinstallation, disassembly or crating is required, cause such units to be deinstalled, disassembled and crated by an authorized manufacturer's representative or such other service person as is reasonably satisfactory to Lessor; and (iii) return such units to a location within the continental United States as Lessor shall direct.

(b) Until Lessee has fully complied with the requirements of Section XI(a) above, Lessee's rent payment obligation and all other obligations under this Agreement shall continue from month to month notwithstanding any expiration or termination of the lease term. Lessor may terminate such continued leasehold interest upon ten (10) days notice to Lessee.

See Ex. M 1, Bates No. GE000194.

H. Section XII of the Master Lease Agreement provides, in part, that:

(a) Lessor may in writing declare this Agreement in default if: Lessee breaches its obligation to pay rent or any other sum when due and fails to cure the breach within ten (10) days; Lessee breaches any of its insurance obligations under Section X; Lessee breaches any of its other obligations and fails to cure that breach within thirty (30) days after written notice thereof;

\* \* \*

(b) After default, at the request of Lessor, Lessee shall comply with the provisions of Section XI(a). Lessee hereby authorizes Lessor to enter, with or without legal process, any premises where any Equipment is believed to be and take possession thereof. Lessee shall, without further demand, forthwith pay to Lessor (i) as liquidated damages for loss of bargain and not as a penalty, the Stipulated Loss Value of the Equipment (calculated as of the rental next preceding the declaration of default), and (ii) all rentals and other sums then due thereunder. Lessor may, but shall not be required to, sell Equipment at private or public sale, in bulk or in parcels, with or without notice, and without having the Equipment present at the place of sale; or Lessor may, but shall not be required to, lease, otherwise dispose of or keep idle all or part of the Equipment; and Lessor may use Lessee's premises for any or all of the foregoing without liability for rent, costs, damages or otherwise. The proceeds of sale, lease or other disposition, if any, shall be applied in the following order of priorities: (1) to pay all of Lessor's costs, charges and expenses incurred in taking, removing, holding, repairing and selling, leasing or otherwise disposing of Equipment; then (2) to the extent not previously paid by Lessee, to pay Lessor all sums due from Lessee hereunder; then (3) to reimburse to Lessee any sums previously paid by Lessee as liquidated damages; and (4) any surplus shall be retained by Lessor. Lessee shall pay any deficiency in (1) and (2) forthwith.

(c) The foregoing remedies are cumulative, and any or all thereof may be exercised in lieu of or in addition to each other or any remedies at law, in equity, or under statute. Lessee waives notice of sale or other disposition (and the time and place thereof), and the manner and place of any advertising. [Lessee shall pay Lessor's reasonable attorney's fees incurred as a result of any default hereunder.] Waiver of any default shall not be a waiver of any other or subsequent default.

See Ex. M 1, Bates No. GE000195, 199; Ex. M 2.

I. Section XX(e) of the Master Lease Agreement provides that:

Any rent or other amount not paid to Lessor when due hereunder shall bear interest, both before and after judgment or termination hereof, at the lessor of eighteen percent (18%) per annum or the maximum rate allowed by law. Any provisions in this Agreement and any Schedule which are in conflict with any statute, law or applicable rule shall be deemed omitted, modified or altered to conform thereto.

See Ex M 1, Bates No. GE000196-197.

18. The Master Lease Agreement does not contain a choice of law provision.

See Master Lease Agreement (Ex. M 1).

19. Each of the Schedules provides that the leased equipment includes all attachments, additions and accessories now or hereafter attached to a Machine. See, e.g., Ex. M 3, Bates No. GE000204.

20. Each Schedule contains additional equipment specific provisions relating to maintenance, equipment returns and equipment sales. See Exs. M 3-21.

### **GECC's Administrative Claims**

21. GECC's applications for allowance and payment of administrative expenses relate to fifty (50) Machines on eighteen (18) Schedules that ultimately were rejected by Hayes at various times during the Case. See Joint Pre-Trial at pp. 4-5, ¶¶1-3

22. The Schedules at issue in this matter are Schedules 30, 31, 32, 34, 35, 36, 37, 38, 40, 41(102), 47(97), 43(98), 48, 59, 62, 80, 83 and 92.

23. The parties attached a Machine List to the Joint Pre-Trial Stipulation, which was used by the parties in the trial as a way to refer to the Machines at issue and which assigns a number to each of the Machines at issue for the purposes of the litigation and summarizes for each Machine the make, description, model, serial number, Schedule number, and rejection date. See Joint Pre-Trial Statement at pp. 4-5, ¶3.

**Rejection of Schedules and Objections and Notice by GECC**

24. Less than two weeks after the Petition Date, Hayes began filing rejection motions with respect to executory contracts and unexpired leases. See Case Docket No. 73

25. On December 17, 2001, Hayes filed the “Debtors’ Motion For Order Under 11 U.S.C. Sec. 365(A) And Bankruptcy Rule 6006 Authorizing Rejection Of Executory Contracts”. See Case Docket No. 73.

26. Hayes’s first rejection motion included Schedules 38 and 40 relating to Machines 3-11. See Case Docket No. 73.

27. On January 15, 2002, the Court entered an Order approving the rejection of Schedules 38 and 40 as of that date. See Case Docket No. 214; Joint Pre-Trial Stipulation at p. 4, ¶2.

28. Machines 3-11, located at the Hayes Gainesville facility, were the only Machines at issue on Schedules rejected by Hayes within the first fifty-nine (59) days of the Case. See Ex. M 256 at p. 16.

29. On January 25, 2002, Hayes filed the “Debtors’ Second Motion For Order Under 11 U.S.C. Sec. 365(A) And Bankruptcy Rule 6006 Authorizing Rejection Of Executory



Contracts” (See Case Docket No. 259) which pertained to Schedules 35 and 37 relating to Machines 2, 30, 50 and 51. See Case Docket No. 259; Joint Pre-Trial Stipulation at p. 4, ¶2.

30. On February 7, 2002, GECC filed the “Objection of General Electric Capital Corporation to Debtors’ Second Motion for Order Authorizing Rejection of Executory Contracts”. See Case Docket No. 332, Ex. M 258.

31. In situations where a customer files bankruptcy and is in breach of its obligations to GECC, it is GECC’s policy to refer the issue to outside counsel to be addressed through the bankruptcy process. See 1/12/2005 Transcript at pp. 38:12-24, 66:23-67:02.

32. Consistent with that policy, GECC’s objection contained the following notice of Hayes’s breach of its maintenance and repair obligations under the Lease:

GE Capital believes that the GE Capital Equipment has not been maintained or serviced by the Debtors in accordance with the terms of the GE Capital Leases (such that the GE Capital Equipment is now in poor working condition, beyond the normal wear and tear permitted by the GE Capital Leases), and that the Debtors do not intend to repair the GE Capital Equipment in accordance with the GE Capital Leases.

See Case Docket No. 332 (Ex. M 258) at p. 6, ¶15.

33. GECC filed the objection to address actions or failures to act by Hayes with respect to Machines on Schedules which had not yet been rejected by Hayes. See Case Docket No. 332 (Ex. M 258); 1/12/2005 Transcript at pp. 41:24-42:07.

34. On February 14, 2002, more than fifty-nine (59) days after the Petition Date, the Court entered the “Second Order Under 11 U.S.C. Sec. 365(A) And Bankruptcy Rule 6006 Authorizing Rejection Of Executory Contracts” authorizing the rejection of Schedules 35 and 37. See Case Docket No. 377.

35. The Order contained specific language reserving GECC's right to file an administrative expense claim with respect to the rejected Schedules. See Case Docket No. 377.

36. On February 15, 2002, Hayes filed the "Debtors' Third Motion For An Order Under 11 U.S.C. Sec. 365(A) Bankruptcy Rule 6006 Authorizing Rejection Of Executory Contracts". See Case Docket No. 382.

37. Hayes's third rejection motion included Schedules 32 and 92 relating to Machines 1, 37-43, 47 and 48. See Case Docket No. 382; Joint Pre-Trial Stipulation at p. 4, ¶2; Machine List.

38. On February 28, 2002, GECC filed the "Limited Objection of General Electric Capital Corporation to Debtors' Third Motion for Order Authorizing Rejection of Executory Contracts". See Case Docket No. 420.

39. GECC's objection again put Hayes on notice of its breach of the maintenance and repair obligations of the Lease:

GE Capital believes that the GE Capital Equipment has not been maintained or serviced by the Debtors in accordance with the terms of the GE Capital Leases (such that the GE Capital Equipment is now in poor working condition, beyond the normal wear and tear permitted by the GE Capital Leases), and that the Debtors do not intend to repair the GE Capital Equipment in accordance with the GE Capital Leases.

See Case Docket No. 420, Ex. M 259 at p. 5, ¶12.

40. On March 7, 2002, more than fifty-nine (59) days after the Petition Date, the Court entered the "Third Order Under 11 U.S.C. Sec. 365(A) And Bankruptcy Rule 6006 Authorizing Rejection Of Executory Contracts" authorizing the rejection of Schedules 32 and 92. See Case Docket No. 468.

41. The Court's Order contained specific language reserving GECC's right to file an administrative claim relating to the rejected Schedules. See Case Docket No. 468.

42. On March 27, 2002, January 31, 2003 and June 6, 2003, GECC filed similar pleadings in the Case in response to rejection motions filed by Hayes. See Case Docket Nos. 545, 1910 and 2393 (Exs. M 260-262).

43. In each case, Hayes was put on notice of its breaches of the Lease, and GECC reserved its rights to file administrative claims with respect to the rejected Schedules. See Case Docket Nos. 545, 1910 and 2393 (Exs. M 260-262).

44. During the course of the Case, the Court granted requests by Hayes to reject the following additional Schedules by entry of appropriate orders: (i) Schedule 59, rejected on 4/3/2002; (ii) Schedules 30, 31, 36, 48, 62, and 80, rejected on 7/19/2002; (iii) Schedule 43(98), rejected on 2/28/2003; (iv) Schedule 41(102), rejected on 3/24/2003; (v) Schedule 47(97), rejected on 5/12/2003; and (vi) Schedules 34 and 83, rejected on 6/13/2003. See Case Docket Nos. 571, 1054, 1964, 2338 and 2423, all of which were entered more than fifty-nine (59) days after the Petition Date. See Joint Pre-Trial Statement at p. 2, ¶2.

45. Each of the rejection orders contained specific language reserving GECC's rights to file administrative expense claims with respect to the rejected Schedules. See Case Docket Nos. 571, 1054, 1964, 2338 and 2423.

46. GECC has grouped the Machines into two groups: the Group 1 Machines, which are all of the Machines on Schedules rejected more than fifty-nine (59) days after the Petition Date, and the Group 2 Machines, which are all of the Machines on Schedules rejected before the fifty-ninth (59<sup>th</sup>) day after the Petition Date. See "General Electric Capital Corporation's Pre-Trial Brief In Support Of Applications For Allowance And Payment Of Administrative Expenses" (the "GECC Pre-Trial Brief") filed on December 13, 2004.

#### **Description of CNC Machines**

47. The Machines consisted of turning centers, lathes and drills used in the manufacture of aluminum wheels, and were all CNC machines. See Exs. M 3-20.

48. A CNC (Computer Numerical Control) machine is a metal cutting machine tool, the cutting and speed function of which is controlled by a central computer programmed in advance and which is capable of making parts repeatedly and to precision. See 1/31/2005 Transcript at pp. 72:25-73:01-5.

49. A CNC machine uses various parts in order to perform its function including spindles, slides, chucks, axis motors, turrets, metal cutting tools, and tool changers. See 1/31/2005 Transcript at pp. 76:04-83:19.

50. The critical capability of a machine tool is to make parts to specifications, and a machine tool which is producing parts to specification, i.e., within tolerance, is generally considered to be operational and usable. See 1/31/2005 Transcript at pp. 140:17-20; 141:9-20.

51. The value of CNC machines, like the Machines at issue, is in their ability to accurately and repeatedly make parts to the tolerances and specifications the machine was capable of producing at the time it was manufactured. See 1/13/2005 Transcript at p. 87:01-14.

52. In the wheel making process, the Machines produce a large quantity of aluminum chips. See 1/31/2005 Transcript at pp. 84:22-85:15.

53. Chips that get inside the covers of the Machines and under the way wipers can cause problems with the Machines, including scoring and/or pitting of the ways. See 1/14/2005 Transcript at pp. 57:11-58:04; Maynard (Ex. M 232) at pp. 108:07-110:22.

54. If the Machine ways become scored and/or pitted, the accuracy of the Machine is affected, as is the Machine's ability to produce parts to the tolerances it previously was capable of achieving. Id.

55. In order to repair the ways, they have to be reground and the parts that move on the ways also have to be ground to ensure their fit and the accuracy of the operation of the machine. 1/31/2005 Transcript at pp. 145:24-146:25.

56. If the slides of a Machine are in need of repair, the Machine cannot make parts to precision. Id.

57. Hayes has admitted that twenty-six (26) of the Machines at issue were not operable and usable, as reflected on the chart prepared by Mr. Kucklick, the expert retained by Hayes. See Ex. D 276.

58. Nine (9) of the twenty-six (26) Machines listed as inoperable on Exhibit D 276 were the Group 2 Machines. See Ex. D 276; Machine List.

59. Another twelve (12) of the 25 Machines that Mr. Kucklick opined were operable on the sales dates, actually were either clearly inoperable based upon the generally accepted definition of an operable and usable machine (as opposed to the definition Mr. Kucklick used solely for purposes of his report) or the inspection reports relied upon by Mr. Kucklick provided no support for his conclusion that the Machines were operable as of the respective sales dates. See Ex. D 275; 1/31/2005 Transcript at pp. 153-175; 2/1/2005 Transcripts at pp. 11-15, 20-22

60. John Josko, GECC's Vice President of Global Investment Recovery, testified regarding GECC's lease and recovery of CNC machines of the type leased to Hayes. See 1/13/2005 Transcript at pp. 72-126; 1/13/2005 Sealed Transcript-2 at pp. 4-32.

61. Mr. Josko is GECC's in-house consultant on equipment values, exit strategies and sales for GECC's loan origination, off-lease and repossessed machinery. See 1/13/2005 Transcript at p. 73:02-6.

62. Mr. Josko has over thirty-one (31) years of experience in the machine tool industry. See 1/13/2005 Transcript at p. 74:22-24.

63. Mr. Josko holds numerous professional certifications, including a senior designation in the American Society of Appraisers for Machinery, a senior designation in the Equipment Appraiser's Association of North America, a senior designation in the GPPA for the Auction Institute and a CAI designation from the National Auctioneers Association. See 1/13/2005 Transcript at p. 74:08-74:24.

64. The Machines are very large machining centers and the de-installation process and removal of the Machines from a production line or a facility requires the retention of a professional rigger or millwright who will go into the manufacturing facility, disconnect the power, air and hydraulics, drain the fluids and properly move and transport the Machines. See 1/13/2005 Transcript at p. 83:12-84:01.

65. Not all riggers or millwrights have the necessary expertise to deinstall CNC Machines and there are riggers or millwrights that GECC will not use. See 1/13/2005 Transcript at pp. 22:19-23:25.

66. When moving a CNC Machine anywhere, even within a facility, the machine heads, ways and/or spindles have to be blocked so that the machine is not damaged during the move. See 1/13/2005 Transcript at pp. 82:24-85:07.

67. If the machine is not blocked, the moving parts of the machine, such as the spindle, can crash into the table during transport, reducing the tolerances and accuracy of the machine. Id.

68. The ways have to be coated to prevent them from rusting, getting nicked or otherwise damaged because if they are not, and the ways become rusted or dirt accumulates

on them, the ways can become scored and/or pitted, reducing the accuracy of the machine. See 1/13/2005 Transcript at pp. 85:08-86:03; See Maynard (Ex. M 232) at pp. 109:16-110:22, 123:22-124:07.

69. After the machine is moved out of its production cell, the machine then should be tarped and, if not sold to a third party, transported to a warehouse for storage. See 1/13/2005 Transcript at pp. 83:13-84:11.

70. If the machine is not properly stored, or is stored outside, the machine can become damaged. See 1/13/2005 Transcript at pp. 87:17-25.

71. A machine that is stored outside, even if it is tarped, is exposed to the elements, and the weather cycles and changes in temperature will cause rusting, cause electronic components to fail or cause other damage to the machine. See 1/13/2005 Transcript at pp. 91:20-92:04.

72. Machines of the type at issue in this case will rust after a period of only two (2) days. See 1/31/2005 Transcript at p. 46:07-10.

73. If a machine is not properly de-installed, transported and stored, the machine can become damaged causing it to lose value and making it difficult for GECC to either resell or re-let the returned machine. See 1/13/2005 Transcript at pp. 82:24-86:03, 87:01-25, 89:13-92:04.

74. If a machine is not properly maintained and repaired by the Lessee, or not returned to GECC in the condition required by the Lease, GECC is unable to recover the value that the parties bargained that it would receive absent the enforcement of the provisions of the Lease. See 1/13/2005 Transcript at pp. 89:13-90:05.

75. After the initial Schedules had been rejected in the Case, Bill Linski, on behalf of Hayes, contacted Lawrence Kovacs at GECC to advise him of Hayes's intentions regarding removal of the Machines upon rejection. See 1/12/2005 Transcript at p. 42:12-25.

76. Mr. Linski informed Mr. Kovacs that Hayes intended to simply unplug the Machines, remove them from the line and put them outside with a tarp. See 1/12/2005 Transcript at p. 42:12-25.

77. Mr. Kovacs, who is not an "equipment person" informed Mr. Linski that he would have to put Mr. Linski in touch with the appropriate people in GECC's Asset Management Group to coordinate the recovery of the Machines. See 1/12/2005 Transcript at p. 43:01-6.

78. Mr. Kovacs then referred Mr. Linski to Jim Alerio at Meritage Remarketing, which was the agent GECC used to handle the recovery and disposition of equipment of that type. See 1/12/2005 Transcript at pp. 43:07-17.

79. Because of the nature of the Machines, GECC requested that Hayes provide as much advance notice as possible of rejection of any of the Schedules to allow GECC to protect their investment and aid in the recovery process. See 1/12/2005 Transcript at pp. 43:24-44:4.

80. In subsequent conversations between Mr. Kovacs and Mr. Linski, they agreed on a process for handling Hayes's rejection of GECC Schedules and recovery of the Machines by GECC. See 1/12/2005 Transcript at pp. 43:23-44:24.

81. Mr. Linski agreed to give Mr. Kovacs 30 days advance notice of rejections. See 1/12/2005 Transcript at pp. 43:23-44:21.



82. The parties further agreed that, due to the sensitive nature of the Machines and the care that needed to be taken in de-installing the Machines, GECC would be in charge of the de-installation and removal of the Machines. See 1/12/2005 Transcript at pp. 44:22-45:19.

83. Despite the parties' agreement, Mr. Kovacs never received any advance notice of lease rejections from Mr. Linski or anyone else at Hayes. See 1/12/2005 Transcript at p. 46:19-22.

84. Shortly after Mr. Kovacs's initial communications with Mr. Linski, the communications "dried up" and Mr. Linski stopped responding to telephone calls and emails from Mr. Kovacs. See 1/12/2005 Transcript at p. 45:22-46:12.

85. Mr. Kovacs later instructed outside counsel to send a letter to Hayes demanding Hayes's compliance with the Agreement. See 1/12/2005 Transcript at pp. 46:23-47:20.

86. All of the Machines that were on the Schedules rejected by Hayes, with the exception of Machines 14 and 15, were moved out of the production line by Hayes with no advance notice to GECC. See 1/12/2005 Transcript at p. 46:19-22; 1/14/2005 Transcript at pp. 50:19-22, 140:07-18; 1/31/2005 Transcript at pp. 44:06-45:07.

87. Hayes was well known in the industry for being very rough on its machine tools and for returning machines with missing parts and full of chips. See 1/13/2005 Transcript at p. 17:10-21.

88. While there was some testimony that professional riggers were used to move some of the Machines, there was no testimony regarding exactly how the riggers or anyone else moved the Machines or whether the steps described by Mr. Josko that were necessary to

prevent damage to the Machines were taken. See, generally, 1/14/2005 Transcript at pp. 99-116, 120-128; 1/31/2005 Transcript at pp. 14:16-15:12.

89. In some instances Hayes put Machines outside without any cover at all; in other instances Hayes put Machines outside and covered them with a tarp but took no other steps to protect the Machines from the elements. See Ex. M 238 at pp. 17:20-18:07; 1/14/2005 Transcript at p. 141:03-12; 1/31/2005 Transcript at pp. 24:23-25:21.

90. Hayes did not take any steps to coat the ways or other exposed metal surfaces to prevent rusting or prevent dirt from accumulating on the moving parts of the Machines. See 1/14/2005 Transcript at pp. 59:25-60:05, 140:23-141:02; 1/31/2005 Transcript at p. 25:19-21, 45:18-21.

#### **GECC's Recovery And Sale Of The Machines**

91. Meritage, Inc. is comprised of three (3) companies, Ellison Machinery Company ("Ellison"), Hartwig, and Robert E. Morris each of which is in the business of manufacturing, servicing and selling manufacturing machines, including CNC machines of the type at issue. See 1/13/2005 Transcript at p. 31:04-25.

92. Meritage Remarketing is a subsidiary of Meritage, Inc. Id.

93. Pursuant to the Remarketing Agreement, Meritage assisted GECC with the inspection, recovery, marketing and sale of the GECC Machines on Schedules rejected by Hayes during the Case. See 1/13/2005 Transcript at p. 48:19-19.

94. Meritage is paid a sales commission based upon the net sales proceeds for any GECC machine sold by Meritage. See 1/13/2005 Sealed Transcript-1 at p. 4:21-24.

95. Cynthia Borgardt was GECC's primary contact at Meritage during the recovery and remarketing process with respect to the Machines. See 1/13/2005 Transcript at pp. 33:25-34:07.

96. In addition to Ms. Borgardt, until approximately the summer of 2003, Meritage employed a sales force, service technicians, a marketing director and a vice president. Id.

97. The process utilized by GECC and Meritage for recovery and sale of a GECC machine was that after GECC received notification that Hayes rejected a Schedule, a Notification of Return form was sent to Meritage which included the name of the lessee, a contact person, a description of the equipment and the equipment location. See 1/13/2005 Transcript at p. 36:03-13.

98. As soon as Meritage received the Notification of Return from GECC, and even before Meritage or GECC had taken possession of a piece of equipment, Ms. Borgardt started the marketing process by listing the Machines on Meritage's web-site, trade publications, and other internet web-sites such as MachineTools.com. See 1/13/2005 Transcript at pp. 48:01-49:13.

99. Meritage would then contact Hayes to schedule the inspection of the Machines. See 1/13/2005 Transcript at pp. 36:14-37:09.

100. After scheduling the inspection, Meritage assigned the inspection to either one of their service technicians, a service technician within Ellison, Hartwig or Robert E. Morris, or in some cases a third-party inspector. See 1/13/2005 Transcript at pp. 37:10-39:13.

101. The inspector was given the information necessary to locate and identify the Machine at issue and was provided with a blank inspection report that he was requested to

fill in as part of his inspection of the a Machine. See 1/13/2005 Sealed Transcript-1 at p. 14:06-15.

102. The inspection reports were designed by the Meritage sales force to provide information about the condition of the Machine, which was then used, in part, by the salesmen at Meritage to determine a recommended selling price for a Machine. See 1/13/2005 Sealed Transcript at p. 13:13-18; Excerpts of Deposition of Kevin Carrico (“Carrico”) (Ex. M 222) at pp. 49:04-50:07; Excerpts of Deposition of Ed Czosek (“Czosek”) (Ex. M 223) at pp. 22:01-23:17.

103. The inspection reports were most useful when the inspector was able to power up the Machine, test various components and measure the tolerances of the Machine, otherwise, it was more difficult to determine the condition of a Machine. See 1/13/2005 Transcript at pp. 39:22-40:13.

104. The Meritage inspectors observed the Machines in the field; they documented the condition of the Machines using the inspection forms; and, they took digital photographs of the Machines. See 1/13/2005 Transcript at pp. 39:14-40:13; 1/13/2005 Sealed Transcript-1 at p. 14:06-15.

105. The inspection reports and digital photographs were returned to Meritage after the inspection was completed, forwarded on to GECC and made available to the Meritage sales force. See 1/13/2005 Transcript at p. 40:14-23.

106. Based on the inspection reports, photographs, comparable pricing in the marketplace, the condition of the Machines and any other information available to the sales force, Meritage proposed a value to GECC for each Machine and proposed an asking price for each Machine. See 1/13/2005 Transcript at p. 46:04-47:13.

107. Meritage communicated its proposed values and asking prices for the Machines to GECC during daily conference calls. See 1/13/2005 Transcript at p. 46:11-22.

108. GECC internally assessed the recommendations made by Meritage based upon GECC's desktop valuation of the Machines, the estimated residual value under the Lease, the condition of the Machines, the prevailing market conditions and any other available information. See 1/13/2005 Transcript at p. 80:02-82:05, 82:13-21.

109. GECC had the final say on the asking prices and the selling prices for the Machines. See 1/13/2005 Transcript at p. 46:23-47:13; 76:15-77:01, 82:08-12.

110. In setting the proposed asking price for the Machines, GECC tried to maximize its recovery. See 1/13/2005 Sealed Transcript at pp. 27:18-28:05.

111. Meritage marketed the Machines to end users, brokers, dealers, machine re-builders and anyone else that might have an interest in the Machines. See 1/13/2005 Transcript at p. 49:14-17.

112. Meritage generally was able to obtain the same price regardless of whether the Machines were sold to an end user or used equipment dealer. See 1/13/2005 Sealed Transcript-1 at pp. 32:19-33:09.

113. Meritage kept a computerized database of all of its customers and potential customers that included notes regarding each particular customer's preferences for certain machines. See 1/13/2005 Transcript at pp. 49:03-50:25; 1/13/2005 Sealed Transcript at p. 40:15-24.

114. Meritage used the database to do fax and email marketing campaigns and to do cold calls with respect to its efforts to sell the Machines. Id.

115. The Machines also were listed on GECC's internet website. Id.

116. GECC did not put any time constraints or deadlines on Meritage's sale of the Machines. See 1/13/2005 Transcript at p. 26:09-16.

117. Hayes had a policy of not allowing any inspectors or prospective buyers of any of its equipment to power up the equipment even if the equipment was still installed in the production line, and this policy was enforced with respect to the Machines. See 1/14/2005 Transcript at p. 68:16-21; 1/31/2005 Transcript at p. 154:15-23.

118. Hayes had a policy and practice of removing the accessories such as the chucks and tool changers from the Machines prior to relinquishing possession of them to GECC even though the individuals whose responsibility it was to move the Machines out of production and get them ready for recovery knew that the Machines were leased. See 1/14/2005 Transcript at pp. 139:13-23, 153:22-155:09;

119. GECC did not have the option of being able to sell any of the Machines in place because the Machines were removed from their respective production cells by Hayes.

120. Both GECC and Meritage were motivated to obtain the highest price possible when selling repossessed or off lease equipment, including the Machines.

121. Hayes presented no evidence regarding the sale and recovery process.

122. The sale process was commercially reasonable under the circumstances and was designed to maximize GECC's recovery and Meritage's commission on the sales.

#### **GECC's Administrative Expense Applications**

123. On April 30, 2003, GECC filed the "Application Of General Electric Capital Corporation For Allowance And Payment Of Administrative Expense Claim Arising From Certain Unexpired Leases Of Personal Property" (the "First Application"). See Case Docket No. 2252.

124. The First Application relates to Machines 28 and 29 on Schedule 34, and Machine 46 on Schedule 83. Id.

125. Pursuant to the First Application, among other things, GECC alleged that Hayes was liable to GECC for damages, including, but not limited to the SLV for Machines 28, 29 and 46, because either (a) each of the Machines at issue suffered a Casualty Occurrence within the meaning of Section VIII of the Master Lease Agreement, or, alternatively, (b) Hayes breached the repair, maintenance, or return provisions of the Lease with respect to each of the Machines. See First Application at p. 8, ¶¶26-28 and pp. 10-11, ¶¶36-38.

126. In paragraph 28 of the First Application GECC alleged as follows:

In the alternative, pursuant to Section XII(b) of the Master Lease, Hayes is obligated to pay GE Capital “forthwith” at least the amount of the Schedule 34 Damages as a result of Hayes’s failures to perform its obligations with respect to the maintenance, repair, and return of the Schedule 34 Equipment.

See First Application at p. 8, ¶28.

127. The First Application’s definition of “Schedule 34 Damages” includes, the SLV for Machines 28 and 29, unpaid rent, and accrued and accruing interest, late charges, costs and attorneys’ fees. See First Application at p. 8, ¶28.

128. In paragraph 38 of the First Application, GECC alleged as follows:

In the alternative, pursuant to Section XII(b) of the Master Lease, Hayes is obligated to pay GE Capital “forthwith” at least the amount of the Schedule 83 Damages as a result of Hayes’s failures to perform its obligations with respect to the maintenance, repair and return of the Schedule 83 Equipment.

See First Application at p. 11, ¶38.

129. The First Application’s definition of “Schedule 83 Damages” includes, the SLV for Machine 46, unpaid rent, and accrued and accruing interest, late charges, costs and attorneys’ fees. See First Application at p. 11, ¶38.

130. On July 3, 2003, GECC filed the “Second Application Of General Electric Capital Corporation For Allowance And Payment Of Administrative Expense Claim Arising From Certain Unexpired Leases Of Personal Property” (the “Second Application”). See Case Docket No. 2445.

131. The Second Application relates to the Machines on Schedules 36, 38, 40, 41, 43, 47, 48, 62 and 92 (defined in the Second Application as the “Subject Schedules”). Id.

132. Pursuant to the Second Application, among other things, GECC alleged that Hayes was liable to GECC for damages, including, but not limited to the SLV for the Machines on the Subject Schedules, because either (a) each of the Machines at issue suffered a Casualty Occurrence within the meaning of Section VIII of the Master Lease Agreement; or, alternatively, (b) Hayes breached the repair, maintenance, or return provisions of the Lease with respect to each of the Machines. See Second Application (Case Docket No. 2445) at pp. 7-8, ¶¶20-22; p. 10, ¶24; p. 15-16, ¶33.

133. On October 1, 2003, GECC filed the “First Supplement Of General Electric Capital Corporation To Application For Allowance And Payment Of Administrative Expense Claim Arising From Certain Unexpired Leases Of Personal Property,” which, among other things, alleged additional facts with respect to Machines 28 and 29 and reported the sales proceeds received by GECC for Machine 46. See Case Docket No. 2609.

134. On October 1, 2003, GECC filed the “First Amended Second Application Of General Electric Capital Corporation To Application For Allowance And Payment Of Administrative Expense Claim Arising From Certain Unexpired Leases Of Personal Property” (the “Amended Second Application”). See Case Docket No. 2610.



135. The Amended Second Application included all of the Machines in the original Second Application and added the Machines on Schedules 30, 31, 32, 35, 59, 80, 97, 98 and 102 (defined in the Amended Second Application, along with the Schedules included in the Second Application, as the “Subject Schedules”). Id.

136. Pursuant to the Amended Second Application, among other things, GECC alleged that Hayes was liable to GECC for damages, including, but not limited to the SLV for the Machines on the Subject Schedules, because either (a) each of the Machines at issue suffered a Casualty Occurrence within the meaning of Section VIII of the Master Lease Agreement; or, alternatively, (b) Hayes breached the repair, maintenance, or return provisions of the Lease with respect to each of the Machines. See Amended Second Application at pp. 9-11, ¶¶26-28; p. 12, ¶30; p. 16, ¶¶34-35; p. 20, ¶40.

137. GECC withdrew Machine 49 from its applications for administrative expense. See Joint Pre-Trial Statement at p. 5, ¶4.

138. GECC’s pleadings put Hayes on notice that it was claiming damages either because a Machine had suffered a Casualty Occurrence or because Hayes had failed to perform its obligations under the Lease.

### Schedules 34 and 83

139. Schedule 34, relating to Machines 28 and 29, which were located at the La Mirada, CA facility, reached the end of its Basic Term on February 14, 2003, four (4) months prior to rejection of Schedule 34 by Hayes. See Joint Pre-Trial Statement at p. 2, ¶2; Schedule 34 (Ex. M 6)

140. When Schedule 34 reached the end of its Basic Term, Section XI of the Master Lease Agreement and paragraph F of Schedule 34 imposed certain obligations on Hayes regarding the return of Machines 28 and 29 (the “Return Provisions”). See Master Lease Agreement (Ex. M 1) and Schedule 34 (Ex. M 6).

141. Under the Return Provisions, Hayes was required to, among other things, “perform repairs required to place the affected units of Equipment in the same condition and appearance as when received by Lessee (reasonable wear and tear excepted) and in good working order for their originally intended purpose.” Ex. M 1.

142. Pursuant to Section XI(b) of the Master Lease Agreement, Hayes’s payment and other obligations continued from month-to-month after the end of the Basic Term, until Hayes fully complied with the Return Provisions. See Master Lease Agreement (Ex. M 1) at Section XI(b).

143. Hayes’s obligation to comply with the Return Provisions of the Lease did not arise as a result of rejection of Schedule 34 but arose prior to rejection and was not related to nor triggered by rejection of Schedule 34.

144. Hayes did not comply with any of the Return Provisions in the Master Lease Agreement or Schedule 34.

145. In addition to not complying with the Return Provisions of the Lease, Hayes failed to comply with its obligations under the Lease by not repairing or maintaining Machines 28 and 29 and by intentionally damaging Machines 28 and 29. See Exs. M 100 and M 265 (photos).

146. At the request of Meritage, Russ Maynard, an experienced machine tool dealer, inspected Machines 28 and 29 on or about July 9, 2003. See Ex. M 100.

147. At the time of inspection by Mr. Maynard, Machine 28 was not operational and was not under power. See Transcript of Deposition of Russell Maynard (“Maynard”) (Ex. M 232) dated June 24, 2004 at pp. 42:12-20, 51:18-25.

148. Machine 28: (a) was very dirty and the exposed surfaces were rusty and was missing many parts (Ex. M 232 at p. 52:13-21); (b) the upper turret X axis of Machine 28 was pitted where lubricant was not on the way (Ex. M 100); (c) the OSP-5020 operator’s panel, which was integral to the computer control of the Machine was damaged (Ex. M 232 at pp. 51:17-25, 52:13-53:04, 53:13-55:21); (d) the electrical cabinet had many loose wires and many “jumper” wires and the electrical cabinets were dirty, which is not normal (Id.); (e) the chip conveyor and coolant tank were dirty and rusty (Id.); and (f) the ASI chuck, an accessory to the Machine, which was the most valuable part of Machine 28, was missing (Ex. M 232 at p. 122:11-17; Ex. M 100).

149. In Mr. Maynard’s opinion, Machine 28 could be restored as a roughing machine only, absent a complete remanufacturing of the Machine. See Exs. M 100 and M 265.

150. A roughing machine is a machine that is suitable for removing the bulk of the metal when making a part and is incapable, because of its lack of precision, of performing a finishing or polishing cut. See Maynard (Ex. M 232) at pp. 59:22-60:20.

151. At the time that Machine 28 was leased to Hayes, it was capable of performing both a roughing and a finishing or polishing cut. See 1/31/2005 Transcript at pp. 152:01-19, 169:12-170:01.

152. Machine 29 was stored outside, was extremely dirty and had many missing parts. See Ex. M 100.

153. Machine 29: (a) was very rusty inside and outside (Ex. M 232 at pp. 67:10-68:21, 70:07-13); (b) the ways were rusted and the ball screw was pitted (Id. at pp. 70:20-71:07, 71:19-72:04.); (c) was missing guards (Id.); (d) had major rust on the doors (Id.); (e) there were loose cables on the VAC spindle drive which indicated that it was replaced with a defective unit (Id.); and (f) the headstock pulley on Machine 29 was rusted (Id.).

154. According to Mr. Maynard, Machine 29 was not repairable because of its condition and also because it would not be economically feasible to rebuild Machine 29. Id. and Ex. M 232 at pp. 116:04-117:09.

155. The value of Machine 29 was for parts only, although, because Machine 29 had been used as a parts machine, the value of the parts was greatly diminished. Id.

156. A parts machine is a machine that isn't used in production, but instead is used solely as a source of replacement parts for other machines. See Ex. M 232 at p. 113:25-116:03.

157. Schedule 83, dated as of March 11, 2000, amended Schedule 26 effective October 15, 1999 and renewed the term of the Schedule for an additional thirty-six (36) months. See Ex. M 20.

158. Schedule 83 relating to Machine 46 which was located at the Huntington, IN facility, reached the end of its Basic Term on October 14, 2002, eight (8) months prior to rejection of Schedule 83 by Hayes. See Exs. M 20, M 256 at p. 16; Machine List.

159. Machine 46 was assigned Huntington No. 351313 by Hayes for the purposes of tracking maintenance and repairs. See Ex. D 189; Transcript of Deposition of Larry L. Kissinger (“Kissinger”) dated July 1, 2004 (Ex. M 236) at p. 66:10-25.

160. When Schedule 83 reached the end of its Basic Term, Hayes became obligated to comply with all of the Return Provisions. See Master Lease Agreement (Ex. M 1) at Section XI; Ex. M 20 at p. GE000336-337.

161. Hayes’s obligation to comply with the Return Provisions of the Lease did not arise as a result of rejection of Schedule 83 but arose prior to rejection and was not related to nor triggered by rejection of Schedule 83.

162. Hayes did not comply with any of the Return Provisions or the return requirements of Schedule 83.

163. On January 28, 2003, Dwight Lanman inspected Machine 46 for Meritage. See Ex. M 35 (Inspection Report and photographs).

164. Mr. Lanman determined that the chip conveyor and hydraulic unit had been stored outside in the weather for three (3) months behind the factory, out in the open and uncovered. See Transcript of Deposition of Dwight E. Lanman III dated July 1, 2004 (Ex. M 238) at pp. 17:20-18:07.

165. The hydraulic unit is a necessary part of a CNC machine. See 1/31/2005 Transcript at pp. 104:11-14, 171:20-174:10.

166. No preventative maintenance or repairs were performed on Machine 46 after November 15, 2002. See Ex. D 189 at pp. HLI 00171-184; Kissinger (Ex. M 236) at pp. 70:05-22, 77:06-79:10, 80:01-80:24.

167. Pursuant to the Lease, the failure of Hayes to comply with the Return Provisions and the failure to maintain and repair the Machines is a default under the Lease. See Ex. M 1, §§ XI and XII.

### **Group 1 Machines**

168. After the Petition Date, performance at the various Hayes facilities was measured by the facility's ability to control cash flow rather than operational performance. See Transcript of Deposition of Geoffrey Horsfield ("Horsfield") (Ex. M 229) at pp. 53:03-55:09

169. After the Petition Date, Hayes was put on "credit hold" with all of its machine parts suppliers, including Okuma and Emco, making it very difficult for Hayes to obtain replacement parts. See Transcript of Deposition of Thomas Bressler dated June 23, 2004 ("Bressler") (Ex. M 228) at pp. 19:01-22.

170. There were certain parts for Okuma and Emco machines that could only be manufactured and supplied by Okuma or Emco or their authorized dealers. See Bressler (Ex. M 228) at pp. 14:23-15:06.

171. Hayes regularly took parts off machines that were not in production (including the Machines) and used the parts to keep machines that were in production running. See Bressler (Ex. M 228) at pp. 14:23-15:06, 18:11-19:22, 20:02-20:09, 39:23-40:10; Almeida (Ex. M 231) at pp. 33:01-11, 33:24-34:11; Horsfield (Ex. M 229) at pp. 53:03-55:09.

172. Before the Petition Date, Hayes kept some records of what parts were being removed from what machines. See Bressler (Ex. M 228) at p. 19:11-22.

173. After the Petition Date, Hayes kept no records of what parts were taken from what machines. See Bressler (Ex. M 228) at p. 19:01-22.

174. On or around the Petition Date, when Hayes began doing poorly financially, the amount of money available at Sedalia for preventative maintenance and repairs on machines was reduced substantially; and, there were not sufficient funds to perform the maintenance required. See 1/31/2005 Transcript at pp. 23:17-24:11.

175. The maintenance dollars that were available were used first for emergency repairs to keep machines in production. Id.

#### **Group 1 Machines at La Mirada**

176. Machines 20-36 all were used by Hayes at its La Mirada, CA manufacturing facility. See “Reorganized Debtors’ Amended Response To General Electric Capital Corporation’s First Set Of Interrogatories And Requests For Production Of Documents” (“Hayes Discovery Responses”) (Ex. M 256) at p. 16.

177. The Machines at the La Mirada facility consisted of four (4) Okuma LAW-S Horizontal Turning Centers (Machines 20-22 and 28), six (6) Okuma LB35II/850 Horizontal Turning Centers (Machines 23-27 and 29), five (5) Emco HWC-15 Drilling Centers (Machines 30-34), and two (2) Okuma LAW-2S Turning Centers. See Machine List.

178. For a period of time, until approximately June 2001 (six months prior to the Petition Date), Hayes contracted with Ellison, the subsidiary of Meritage, to do preventative maintenance in the La Mirada facility on all of the Okuma and Emco Machines. See 1/14/2005 Transcript at pp. 90:07-23.

179. “Emco” is an acronym for Ellison Machinery Co. See Bressler (Ex. M 228) at p. 15:03-6.

180. Ellison was an integral part of the La Mirada preventative maintenance program. See 1/14/2005 Transcript at pp. 90:07-23.

181. Maintenance in accordance with the program set up by Ellison required that there be daily, weekly, monthly, quarterly and semi-annual maintenance which could involve a Machine being out of production for as much as six days, depending upon the maintenance cycle (e.g. quarterly or semi-annual) and required significant man hours. Id.; see 1/14/2005 Transcript at pp. 90:24-91:10.

182. At some point in time before the Petition Date, as a cost-cutting measure, Hayes ceased using Ellison to do preventative maintenance which was about the same time Hayes had major layoffs at the La Mirada facility. See Horsfield (Ex. 229) at pp. 21:05-21:23.

183. After the arrangement with Ellison was terminated by Hayes, preventative maintenance was done, if at all, on a much lower level. See Bressler (Ex. M 228) at pp. 16:04-17:08, 17:16-18:07.

184. During the Case, approximately 180 of the 300 La Mirada employees were laid off. Id.

185. Hayes ceased keeping any maintenance records with respect to its equipment on or about March 24, 2002, although the La Mirada plant continued to operate. See Hayes La Mirada Maintenance Records (Ex. D 294); 1/14/2005 Trial Transcript at p. 135:03-135:23.

186. The time that Hayes ceased keeping maintenance records coincided with the La Mirada Plant Manager's decision to layoff the remaining preventative maintenance personnel and terminate the preventative maintenance program that Hayes had instituted after its relationship with Ellison ceased. See Bressler (Ex. M 228) at pp. 39:23-40:10.



187. At the time of the major layoff and cessation of the preventative maintenance program at Hayes, none of the Schedules pertaining to the Machines at LaMirada had been rejected, with the exception of Schedule 35. See Joint Pre-Trial Statement at p. 2, ¶2.

188. At the LaMirada facility, Hayes used a Machine Shop Equipment Inventory numbering system to identify the machines, the cell in which each machine operated and whether it was leased from a third party or owned by Hayes. See Machine Shop Equipment Inventory (Ex. D 136)

189. Post-petition, Hayes employees at the La Mirada facility were aware of which machines were owned by Hayes and which machines were leased from GECC; and, Hayes employees knowingly and intentionally stripped parts off of the leased GECC Machines and used the parts to keep machines owned by Hayes running in production. See Bressler (Ex. M 228) at pp. 14:23-15:06, 18:11-19:22, 20:02-20:09, 39:23-40:10; Almeida (Ex. M 231) at pp. 33:01-11, 33:24-34:11; Horsfield (Ex. M 229) at pp. 53:03-55:09; Machine Shop Equipment Inventory (Ex. D 136); 1/14/2005 Transcript at pp. 136:15-21, 138:19-139:23.

190. Machine 20, 21 and 22 were assigned La Mirada Nos. 2122, 2121 and 2120, respectively, by Hayes for the purposes of tracking uptime, maintenance and repairs. See Ex. D 136; 1/14/2005 Transcript at pp. 88:17-89:12, 96:22-97:08, 100:13-25, 102:24-103:07.

191. No repairs were performed on Machine 20 after January 14, 2001 and no preventative maintenance was performed on Machine 20 after February 20, 2002. See Exs. D 136 (Machine Shop Equipment Inventory) and D 294 (La Mirada Maintenance Reports (12/5/2001-3/24/2002)).

192. No repairs were performed on Machine 21 after February 25, 2002 and no preventative maintenance was performed on Machine 21 after the Petition Date. See Exs. D 136 and D 294.

193. No repairs were performed on Machine 22 after March 7, 2002 and no preventative maintenance was performed on Machine 22 after January 21, 2002. See Exs. D 136 and D 294.

194. At the time Machines 20, 21 and 22 were removed from La Mirada, they were missing various parts, including parts such as a headstock shaft. See Hayes Discovery Responses (Ex. M 256) at p. 28.

195. After the Petition Date, Hayes disconnected Machines 20, 21 and 22 and moved them outside within the La Mirada facility. See 1/14/2005 Transcript at pp. 99:12-15, 102:09-12, 104:19-25, 141:03-12.

196. Hayes took no steps to protect Machines 20, 21 and 22 from the elements or to keep these Machines from rusting when they were put outside. Id.

197. Machines 20, 21 and 22 were not operable when returned to GECC. See Ex. 276.

198. Machine 23-27 were assigned La Mirada Nos. 2023, 2022, 2025, 2024 and 2026, respectively, by Hayes for purposes of tracking uptime, maintenance and repairs. See Ex. D 136; 1/14/2005 Transcript at p. 105:15-25, 107:23-108:08, 110:01-08, 112:06-13, 114:12-21.

199. No repairs were performed on Machine 23 after January 2, 2002 and no preventative maintenance was performed on Machine 23 after the Petition Date. See Exs. 136 and D 294.

200. At the time Machine 23 was removed from La Mirada, it was missing at least the spindle drive. See Hayes Discovery Responses (Ex. M 256) at p. 28.

201. A CNC Machine cannot operate without a spindle drive and, therefore, Machine 23 was not operable. See Ex. 276; 1/14/2005 Transcript at pp. 152:15-153:13.

202. No repairs were performed on Machine 24 after March 23, 2002, and no preventative maintenance was performed on Machine 24 after the Petition Date. See Exs. 136 and D 294.

203. No repairs were performed on Machine 25 after March 13, 2002, and no preventative maintenance was performed on Machine 25 after the Petition Date. See Exs. D 136 and D 294.

204. No repairs were performed on Machine 26 after March 18, 2002, and no preventative maintenance was performed on Machine 26 after March 11, 2002. See Exs. D 136 and D 294.

205. No repairs were performed on Machine 27 after February 15, 2002, and no preventative maintenance was performed on Machine 27 after the Petition Date. See Exs. D 136 and D 294.

206. At the time Machines 24, 26 and 27 were removed from La Mirada, they were missing certain parts. See Hayes Discovery Responses (Ex. M 256) at p. 28-29.

207. At some point in time after the Petition Date, Hayes disconnected Machines 23, 24, 26 and 27 and moved them outside within the La Mirada facility. See 1/14/2005 Transcript at pp. 107:07-10, 109:12-17, 111:12-16, 113:22-114:03, 116:04-08, 141:03-12.

208. Hayes took no steps to protect those Machines from the elements or to keep those Machines from rusting when they were put outside other than to put a tarp on the Machines. Id.

209. In the condition in which Hayes returned Machines 24, 26 and 27 to GECC, they were not operable. See Ex. D 276.

210. Machine 30 was assigned La Mirada No. 4017 by Hayes for the purpose of tracking uptime, maintenance and repairs. See Ex. D 136; 1/14/2005 Transcript at pp. 120:19-121:07.

211. No preventative maintenance was performed on Machine 30 after March 24, 2002. See Ex. D 294.

212. Machine 31 was assigned La Mirada No. 4018 by Hayes for the purposes of tracking uptime, maintenance and repairs. See Ex. D 136; 1/14/2005 Transcript at p. 123:04-12.

213. At the time Machine 31 was removed from the La Mirada facility: (a) it was missing a table and spindle, had wear and tear on the axis and was missing some guards; (b) the way covers, doors, way wipers and paint were all in poor condition; (c) the Fanuc 21M Controller was not functional; (d) it was missing all manuals, the spindle unit and tool changer; and (e) the box ways for the X and Z axis were in poor condition. See Hayes Discovery Responses (Ex. M 256) at p. 29; 1/14/2005 Transcript at p. 124:20-23; Ex. M 38.

214. No repairs were performed on Machine 31 after March 24, 2002 and no preventative maintenance was performed on Machine 31 after January 21, 2002. See Ex. D 294.

215. At some point in time after the Petition Date, Hayes disconnected Machine 31 and moved it outside at the La Mirada facility. See 1/14/2005 Transcript at pp. 124:06-10, 141:03-12.

216. Hayes took no steps to protect the Machine from the elements or to keep the Machine from rusting when it was put outside. Id.

217. In the condition in which Machine 31 was returned to GECC, it was not operable. See Ex. D 276; 1/14/2005 Transcript at pp. 152:15-153:13.

218. Machines 32 and 33 were assigned La Mirada Nos. 4020 and 4019, respectively, by Hayes for purposes of tracking uptime, maintenance and repairs. See Ex. D 136; 1/14/2005 Transcript at p. 125:01-11, 127:07-17.

219. No repairs were performed on Machine 32 after February 5, 2002, and no preventative maintenance was performed on Machine 32 after February 20, 2002. See Ex. D 294.

220. At the time Machine 32 was removed from the La Mirada facility, Machine No. 32 was missing a spindle, spindle drive, axis drives, guarding and table. See Hayes Discovery Responses (Ex. M 256) at p. 30.

221. A CNC Machine cannot perform its function without a spindle, spindle drive, axis drives and table, which are major components of a CNC Machine; and, therefore, Machine No 32 was not operable. See Ex. D 276; 1/14/2005 Transcript at pp. 152:15-153:13.

222. No repairs were done on Machine 33 after March 12, 2002, and no preventative maintenance was performed on Machine 33 after the Petition Date. See Ex. D 294.

223. Machine 33: (a) was missing the spindle motor, spindle assembly, tool changer, Y axis motor, X, Y, Z Fanuc drive, spindle drive and all manuals; (b) the way covers,

doors, way wipers and paint all were in poor condition; (c) the doors and covers were damaged; (d) the Fanuc 21M controller was not functional, and the X and Z axis box ways were in poor condition; (d) had turkite and rust problems.. See Ex. M 92; Hayes Discovery Responses (Ex. M 256) at p. 30.

224. Repairing turkite problems is a very “heavy” job and is like rebuilding part of the machine. See 1/14/2005 Transcript at p. 122:01-04.

225. A Machine such as Machine 33 cannot operate with the number of parts missing that were described in these findings; and, therefore, Machine 33 was not operable. See Ex. D 276; 1/14/2005 Transcript at pp. 152:15-153:13.

226. At some point in time after the Petition Date, Hayes disconnected Machines 32 and 33 and moved them outside at the La Mirada facility, but took no steps to protect these Machines from the elements or to keep these Machines from rusting when they were put outside . See 1/14/2005 Transcript at pp. 126:18-22, 128:17-21, 141:03-12.

227. Machines 34-36 were assigned La Mirada Nos. 4027, 2128 and 2127, respectively, by Hayes for the purposes of tracking uptime, maintenance and repairs. See Ex. D 136; 1/14/2005 Transcript at p. 129:04-14, 130:15-131:01, 132:01-12.

228. After the Petition Date, no preventative maintenance or repairs were performed on Machine 34. See Ex. D 294

229. At the time Machine 34 was returned to GECC, it was missing its table, spindle, drives and guarding which was taken off the Machine by Hayes after the Petition Date. See Hayes Discovery Responses (Ex. M 256) at p. 24, 30; 1/14/2005 Transcript at p. 130:04-11.

230. Machine 34 was stripped of its main parts and was rendered useless. See 1/14/2005 Transcript at p. 130:04-11; Hayes Discovery Responses (Ex. M 256) at p. 30; Ex. M 113.

231. No repairs were performed on Machine 35 after March 23, 2002 and no preventative maintenance was performed on Machine 35 after February 6, 2002. See Ex. D 294.

232. No preventative maintenance or repairs were performed on Machine 36 after the Petition Date. See Ex. D 294.

233. At the time it was returned to GECC, Machine 36 was missing a turret, ball screws, spindle drives, axis drives, motors and guarding and other parts which were taken off Machine 36 after the Petition Date. See Hayes Discovery Responses (Ex. M 256) at p. 24, 30; 1/14/2005 Transcript at p. 133:02-6.

234. The parts which were removed from Machine 36 were major components of the Machine without which, the Machine was unable to operate. See Ex. 276; 1/14/2005 Transcript at pp. 152:15-153:13; 1/31/2005 Transcript at pp. 108:23-109:07.

235. At some point in time after the Petition Date, Hayes disconnected Machines 34, 35 and 36 and moved them outside at the La Mirada facility, but took no steps to protect these Machines from the elements or from rusting. See 1/14/2005 Transcript at pp. 133:09-11, 141:03-12.

#### **Group 1 Machines Used At The Hayes Sedalia, MO Facility**

236. Machine 44 and 45 were used by Hayes at the Sedalia, MO facility. See Hayes Discovery Responses (Ex. M 256) at p. 16; Machine List (attached to Joint Pre-Trial Statement); Schedule 80 (Ex. M 19).

237. When Hayes needed replacement parts to keep the machines it owned running in production, Hayes robbed parts off of whatever machines were available, including Machines 44 and 45. See 1/31/2005 Transcript at p. 24:03-8.

238. Machines 44 and 45 had been cannibalized and among other things were missing electrical parts, electrical boards, controllers, CRT screens, MDI panel, at least one blower and one motor which had been robbed from Machines 44 and 45 after the Petition Date. See 1/31/2005 Transcript at pp. 25:22-26:12; Exs. M 46 and 47 (Inspection Report and photographs).

239. There may have been other parts robbed off Machines 44 and 45, but Hayes did not keep any records of what parts were robbed off of Machines 44 and 45. See 1/31/2005 Transcript at p. 24:17-22.

240. Machines 44 and 45 were cannibalized, and what portions of the Machines that remained were in very poor condition. See Exs. M 46 and 47.

241. In the machinery vernacular, a machine that has been “cannibalized” has been stripped of main parts and is inoperable. See 1/13/2005 Transcript at p. 93:15-17.

242. At the Sedalia facility, Hayes has an outside storage yard that is used as a staging area for machines that Hayes is throwing away. See 1/31/2005 Transcript at pp. 24:23-25:21.

243. After Machines 44 and 45 were stripped of parts, Hayes put these Machines outside, but took no steps to protect the Machines from the elements, from rust or from other damage while they were stored outside. Id.



244. Machines 44 and 45 could not be operated without the missing parts and needed to be completely rebuilt. Id.; Transcript of Deposition of James Westerdale (“Westerdale”) (Ex. M 246) at p. 89:13-23; 1/31/2005 Transcript at pp. 26:20-27:07.

**Group 1 Machines Used At The Hayes Gainesville, GA Facility**

245. Machines 1, 2, 12 and 14-19 all were used by Hayes at its Gainesville, GA facility. See Hayes Discovery Responses (Ex. M 256) at p. 16; Machine List (attached to Joint Pre-Trial Statement).

246. At the time of the inspection, the Machines could not be operated or tested because they were not connected to power, air or hydraulics. See Exs. M 97, 98 and M 99.

247. On Machine 1, the way covers, doors, way wipers, sheet metal and CRT all were in poor condition and needed work. Id.

248. At the time Machine 1 was returned to GECC, the slides needed to be repaired; and, therefore, the Machine was not operable. See Ex. M 256 at pp. 22, 26.

249. Hayes did not repair or maintain Machine 1 after the Petition Date. See Ex. M 256 at p. 26.

250. On Machine 2, the way covers, way wipers, doors, electrical Seal-Tite, cables and duct work and paint all were in poor condition, the slides needed to be repaired, and the Machine was in overall poor condition. See Ex. M 97; Ex. M 256 at p. 22, 26.

251. Machine 2 was assigned Gainesville No. M 222005 for the purposes of tracking maintenance and repairs. See Equipment by Location (Ex. D 180).

252. No preventative maintenance was performed on Machine 2 after the Petition Date. See PMs for Okuma Howas (Ex. M 114).

253. Machine 12 suffered damage after the Petition Date that was not repaired by Hayes. See Ex. M 256 at p. 27.

254. Machine 12 had many missing boards and required a motor replacement; and, therefore it was not operable. See Ex. M 256 at p. 27; Ex. D 276.

255. Before the Petition Date, Hayes performed weekly, monthly, quarterly and semi-annual preventative maintenance on the Niigatas at the Gainesville, GA facility. See Ex. D 93 at pp. HLI 00477-486.

256. Machine 14, which is a Niigata SPN 40, was assigned Gainesville No. M222012 by Hayes for the purposes of tracking maintenance and repairs. See Ex. D 180; Transcript of Deposition of John Stinchcomb (“Stinchcomb”) dated June 29, 2004 (Ex. M 245) at p. 115:16-21.

257. After the Petition Date, Hayes ceased performing monthly, quarterly and semi-annual preventative maintenance on Machine 14. See Ex. D 93 at pp. HLI 00486-495.

258. At times after the Petition Date, Hayes even failed to timely perform weekly preventative maintenance on Machine 14. See Ex. D 93 at pp. HLI 00490-491 (No weekly PMs from 6/24/02 – 7/22/02), pp. HLI 00491-492 (No weekly PMs from 8/13/02 – 9/30/02), pp. HLI 00492-493 (No weekly PMs from 11/11/02-12/16/02), p. HLI 00493 (No weekly PMs from 12/20/02-3/3/2003).

259. Machine 15, which also is a Niigata SPN 40, was assigned Gainesville No. M222011 by Hayes for purposes of tracking maintenance and repairs. See Ex. D 180; Ex. M 245 at p. 125:14-19.

260. After the Petition Date, Hayes ceased performing monthly, quarterly and semi-annual preventative maintenance on Machine 15. See Ex. D 93 at pp. HLI 00486-495.

261. At times after the Petition Date, Hayes even failed to timely perform weekly preventative maintenance on Machine 15. See Ex. D 93 at p. HLI 00486 (No weekly PMs from 12/17/01-1/11/02), p. HLI 00490 (No weekly PMs from 5/10/02-5/31/02, 5/31/02-6/24/02 and 6/24/02-7/15/02), p. HLI 00491 (No weekly PMs from 7/16/02-8/12/02), pp. HLI 00491-492 (No weekly PMs from 8/13/02-9/30/02), p. HLI 00492-493 (No weekly PMs from 10/28/02-12/16/02), p. HLI 00493 (No weekly PMs from 12/20/02-1/22/03 and 1/22/03-3/7/03).

262. Prior to Hayes's rejection of Schedule 47(97) pertaining to Machines 14 and 15, Dennis Rank of Rank International called John Stinchcomb, the former Facilities Manager for the Hayes Gainesville facility because, having purchased some of the Machines previously rejected by Hayes, he wanted to know what other Machines Hayes would be rejecting so he could "get his bid in first as other people were calling about the same thing". See Ex. D 318 at p. 118:19-119:15.

263. On April 17, 2003, Hayes filed a motion to reject Schedule 47(97) for Machines 14 and 15 wherein Hayes asserted that the leases to be rejected were "unnecessary to the Debtors go-forward business operations." See Case Docket No. 2202 at p. 5, ¶10.

264. On or about April 23, 2003, based on their condition, Rank purchased Machines 14 and 15 (with an original equipment cost to GECC of \$900,000) from GECC for \$18,000. See Ex. D 81.

265. Rank then arranged with Hayes to immediately sell Machines 14 and 15 back to Hayes for \$36,000 which, according to an employee of Hayes, was a good deal for Hayes because, among other things, it would have cost Hayes \$18,000 to disconnect and remove Machines 14 and 15 from the Gainesville facility. See Ex. M 245 at pp. 119:22-120:01, 120:07-121:12, 121:23-122:09, 123:11-19.

266. Contrary to the position taken by Hayes in its rejection motion, Hayes needed Machines 14 and 15 in its go forward business operations and continuously used Machines 14 and 15 from the Petition Date until at least May 14, 2004. Id.

267. A sale of a machine in place where it does not have to be removed and reinstalled will bring a higher price than one which has to be moved and reinstalled. See 1/12/2005 Transcript at pp. 103:24 – 104:9.

268. Machine 16, which is an Okuma & Howa, was assigned Gainesville No. M072012 for the purposes of tracking maintenance and repairs. See Ex. D 180; Ex. M 245 at p. 129:20-25.

269. No preventative maintenance was done on Machine 16 after the Petition Date. See Ex. M 114.

270. Upon its return to GECC, the doors and the chip auger for Machine 16 needed to be repaired, and the slides needed to be rebuilt. See Ex. M 256 at p. 27.

271. Machines 17-19, which are Okuma & Howa Machines, were assigned Gainesville No. M073021, M073020 and M073022, respectively, by Hayes for the purposes of tracking preventative maintenance and repairs. See Ex. D 180; Ex. M 245 at p. 142:07-10, 148:24-149:02, 156:21-157:03.

272. After the Petition Date, Hayes ceased doing daily, weekly and quarterly preventative maintenance on Machines 17, 18 and 19; and, after January 28, 2002, Hayes performed no preventative maintenance on Machines 17, 18 and 19. See Ex. M 114; Ex. M 245 at p. 142:15-21, 156:02-156:10. 157:04-10.

273. Upon its return to GECC, Machine 17 needed a new transformer, the covers needed to be replaced and the doors were damaged. See Ex. M 256 at pp. 22, 27.

274. Machine 17 could not be operated without a transformer. See cite

275. Upon its return to GECC, the slides on Machine 18 needed to be rebuilt and its doors were damaged. See Ex. M 256 at p. 28.

276. Upon its return to GECC, the slides on Machine 19 needed to be rebuilt and its doors were damaged. See Ex. M 256 at p. 28.

277. A Machine that needs its slides rebuilt cannot produce parts to tolerance; and, therefore it is not operable. See 1/31/2005 Transcript at pp. 145:02-150:03.

278. The only inspection reports available for Machines 14-19 were dated September 4, 2002, approximately eight (8) months before Schedule 47(97) was rejected by Hayes, approximately six (6) months before Schedule 43(98) was rejected by Hayes and approximately seven (7) months before Schedule 41(102) was rejected by Hayes; and, therefore, those inspection reports are not indicative of the condition of the Machines as of the respective rejection dates. See Exs. D 205, D 41, D 43, D 45, D 47 and D 209; Joint Pre-Trial Statement at p. 4, ¶2.

**Group 1 Machines Used By Hayes At The Huntington Facility**

279. Machine 47 was used by Hayes at the Huntington facility. See Ex. M 256 at p. 16; Machine List.

280. Machine 47 was assigned Huntington No. 351314 for the purposes of tracking maintenance and repairs. See Ex. D 189; Kissinger (Ex. M 236) at p. 81:22-24.

281. Hayes performed no preventative maintenance on Machine 47 after the Petition Date. See Ex. D 189 at pp. HLI 00184-193; Kissinger (Ex. M 236) at p. 82:08-11.

**Group 1 Machines Used By Hayes At The Somerset, KY Facility**

282. Machines 13, 37-43 and 48 were used by Hayes at the Somerset, KY facility. See Ex. M 256 at p. 16; Machine List.

283. In June 2001, Hayes advised its management personnel at the Somerset facility that the facility would be shutting down. See Transcript of Deposition of Marty Asberry (“Asberry”) dated July 1, 2004 (Ex. M 230) at p. 48:03-24.

284. During the same period of time, Somerset had dramatic lay-offs of plant personnel, including maintenance workers, and the number of Somerset maintenance workers was cut from 35 to 6 or 7. Id.

285. No preventative maintenance was done at Somerset after the Petition Date; the only maintenance that was done at Somerset after the Petition Date was “breakdown maintenance,” so that a Machine only was repaired if it was still in operation in a cell. See Asberry (M 230) at pp. 100:08-11, 112:13-15, 122:23-123:22, 133:01-05, 139:03-8; Ex. M 256 at pp. 20-21.

286. After Hayes ceased doing preventative maintenance, the only cleaning of the Machines that was done was a superficial surface cleaning of the Machines by the daily operators so that none of the Machines was thoroughly cleared of metal chips by removing the Machine covers and clearing the impacted chips from the inside of the Machine where the ball screws and other components are located. See Asberry (M 230) at pp. 115:25-116:22, 117:01-4.

287. The Somerset facility eventually ceased production on February 15, 2002 and later shutdown completely. See 1/14/2005 Transcript at pp. 70:09-71:23

288. After Somerset shutdown, representatives from each of Hayes’s other facilities was invited to go to Somerset to identify machines, parts, inventory and other

equipment that they could use in their respective facilities, which was described as a “...shopping spree of anything in the plant that they wanted...”. See Ex. M 245 at pp. 110:09-111:08; 1/14/2005 Transcript at pp. 62:10-63:06, 70:09-71:23, 74:12-75:04, 75:15-21; Asberry (Ex. M 230) at pp. 48:03-13, 49:15-50:06, 65:01-66:10.

289. All of the GECC Machines at Somerset were “tagged” by personnel from other Hayes facilities. Id.

290. Hayes kept no records of what parts or equipment were shipped to other Hayes facilities after the “shopping spree.” Id.

291. Mr. Asberry never inspected any of the GECC Machines on the Petition Date, when the facility shutdown or at any time thereafter; and, Hayes did not keep any records of what parts were removed from Machines; and, therefore Hayes is unable to establish what parts were or were not taken off of any of the Machines. See Asberry (Ex. M 230) at pp. 65:01-66:10,

292. Machine 13 was originally located in the Gainesville facility, but at some point in time was moved by Hayes to Somerset, but no notice was ever given to GECC of the move. See 1/14/2005 Transcript at p. 50:07-22.

293. The Lease required Hayes to give GECC notice when Machines were moved from the location specified on the Schedule. See Ex. M 1.

294. After Machine 13 was moved to Somerset, Hayes used the Machine as a parts machine to keep other machines of the same type that were owned by Hayes (not leased from GECC) running in production. See 1/14/2005 Transcript at pp. 45:01-8, 51:23-52:14; Asberry (M 230) at pp. 83:07-84:06.

295. Machine 13 was stored in the Somerset facility by the foundry in the back of the facility, a very dusty and dirty area where it was not covered and nothing was done to prevent rust on the Machine. See 1/14/2005 Transcript at pp. 59:13-60:07

296. When Machine 13 was returned to GECC, it was missing at least the gear box off of the turntable, the servo axis for the axis motor and the tool arms. See Ex. M 256 at pp. 22 and 25.

297. Machine 13 was not operable when it was returned to GECC. See Ex. D 276.

298. Machine 48, which was a Motch, was originally located at the Hayes Huntington facility, but was moved by Hayes to the Somerset facility. See 1/14/2005 Transcript at p. 46:04-9.

299. Machine 48 was in very poor condition as of the Petition Date, no repairs or preventative maintenance were performed on Machine 48 after the Petition Date and it was not operable when it was returned to GECC. See 1/14/2005 Transcript at p. 66:11-19; Ex. M 256 at p. 21; Ex. D 276.

300. Machines 37-43 on Schedule 92 consisted of one (1) Enshu JE-80, one (1) Okuma LAW-2S and five (5) Okuma LAW-Fs. See Machine List.

301. Hayes did not perform any preventative maintenance on Machines 37-43 after the Petition Date. See Ex. M 256 at p. 20.

302. Hayes did not do any inspection or testing of the Machines on the Petition Date or after to determine their condition. See Asberry (Ex. M 230) at pp. 165:01-166:10.



**Group 1 Machines Used By Hayes At The Howell, MI Facility**

303. Machines 50 and 51 were located at Hayes's Howell, MI facility. See Ex. M 256 at p. 16; Machine List.

304. In September 2001, Hayes moved the Machines to a third-party storage warehouse, without notifying GECC of the move or obtaining GECC's consent, where they remained until being removed by GECC after the Schedule was rejected. See 1/31/2005 Transcript at pp. 44:06-47:08.

305. Hayes did not do any maintenance or repairs on the Machines after September 2001, nor did anyone power up the Machines or otherwise verify that they were capable of being operated in accordance with manufacturer's specifications. Id.

306. Hayes did not apply cosmoline or any other similar substance to the bare metal parts on the Machines to prevent rusting during storage, and the Machines rusted while stored in the warehouse. Id.

307. In April 2002, Kevin Carrico, a salesman with Meritage, asked Tom Hill, a used machine dealer in Pontiac, MI, to go to the warehouse to take pictures of the Machines. See Ex. M 40; Ex. M 222 at pp. 76:18-77:25, 112:06-115:24, 116:06-117:07.

308. Mr. Hill advised Mr. Carrico: (a) that the Machines were sitting outside at the Ryan Industries warehouse and were missing many parts; and (b) that the horizontal Machine may not be worth what it would cost to rig and ship it. See 2/1/2005 Transcript at pp. 13:06-21.

309. On May 1, 2002, Larry Lundquist inspected the Machines for Meritage and took digital photographs. See Exs. M 104-107.

310. Mr. Lundquist was unable to power-up and test the various systems on the Machines and noted that, among other things, both Machines were rusted. See 1/31/2005 Transcript at p. 47:12-19; Exs. M 104 and 106.

311. Machines 50 and 51 were not operable when returned to GECC. See 2/1/2005 Transcript at pp. 13:06-21.

### **Group 2 Machines At The Gainesville, GA Facility**

312. Group 2 Machines 3-11 were located at the Hayes Gainesville facility. See Ex. M 256 at p. 16; Joint Pre-Trial Statement at p. 4, ¶2.

313. Hayes alleged that as of the Petition Date, 2 of the 9 Group 2 Machines were in operating condition and the other 7 were in various states of disrepair and missing parts or had been damaged. See Ex. M 256 at p. 22.

314. Hayes did not present any evidence to support the date the Group 2 Machines were damaged.

315. On March 25, 2002, Larry Lundquist inspected the Group 2 Machines at Gainesville and took digital photographs detailing the deteriorated condition of the Machines. See Exs. M 87 (Machines 5 and 10), M 88 (Machines 11, 3 and 7) and M 89 (Machines 8, 4, 6 and 9).

316. Information regarding the date of damage to the Group 2 Machines was not available to GECC.

### **Sale of Machines**

317. The sales price of a Machine reflects the condition of the Machine. See generally, testimony of Cynthia Borgardt, John Josko and Tom Hazelhurst.

318. Machine 1 was purchased by GECC for lease to Hayes at an original cost to GECC of \$330,000.00. See Ex. M 5.

319. In the condition in which Hayes returned Machine 1 to GECC, it sold for \$6,000.00. See Ex. M 55.

320. Machine 2 was purchased by GECC for lease to Hayes at an original cost to GECC of \$242,990.00. See Ex. M 9.

321. In the condition in which Hayes returned Machine 2 to GECC, it sold for \$6,000.00. See Ex. M 55.

322. GECC purchased the Group 2 Machines (Machines 3-11) for lease to Hayes at an original cost to GECC of \$3,317,375.00. See Exs. M 10 and 11.

323. In the condition in which the Group 2 Machines were returned to GECC by Hayes, they sold for a total of \$36,000.00. See Ex. M 55.

324. Machine 12 was purchased by GECC for lease to Hayes at an original cost to GECC of \$310,000.00. See Ex. M 17.

325. In the condition in which Hayes returned Machine 12 to GECC, it sold for \$17,000.00. See Ex. M 55.

326. Machine 13 was purchased by GECC for lease to Hayes at an original cost to GECC of \$218,796.00. See Ex. M 17.

327. In the condition in which Hayes returned Machine 13 to GECC, it sold for \$500.00. See Ex. M 55.

328. Machines 14 and 15 were purchased by GECC for lease to Hayes at an original cost of \$500,000.00. See Ex. M 15.

329. In the condition in which Hayes returned the Machines to GECC, they sold for a total of \$18,000.00. See Ex. M 55.

330. Machine 16 was purchased by GECC for lease to Hayes at an original cost to GECC of \$224,000.00. See Ex. M 14.

331. In the condition in which Hayes returned Machine 16 to GECC, it sold for \$10,500.00. See Ex. M 55.

332. Machines 17, 18 and 19 were purchased by GECC for lease to Hayes at an original cost to GECC of \$649,400.00. See Ex. M 12.

333. In the condition in which Hayes returned the Machines to GECC, they sold for a total of \$37,500.00. See Ex. M 55.

334. Machines 20, 21 and 22 were purchased by GECC for lease to Hayes at an original cost to GECC of \$884,442.00. See Ex. M 3.

335. In the condition in which Hayes returned the Machines to GECC, they sold for a total of \$30,000.00. See Ex. M 55.

336. Machines 23-27 were purchased by GECC for lease to Hayes at an original cost to GECC of \$1,072,370.00. See Ex. M 4.

337. In the condition in which Hayes returned Machines 23-27 to GECC, they sold for a total of \$25,000.00. See Ex. M 55.

338. Machines 28 and 29 were purchased by GECC for lease to Hayes at an original cost to GECC of \$529,750.00. See Ex. M 6.

339. In the condition in which Hayes returned Machines 28 and 29 to GECC, they sold for a total of \$9,500.00. See Ex. M 55.

340. Machine 30 was purchased by GECC for lease to Hayes at an original cost to GECC of \$151,370.00. See Ex. M 7.

341. In the condition in which Hayes returned the Machine to GECC, it sold for \$2,000.00. See Ex. M 55

342. Machine 31 was purchased by GECC for lease to Hayes at an original cost to GECC of \$154,700.00. See Ex. M 8.

343. In the condition in which Hayes returned the Machine to GECC, it sold for \$500.00. See Ex. M 55.

344. Machines 32 and 33 were purchased by GECC for lease to Hayes at an original cost to GECC of \$366,550.00. See Ex. M 16.

345. In the condition in which Hayes returned the Machines to GECC, they sold for a total of \$1,000.00. See Ex. M 55.

346. Machines 34, 35 and 36 were purchased by GECC for lease to Hayes at an original cost to GECC of \$817,606.24. See Ex. M 18.

347. In the condition in which Hayes returned Machines 34, 35 and 36 to GECC, they sold for a total of \$19,000.00. See Ex. M 55.

348. Machines 37-43 were purchased by GECC for lease to Hayes at an original cost to GECC of \$1,584,886.00. See Ex. M 21.

349. Machines 37-43 were sold by GECC as part of a bulk sale of eighteen (18) machines to ACT Machinery, Inc. for \$213,000.00. See Ex. M 80.

350. GECC allocated a total of \$105,000.00 of the purchase price to Machines 37-43. See Ex. M 80.

351. Machines 44 and 45 were purchased by GECC for lease to Hayes at an original cost to GECC of \$815,895.00 See Ex. M 19.

352. In the condition in which Hayes returned Machines 44 and 45 to GECC, they sold for a total of \$3,500.00. See Ex. M 55.

353. Machine 46 was purchased by GECC for lease to Hayes at an original cost to GECC of \$259,122.00. See Ex. M 20.

354. In the condition that Hayes returned Machine 46 to GECC, it sold for \$2,500.00. See Ex. M 55.

355. GECC purchased Machine 47 for lease to Hayes at an original cost to GECC of \$231,657.50. See Ex. M 5.

356. In the condition in which Hayes returned Machine 47 to GECC, it sold for \$4,000.00. See Ex. M 55.

357. Machine 48 was purchased by GECC for lease to Hayes at an original cost to GECC of \$231,657.50. See Ex. M 5.

358. In the condition in which Hayes returned Machine 48 to GECC, it sold for only \$4,000.00. See Ex. M 55.

359. GECC purchased Machines 50 and 51 for lease to Hayes at an original cost to GECC of \$262,500.00. See Ex. M 7.

360. In the condition in which Hayes returned Machines 50 and 51 to GECC, they sold for a total of \$4,000.00. See Ex. M 55.

#### **GECC's Expert Valuation Testimony**

361. GECC retained Thomas Hazelhurst, of Machinery Management, LLC, as an expert to perform a desktop appraisal of the Machines at issue, as of the date of rejection of

each respective Schedule, to determine the orderly liquidation value and the fair market value of that each of the Machines should have brought if they had been properly maintained and repaired. See 1/12/2005 Transcript at pp. 69:24-70:11, 81:24-83:07; Ex. M 108.

362. Machinery Management, LLC is a used equipment company that buys and sells used equipment, performs appraisals and provides consulting services. Id.

363. Mr. Hazelhurst has twenty-one (21) years of experience buying, selling and evaluating used CNC machine tools of the type at issue in this proceeding. Id.

364. Mr. Hazelhurst valued each of the Machines at issue under the assumption that each of the Machines was in “reasonable condition for its vintage” meaning that Mr. Hazelhurst assumed for purposes of the appraisal that each of the Machines was “functional, complete, and not requiring repairs, but consideration has been taken for wear due to usage within normal hours, conditions, maintenance and environment.” See Fair Market and Orderly Liquidation Valuation dated July 9, 2004 (Ex. M 108) at p. 6-7.

365. Mr. Hazelhurst also took into account the prevailing market conditions as of the respective valuation dates stated in the appraisal report. See 1/12/2005 Transcript at pp. 94:02-24.

366. The used machine tool market was depressed in 2002-2003, but has since rebounded. See 1/12/2005 Transcript at pp. 108:16-109:07; 1/13/2005 Sealed Transcript-2 at pp. 14:14-15:10.

367. Based on the assumptions and limiting conditions stated in the appraisal report, each of the Machines at issue should have had the fair market values and orderly liquidation values stated in Section XI of Mr. Hazelhurst’s appraisal report (attached hereto as Schedule 1) as of the respective Schedule rejection dates and for a reasonable time thereafter if

they had been properly repaired and maintained by Hayes. See 1/12/2005 Transcript at pp. 93:04-16; Ex. M 108 at Section XI. See, generally, 1/12/2005 Transcript at pp. 69-112.

368. GECC was under no obligation to repair any of the Machines under the terms of the Lease. See Ex. M 1.

369. Hayes did not present any controverting value evidence regarding the Machines.

370. If the Machines had been properly maintained and repaired by Hayes, GECC would have been able to recover the fair market values of the Machines, as set forth in the attached Schedule 2, rather than the low sales prices obtained by GECC for the Machines (summarized in Ex. M 55).

371. The low sales prices are more indicative of the very poor condition of the Machines, rather than the prevailing market conditions, which already were taken into account by Mr. Hazelhurst in determining the values.

#### **Hayes's Proffered Expert Testimony**

372. Frederick Kucklick, is the President and sole employee of IMT Consulting, Inc., a self-professed "one-person corporation" engaged primarily in the business of providing litigation consulting/expert witness services. See 1/31/2005 Transcript at pp. 49:25-50:07.

373. Hayes retained Mr. Kucklick as an expert witness to review documents and information in the Case and to allegedly render opinions regarding whether or not each of the Machines at issue had suffered a Casualty Occurrence within the meaning of the Lease. See 1/31/2005 Transcript at p. 130:6-11.



374. In forming his conclusions in this matter, Mr. Kucklick did not do any independent scientific or technical analysis. See 1/31/2005 Transcript at pp. 66:07-25; 71:24-72:04, 131:10-17.

375. In every other case in which Mr. Kucklick had been retained to opine on the condition of a machine, the machine always was available for inspection. See 1/31/2005 Transcript at pp. 134:06-10.

376. Mr. Kucklick did not view or inspect, at any time, any of the Machines, nor did anyone inspect the Machines on his behalf. See 1/31/2005 Transcript at pp. 66:07-25; 71:24-72:04, 131:10-17.

377. All that Mr. Kucklick did was review documents relating to the Machines, review inspection reports, review testimony presented during trial and through depositions and review other documentary materials, most of which were inadmissible as evidence by Hayes, including Hayes's discovery responses. Id.

378. Mr. Kucklick sat through the first three and one-half days of trial and then testified that his conclusions were based in part on the testimony he heard, although he reached those same conclusions more than six (6) months earlier when he prepared his expert report for Hayes. See 1/31/2005 Transcript at pp. 66:07-18, 67:19-68:01.

379. Mr. Kucklick identified which Machines in his opinion were "operable" and which were "non-operable." See, Exs. D 275 and D276; generally 1/31/2005 and 2/1/2005 Transcripts, testimony of Mr. Kucklick.

380. Mr. Kucklick did not use the definition of an operable Machine as one which is capable of producing parts in tolerance, which he agreed was the proper definition of an operable and usable machine, in opining which of the Machines were operable, rather he used a

lesser standard, meaning that the machine simply was capable of running at all. See 1/31/2005 Transcript at pp. 139:22-141:21.

381. Mr. Kucklick, in reaching his conclusions in the Case, rather than using the ordinary, everyday meaning of the term “worn out” within the definition of “Casualty Occurrence” under Section VIII of the Master Lease Agreement, interpreted “worn out” to mean “irreparably damaged or permanently unfit for use”. See 1/31/2005 Transcript at pp. 134:24-137:08, 138:03-15.

382. Merriam-Webster’s Dictionary defines “worn out” as “exhausted or used up by or as if by wear” See *Merriam-Webster Online Dictionary* copyright © 2005 by *Merriam-Webster, Incorporated*.

383. Synonyms for “worn out” include “over used,” “deteriorated,” “dilapidated,” “in disrepair” and “run down”; and, antonyms for “worn out” include “fixed,” “mended,” “reconditioned” and “repaired.” See *Roget’s Thesaurus, First Edition (v 1.1.1) (2004)*.

384. Mr. Kucklick could not conceive of a situation where a Machine could suffer a Casualty Occurrence within the meaning of the Lease because a Machine always could be repaired or rebuilt, absent exposure to nuclear radiation or being sunk in a ship to the bottom of the ocean. See 1/31/2005 Transcript at pp. 134:24-137:08, 138:03-15.

385. In determining that a Machine always could be repaired or rebuilt, Mr. Kucklick did not take into account whether or not the proposed repair or rebuild would be economically feasible. Id.

386. Mr. Kucklick’s testimony, which was little more than argument, was not helpful to the Court, and instead, merely sought to instruct the Court on how it should rule.

### **Hayes's Waiver Of Any Allegation That SLV Is A Penalty Sum**

387. On October 15, 2003, Hayes filed the "Debtors' Objection To General Electric Capital Corporation's Application And First Supplement For Allowance And Payment Of Administrative Expense Claim Arising From Certain Unexpired Leases Of Personal Property". See Case Docket No. 2625 at pp. 2-3.

388. Hayes's objection to the First Application (as supplemented) raised the following affirmative defenses:

5. GE Capital is not entitled to an administrative expense under §365(d)(10) because, among other reasons:

a. The condition of the Subject Equipment does not rise to the level of a Casualty Occurrence as that term is defined in the Master Lease.

b. The condition of the Subject Equipment that allegedly constitutes a Casualty Occurrence and the alleged obligation to pay the Stipulated Loss Value pursuant to any Subject Schedule arose before the Petition Date.

c. Debtors are not in default of any obligation allegedly breached by Debtors, or alternatively, any such default arose before the Petition Date.

6. GE Capital is not entitled to an administrative expense pursuant to §503(b) because, among other reasons:

a. The expense did not arise out of a post-petition transaction between GE Capital and the Debtors. The Master Lease and the Subject Schedules, which form the basis of GE Capital's claim, were entered into long before the Petition Date.

b. The alleged failure to maintain and repair the Subject Equipment conferred no concrete benefit on Debtors; or alternatively, such benefit allowable as an administrative expense is not measured by the Stipulated Loss Value, but by the actual benefit to Debtors, which (if any) is far less than the stipulated amount.

c. GE Capital's claim for an administrative claim is based upon an alleged breach of contract, not a tort.

d. Debtors were not unjustly enriched by the alleged breaches so as to justify allowing an administrative expense.

See Case Docket No. 2625 at pp. 2-3.

389. On October 15, 2003, Hayes filed the “Debtors’ Objection To General Electric Capital Corporation’s First Amended Second Application For Allowance And Payment Of Administrative Expense Claim Arising From Certain Unexpired Leases Of Personal Property”.

390. In response to the Amended Second Application, Hayes raised the same affirmative defenses as it raised in response to the First Application (as supplemented). See Case Docket No. 2646.

391. Pursuant to the Court’s April 13, 2004 “Amended Scheduling Order,” fact discovery closed on July 2, 2004, and the deadline for disclosing expert testimony was July 9, 2004. See Joint Pre-Trial Statement at p. 3, ¶14.

392. On August 6, 2004, Hayes filed the “Reorganized Debtor’s Motion For Partial Summary Judgment” and the “Brief In Support Of Reorganized Debtors’ Motion For Partial Summary Judgment”; and, on August 31, 2004, Hayes filed the “Reorganized Debtors’ Reply Brief In Support Of Their Motion For Partial Summary Judgment”. See Case Docket Nos. 3771, 3772 and 3807.

393. Hayes did not allege in any pleading, that the liquidated damages, stipulated to by GECC and Hayes in the Lease, was an unenforceable penalty. Id.

394. On September 3, 2004, GECC and Hayes filed the Joint Pre-Trial Statement. See Case Docket No. 3813.

395. Section IV of the Joint Pre-Trial Statement lists “Issues of Fact To Be Determined At Trial.” Id.

396. Section V of the Joint Pre-Trial Statement lists “Issues of Law to be Determined at Trial.” Id.

397. In the Joint Pre-Trial Statement, the following was stated as an issue of law to be determined by the Court:

“With respect to each machine, under the terms of the Lease and relevant schedule and pursuant to Bankruptcy Code §365(d)(10), is GECC entitled to recover the Stipulated Loss Value of the machines . . . .”

398. Hayes had alleged that GECC was not entitled to SLV as a remedy for Hayes’s defaults under the Lease because, according to Hayes, GECC had not given the notice required under the Lease.

399. On December 13, 2004, Hayes filed the “Reorganized Debtors’ Pre-Trial Brief”. See Case Docket No. 3882.

400. At no time, in any of its pleadings, did Hayes allege as an affirmative defense or otherwise, that the liquidated damages, that GECC and Hayes stipulated to in the Lease, constituted a penalty. Id.

401. On January 12, 2005, during opening statements at trial, counsel for Hayes referenced for the first time the liquidated damages provision in the Lease being an unenforceable penalty. See 1/12/2005 Transcript at p. 25:10-23.

402. The statement was made in the context of why Hayes believed that GECC asserted a Casualty Occurrence with respect to the Machines; according to counsel for Hayes, the reason that GECC asserted a Casualty Occurrence with respect to the Machines was that the SLV was a “penalty sum.” Id.

403. At trial, Hayes offered no evidence regarding the type or amount of damages that the parties anticipated, at the time of the execution of the Lease, that GECC might suffer as a result of a breach of the Lease by Hayes.

404. At trial, Hayes offered no evidence regarding whether or not, at the time the Lease was executed, GECC's damages, as a result of a breach of the Lease by Hayes, would be difficult or inconvenient to calculate.

405. At trial, Hayes offered no evidence that the liquidated damages, stipulated to by GECC and Hayes in the Lease, were unreasonable when judged as of the time the Lease was executed.

406. GECC did not receive fair notice that Hayes would contend at trial that the liquidated damages, that GECC and Hayes stipulated to in the Lease, constituted a penalty.

407. GECC had no opportunity to conduct discovery regarding the issue of whether or not the liquidated damages, that GECC and Hayes stipulated to in the Lease, constituted a penalty.

408. GECC had no opportunity to prepare a case or offer any evidence, including expert testimony, regarding the issue of whether or not the liquidated damages, that GECC and Hayes stipulated to in the Lease, constituted a penalty.

409. After the Lease and the Schedules were negotiated between GECC and Hayes, the market for used machine tools declined significantly in 2002-2003, but has since rebounded. See 1/12/2005 Transcript at pp. 108:16-109:07; 1/13/2005 Sealed Transcript-2 at pp. 14:14-15:10.

410. The drop in the market was not anticipated by GECC or Hayes at the time the Lease and Schedules were entered into by the parties.

411. When Hayes entered into the Lease, it agreed to pay the contractual damages, including SLV, under the circumstances provided for in the Lease. See Ex. M 1.

**GECC's Remedies for Breach of the Lease**

412. GECC sold all of the Machines at issue through Meritage for a total of \$340,000. See Ex. M 55.

413. GECC purchased the Machines for Lease to Hayes at an original cost to GECC of \$15,222,464.46. See Exs. M 1-21.

414. GECC's ultimate loss in the Case was over \$8,000,000. See 1/12/2005 Transcript at p. 55:13-16.

415. Pursuant to the terms of the Lease, the remedy for a Casualty Occurrence is the payment to GECC of the Stipulated Loss Value as calculated under the terms of the Lease ("SLV"). See Ex. M 1, Section VIII.

416. If a lessee defaults under the terms of the Lease and fails to cure the default after an opportunity to do so, the Lease obligates the lessee to pay GECC the SLV to compensate GECC for its damages for its loss of bargain. See Ex. M 1, Section XII.

417. GECC's damages upon default include more than just recovery of the value of a piece of leased equipment; GECC is in the business of leasing equipment and is not in the business of owning, repairing or rebuilding equipment. See 1/13/2005 Transcript at p. 84:4-8.

418. At the inception of a lease, GECC will calculate the residual value of a piece of equipment which is a projection of what GECC believes the piece of equipment will bring to GECC when it returns at the end of the lease term. See 1/13/2005 Transcript at p. 82:15-21.

419. The residual analyst will then take the residual value and determine the anticipated residual value at various points during the lease term. See 1/13/2005 Transcript at p. 82:19-21.

420. The agreed upon liquidated damages, provided for under Section XII(b) of the Master Lease Agreement for breaches of the Lease by Hayes, are calculated by reference to the respective Schedules. See Exs. M 1-21; 1/12/2005 Transcript at p. 50:02-51:09.

421. Each Schedule contains a SLV Table. See Exs. M 3-21.

422. Each Schedule states the relevant Original Equipment Cost and the Lease Commencement Date. See Exs. M 3-21.

423. The SLV for any given Machine is calculated by multiplying the Original Equipment Cost for the Machine times the applicable percentage stated in the SLV Table. See 1/12/2005 Transcript at p. 50:02-51:09.

424. The appropriate percentage is determined by calculating the number of months that passed from the Lease Commencement Date until the date of default. See 1/12/2005 Transcript at p. 50:02-51:09.

425. As the number of months that passed from the Lease Commencement Date increases, the applicable percentage and the amount of liquidated damages due to GECC as a result of a breach decreases. See Exs. M 3-21.

426. The proper calculation of SLV for each of the Machines at issue in this case is as set forth in Ex. M 264 (attached as Schedule 1 hereto).

427. Machines 13, 16, 18, 19, 28, 29, 31-34, 36, 44, 45, 50 and 51 all were worn out, irreparably damaged or rendered permanently unfit for use.



428. As to each of the Group 1 Machines, including Machines that were worn out, irreparably damaged or rendered permanently unfit for use, Hayes breached the Lease and GECC is entitled to the SLV of the Group 1 Machines because Hayes: (a) failed to properly maintain and repair the Machines; (b) failed to promptly notify GECC in writing that the Machines had suffered damage in excess of ten percent (10%) of their then fair market value; (c) failed to notify GECC that the Machines were or had become worn out, irreparably damaged or permanently rendered unfit for use; (d) failed to promptly notify GECC that the Machines had been relocated from the locations stated in the Schedules; and/or (e) failed to comply with the Return Provisions of the Lease.

429. The contractual damages to be awarded to GECC for each of the Group 1 Machines is set forth in Ex. M 264, and all such amounts recoverable under the Lease, are current charges under the Lease.

430. Interest is a current charge under the Lease.

431. GECC is entitled to interest at the rate of eighteen percent (18%) per annum on all sums found to be owing from the date of rejection until paid in full.

432. GECC has incurred attorneys' fees and costs for enforcing its rights under the Lease.

433. GECC's attorneys' fees and costs are current charges under the Lease.

434. Each of the foregoing findings will be deemed a finding of fact if and to the full extent that it makes and contains factual findings and a conclusion of law if and to the full extent that it makes legal conclusions; and, each of the following conclusions of law will be deemed to be a finding of fact if and to the full extent it makes and contains factual findings.

## CONCLUSIONS OF LAW

A. This Court has jurisdiction over the Case and GECC's applications for allowance and payment of Administrative Claims, as defined in the Plan, pursuant to 28 U.S.C. §§ 157(b) and 1334. The applications presents a core proceeding as defined in 28 U.S.C. §157(b)(2)(B) and (O).

B. Pursuant to Section VIII of the Master Lease Agreement and 11 U.S.C. §365(d)(10), Hayes had a current obligation, that arose each day from and after the sixtieth (60<sup>th</sup>) day after the Petition Date until the respective rejection dates of the Schedules, to "promptly and fully notify [GECC] in writing if any unit of Equipment shall be or become worn out, lost, stolen, destroyed, irreparably damaged or permanently rendered unfit for use..."

C. Hayes offered the testimony of Frederick Kucklick, pursuant to Fed.R.Evid. 702 and 704, to testify based on his review of documentary evidence and testimony in the Case, that none of the Machines at issue suffered a Casualty Occurrence within the meaning of the Lease. Mr. Kucklick's testimony was no more than legal argument offered under the guise of expert testimony, purporting to interpret the meaning of Section VIII of the Lease, purporting to state legal conclusions drawn by applying the facts to the law, and purporting to instruct the Court how it should rule. Based on the facts and circumstances of the Case, the Court concludes that Mr. Kucklick's proffered expert testimony was not helpful to the Court in determining any fact in issue. Mr. Kucklick's testimony and report are not proper expert testimony pursuant to Fed.R.Evid. 702 and 704. Accordingly, Exs. D 251, 275 and 276, which together comprise Mr. Kucklick's proffered expert report shall not be admitted as evidence; and, the testimony of Mr. Kucklick shall be stricken from the record and disregarded by the Court.

D. Section VIII of the Master Lease Agreement should be construed in accordance with its plain meaning and in the manner, which gives effect to all of the terms of Section VIII.

E. Within the meaning of the Lease, a Machine has suffered a Casualty Occurrence if the Machine is found to be in a severely deteriorated condition, the Machine or critical components thereof must be rebuilt or remanufactured, or the Machine is irreparably damaged or permanently rendered unfit for use.

F. Machines 13, 16, 18, 19, 28, 29, 31-34, 36, 44, 45, 50 and 51 each suffered Casualty Occurrences within the meaning of Section VIII of the Master Lease Agreement.

G. In addition, Hayes breached Section VIII of the Master Lease Agreement, from and after the sixtieth (60<sup>th</sup>) day after the Petition Date, by failing to promptly notify GECC in writing that Machines 13, 16, 18, 19, 28, 29, 31-34, 36, 44, 45, 50 and 51 each had suffered Casualty Occurrences within the meaning of the Lease.

H. Pursuant to Section VII(a) of the Master Lease Agreement and 11 U.S.C. §365(d)(10), Hayes had a current obligation, that arose each day from and after the sixtieth (60<sup>th</sup>) day after the Petition Date until the respective rejection dates of the Schedules, to properly maintain each of the Group 1 Machines “in good operating order, repair, condition and appearance in accordance with manufacturer’s recommendations, normal wear and tear excepted.”

I. Hayes breached Section VII(a) of the Master Lease Agreement, from and after the sixtieth (60<sup>th</sup>) day after the Petition Date, with respect to each of the Group 1 Machines.

J. Pursuant to Section XI of the Master Lease Agreement and 11 U.S.C. §365(d)(10), among other things, Hayes had a current obligation, that arose each day from and after the sixtieth (60<sup>th</sup>) day after the Petition Date until the respective rejection dates of the Schedules, and “upon any expiration or termination of [the Master Lease Agreement] or any Schedule,” to “promptly, at its own expense: (i) perform any testing and repairs required to place the affected units of Equipment in the same condition and appearance as when received by Lessee (reasonable wear and tear excepted) and in good working order for their originally intended purpose...”

K. Hayes breached Section XI of the Master Lease Agreement, from and after the sixtieth (60<sup>th</sup>) day after the Petition Date, with respect to Machines 28, 29 and 46.

L. Pursuant to Section V(d) of the Master Lease Agreement and 11 U.S.C. §365(d)(10), Hayes had a current obligation, that arose each day from and after the sixtieth (60<sup>th</sup>) day after the Petition Date until the respective rejection dates of the Schedules, to “promptly notify [GECC] of any relocation of the Equipment.”

M. Hayes breached Section V(d) of the Master Lease Agreement, from and after the sixtieth (60<sup>th</sup>) day after the Petition Date, with respect to Machines 13, 48, 50 and 51.

N. Pursuant to Section V(e) of the Master Lease Agreement and 11 U.S.C. §365(d)(10), Hayes had a current obligation, that arose each day from and after the sixtieth (60<sup>th</sup>) day after the Petition Date until the respective rejection dates of the Schedules, to “promptly and fully report to [GECC] in writing if any Equipment is lost or damaged (where the estimated damages exceed ten percent (10%) of its then fair market value)...”

O. Hayes breached Section V(e) of the Master Lease Agreement with respect to each of the Group 1 Machines.

P. Pursuant to Section IX of the Master Lease Agreement, Hayes assumed and must bear “the entire risk of loss, theft, damage to or destruction of, any unit of Equipment from any cause whatsoever from the time the Equipment is shipped to Lessee.”

Q. Based on the particular facts and circumstances of this Case, where Hayes elected not to reject the Schedules relating to the Group 1 Machines within the first fifty-nine (59) days after the Petition Date; the breaches under the Lease occurred from and after the sixtieth (60<sup>th</sup>) day after the Petition Date; and the precise dates upon which the breaches occurred were within the particular knowledge of Hayes, and were not within the knowledge of GECC; pursuant to 11 U.S.C. §§105(a) and 365(d)(10), equity demands that the Court enforce a presumption that the breaches occurred prior to the respective rejection dates of the Schedules relating to the Group 1 Machines, and the burden of production shifts to Hayes to rebut that presumption. Because Hayes failed to offer any evidence of the dates of the breaches under the Lease, the Court concludes that the dates of the breaches either are irrelevant or are presumed to have occurred during the time from and after the sixtieth (60<sup>th</sup>) day after the Petition Date through the rejection dates of the respective Schedules relating to the Group 1 Machines.

R. Based on the particular facts and circumstances of the Case, to the extent that notice of the breaches by Hayes under the Lease were required, the Court concludes that the notice provided by GECC through the multiple pleadings filed by GECC in the Case, and the rejection orders entered by the Court, provided Hayes with due and sufficient notice of the breaches and an adequate opportunity for Hayes to cure, which Hayes failed to do.

S. Accordingly, Hayes’s breaches of Sections V(d), V(e), VII(a), VIII and XI of the Master Lease Agreement constitute defaults under Section XII(b) of the Master Lease Agreement.

T. Stipulated Loss Value, as liquidated damages for loss of bargain, and all other charges recoverable under the Lease, were the remedies agreed upon by Hayes and GECC for the defaults of the Lease proved by GECC, and are the proper measure of damages in this matter.

U. To the extent that Hayes claims that the liquidated damages, agreed by GECC and Hayes at the inception of the Lease, are an unenforceable penalty, any such claim is an affirmative defense that must be timely raised or is waived. Hayes failed to timely and properly raise any such affirmative defense in any pleading in this matter or otherwise, the issue was not tried by the consent of the parties, either express or implied, and GECC had no adequate notice of the affirmative defense. Accordingly, Hayes waived any affirmative defense that the liquidated damages, agreed by GECC and Hayes at the inception of the Lease, are an unenforceable penalty.

V. Even if the affirmative defense had been properly raised, Hayes had the burden of proving that the liquidated damages, agreed by GECC and Hayes at the inception of the Lease, are an unenforceable penalty; and, Hayes failed to meet its burden.

W. Accordingly, the negotiated agreement of the parties at the time of inception of the Lease with respect to the liquidated damages and other charges recoverable by GECC under the Lease, upon a default by Hayes, should be enforced under the facts and circumstances of this Case.

X. Pursuant to 11 U.S.C. §365(d)(10) and Sections VIII, XII(b) and XX(e) of the Master Lease Agreement, GECC shall have an Allowed Administrative Claim in the Case with respect to the Group 1 Machines, in the amount of \$6,135,346.90, representing the total Stipulated Loss Value of the Group 1 Machines, calculated as of the respective rejection dates of

the Schedules relating to the Group 1 Machines, less the sales proceeds received by GECC for the Group 1 Machines in the amount of \$304,000, plus interest on the foregoing sum at the rate of eighteen percent (18%) per annum, calculated from the respective rejection dates of the Schedules relating to each of the Group 1 Machines, until such time as all amounts are paid in full.

Y. Pursuant to 11 U.S.C. §365(d)(10), Section XII(c) of the Master Lease Agreement, and Fed.R.Civ.P. 54(d), made applicable to this proceeding by Fed.R.Bankr.P. 9014(c), GECC shall have an Allowed Administrative Claim in the Case, in the amount of the total attorneys' fees and costs incurred by GECC in the enforcement of its rights and remedies under the Lease in a manner consistent with 11 U.S.C. §365(d)(10), upon the filing of an appropriate attorneys' fees and costs statement by GECC.

Z. The Group 2 Machines all were on Schedules rejected by Hayes within the first fifty-nine (59) days after the Petition Date. However, based on the facts and circumstances of the Case, the Court concludes that the Group 2 Machines were damaged post-petition by acts and omissions of Hayes; and, therefore, GECC is entitled to an Allowed Administrative Claim pursuant to 11 U.S.C. §503(b)(1).

AA. Pursuant to 11 U.S.C. §503(b)(1), GECC shall have an Allowed Administrative Claim with respect to the Group 2 Machines in the amount of \$954,000, calculated as the difference between the fair market value of the Group 2 Machines prior to the damage and the proceeds received by GECC upon the sale of the Group 2 Machines after the damage.

Wilmington, Delaware  
March 17, 2005

Respectfully Submitted,

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# **Schedule 1**

**GE Re: Hayes Lemmerz International, Inc., et al.**  
**Case No. 01-11490**  
**Machine Stipulated Loss Value Calculation**

No.	Make	Model	Serial Number	Schedule	Calculation	Sales Proceeds	Original Lessor's Cost	Lease Commencement Date	Rental No.	SLV
1	Okuma & Howa	ACT 2SP-V5	6744	32	03/07/02	\$6,000	\$330,000.00	10/15/95	76	\$142,025.40
2	Okuma & Howa	Millac 511V	159	37	02/14/02	\$6,000	\$242,990.00	10/15/96	63	\$144,717.55
12	Niigata	SPN 40	46680086	59	04/03/02	\$17,000	\$310,000.00	12/15/98	39	\$228,032.90
13	Chiron	WM-02	448-23	59	04/03/02	\$500	\$218,796.00	12/15/98	39	\$160,944.15
14	Niigata	SPN 40	46680079	47(97)	05/12/03	\$9,000	\$450,000.00	05/15/98	59	\$253,908.00
15	Niigata	SPN 40	46680084	47(97)	05/12/03	\$9,000	\$450,000.00	05/15/98	59	\$253,908.00
16	Okuma & Howa	Millac 511V	346	43(98)	02/28/03	\$10,500	\$224,000.00	08/15/97	66	\$125,146.56
17	Okuma & Howa	ACT 2SP-V55	55065	41(102)	03/24/03	\$12,500	\$649,400.00	06/15/97	69	\$342,980.61
18	Okuma & Howa	ACT 2SP-V55	55066	41(102)	03/24/03	\$12,500	\$649,400.00	06/15/97	69	\$342,980.61
19	Okuma & Howa	ACT 2SP-V55	55067	41(102)	03/24/03	\$12,500	\$649,400.00	06/15/97	69	\$342,980.61
20	Okuma	LAW-S	1190	30	07/19/02	\$10,000	\$294,814.00	04/15/95	87	83,697.69
21	Okuma	LAW-S	1203	30	07/19/02	\$10,000	\$294,814.00	04/15/95	87	83,697.69
22	Okuma	LAW-S	1212	30	07/19/02	\$10,000	\$294,814.00	04/15/95	87	83,697.69
23	Okuma	LB35II/850	148	31	07/19/02	\$5,000	\$214,474.00	03/15/95	88	\$54,489.26
24	Okuma	LB35II/850	150	31	07/19/02	\$5,000	\$214,474.00	03/15/95	88	\$54,489.26
25	Okuma	LB35II/850	173	31	07/19/02	\$5,000	\$214,474.00	03/15/95	88	\$54,489.26
26	Okuma	LB35II/850	175	31	07/19/02	\$5,000	\$214,474.00	03/15/95	88	\$54,489.26
27	Okuma	LB35II/850	184	31	07/19/02	\$5,000	\$214,474.00	03/15/95	88	\$54,489.26
28	Okuma	LAW-S	1223	34	06/13/03	\$6,000	\$306,950.00	02/15/96	87	\$93,932.84
29	Okuma	LB35II/850	312	34	06/13/03	\$3,500	\$222,800.00	02/15/96	87	\$68,181.26
30	Emco	HWC-15	R0400695	35	02/14/02	\$2,000	\$151,370.00	03/15/96	70	\$60,932.48
31	Emco	HWC-15	R0400895	36	07/19/02	\$500	\$154,700.00	05/15/96	74	\$59,607.46
32	Emco	HWC-15	RO5B-007-98	48	07/19/02	\$500	\$183,275.00	08/15/98	47	\$129,529.61
33	Emco	HWC-15	RO5B-009-98	48	07/19/02	\$500	\$183,275.00	08/15/98	47	\$129,529.61
34	Emco	HWC-15	RO5C-016-98	62	07/19/02	\$500	\$184,290.00	02/15/99	41	\$148,913.69
35	Okuma	LAW-2S	2202	62	07/19/02	\$500	\$316,658.12	02/15/99	41	\$255,872.43
36	Okuma	LAW-2S	2203	62	07/19/02	\$18,000	\$316,658.12	02/15/99	41	\$255,872.43
37	Enshu	JE-80	143	92	03/07/02	\$45,000	\$286,705.00	11/15/00	15	\$282,384.35
38	Okuma	LAW-2S	593.2317	92	03/07/02	\$10,000	\$272,316.00	11/15/00	15	\$268,212.19
39	Okuma	LAW-F	597.0287	92	03/07/02	\$10,000	\$205,173.00	11/15/00	15	\$202,081.04

No.	Make	Model	Serial Number	Schedule	Calculation	Sales Proceeds	Original Lessor's Cost	Lease Commencement Date	Rental No.	SLV
40	Okuma	LAW-F	597.0288	92	03/07/02	\$10,000	\$205,173.00	11/15/00	15	\$202,081.04
41	Okuma	LAW-F	597.0291	92	03/07/02	\$10,000	\$205,173.00	11/15/00	15	\$202,081.04
42	Okuma	LAW-F	597.0292	92	03/07/02	\$10,000	\$205,173.00	11/15/00	15	\$202,081.04
43	Okuma	LAW-F	597.0296	92	03/07/02	\$10,000	\$205,173.00	11/15/00	15	\$202,081.04
44	Motch	219D-VNC	VT2939493	80	07/19/02	\$1,000	\$407,947.50	12/01/99	31	\$78,750.19
45	Motch	219D-VNC	VT2939290	80	07/19/02	\$1,000	\$407,947.50	12/01/99	31	\$78,750.19
46	Motch	119L-VNC	VT29550194	83	01/31/03	\$2,500	\$259,122.00	10/15/99	39	\$48,240.74
47	Motch	120 VTC	VT2958395	32	03/07/02	\$4,000	\$231,657.50	10/15/95	76	\$99,700.75
48	Motch	120 VTC	VT2958295	32	03/07/02	\$4,000	\$231,657.50	10/15/95	76	\$99,700.75
50	Kira	KN-30-HS	B-0114	35	02/14/02	\$2,000	\$131,250.00	03/15/96	70	\$52,833.38
51	Kira	KN-30-VS	CO-128	35	02/14/02	\$2,000	\$131,250.00	03/15/96	70	\$52,833.38
<b>TOTALS:</b>						\$304,000.00	\$11,536,492.24			\$6,135,346.90

## **Schedule 2**

XI. Equipment Listing

Make	Model	Serial Number	Schedule	Year	Effective Date	FMV	OLV
Motch	119L-VNC	VT29550194	83	1994	2/15/2003	\$ 35,000	\$ 25,000
Motch	120 VTC	VT2958395	32	1995	3/7/2002	\$ 50,000	\$ 35,000
Motch	120 VTC	VT2958295	32	1995	3/7/2002	\$ 50,000	\$ 35,000
Motch	219D-VNC	VT2939493✓	80	1997	7/19/2002	\$ 85,000	\$ 60,000
Motch	219D-VNC	VT2939290✓	80	1997	7/19/2002	\$ 85,000	\$ 60,000
Okuma & Howa	ACT 2SP-V5	6744	32	1995	3/7/2002	\$ 75,000	\$ 50,000
Okuma & Howa	ACT 2SP-V55	55065	41	1997	3/24/2003	\$ 110,000	\$ 90,000
Okuma & Howa	ACT 2SP-V55	55066	41	1997	3/24/2003	\$ 110,000	\$ 90,000
Okuma & Howa	ACT 2SP-V55	55067	41	1997	3/24/2003	\$ 110,000	\$ 90,000
Emco	HWC-15	R0400695	35	1996	2/14/2002	\$ 42,000	\$ 21,000
Emco	HWC-15	R0400895	36	1996	7/19/2002	\$ 42,000	\$ 21,000
Emco	HWC-15	RO5B-007-98	48	1998	7/19/2002	\$ 76,000	\$ 38,000
Emco	HWC-15	RO5B-009-98	48	1998	7/19/2002	\$ 76,000	\$ 38,000
Emco	HWC-15	RO5C-016-98	62	1999	7/19/2002	\$ 84,000	\$ 42,000
Enshu	JE-80	143	92	2000	3/7/2002	\$ 190,000	\$ 160,000
✓ Kira	KN-30-HS	B-0114	35	1996	2/14/2002	\$ 20,000	\$ 10,000
✓ Kira	KN-30-VS	CO-128	35	1996	2/14/2002	\$ 20,000	\$ 10,000
Okuma	LAW-2S	2202	62	1999	7/19/2002	\$ 110,000	\$ 75,000
Okuma	LAW-2S	2203	62	1999	7/19/2002	\$ 110,000	\$ 75,000
Okuma	LAW-2S	593.2317	92	2000	3/7/2002	\$ 110,000	\$ 75,000
Okuma	LAW-F	597.0287	92	2000	3/7/2002	\$ 75,000	\$ 60,000
Okuma	LAW-F	597.0288	92	2000	3/7/2002	\$ 75,000	\$ 60,000
Okuma	LAW-F	597.0291	92	2000	3/7/2002	\$ 75,000	\$ 60,000
Okuma	LAW-F	597.0292	92	2000	3/7/2002	\$ 75,000	\$ 60,000
Okuma	LAW-F	597.0296	92	2000	3/7/2002	\$ 75,000	\$ 60,000
Okuma	LAW-S	1190	30	1995	7/19/2002	\$ 30,000	\$ 20,000
Okuma	LAW-S	1203	30	1995	7/19/2002	\$ 30,000	\$ 20,000
Okuma	LAW-S	1212	30	1995	7/19/2002	\$ 30,000	\$ 20,000
Okuma	LAW-S	1223	34	1996	2/14/2002	\$ 30,000	\$ 20,000
✓ Okuma	LB35II/850	148	31	1995	7/19/2002	\$ 55,000	\$ 45,000
Okuma	LB35II/850	150	31	1995	7/19/2002	\$ 55,000	\$ 45,000
Okuma	LB35II/850	173	31	1995	7/19/2002	\$ 55,000	\$ 45,000
Okuma	LB35II/850	175	31	1995	7/19/2002	\$ 55,000	\$ 45,000
Okuma	LB35II/850	184	31	1995	7/19/2002	\$ 55,000	\$ 45,000
Okuma	LB35II/850	312	34	1996	2/15/2003	\$ 55,000	\$ 45,000
Hess	MAW-3FFM	657	42	1997	2/14/2002	\$ 15,000	\$ 5,000
✓ Okuma & Howa	Millac 511V	159	37	1996	2/14/2002	\$ 55,000	\$ 35,000
Okuma & Howa	Millac 511V	346	43	1997	2/28/2003	\$ 60,000	\$ 40,000
Motch	MVSL450CNC	VT-2960901-97	38	1997	1/15/2002	\$ 145,000	\$ 110,000
✓ Motch	MVSL450CNC	VT-2960902-97	38	1997	1/15/2002	\$ 145,000	\$ 110,000
Motch	MVSL450CNC	VT-2960903-97	38	1997	1/15/2002	\$ 145,000	\$ 110,000
Motch	MVSL450CNC	VT-2961001-97	38	1997	1/15/2002	\$ 145,000	\$ 110,000
Motch	MVSL450CNC	VT-2961002-97	38	1997	1/15/2002	\$ 145,000	\$ 110,000
Motch	MVSL450CNC	VT-2961003-97	38	1997	1/15/2002	\$ 145,000	\$ 110,000
Motch	MVSL450CNC	VT-2961101-97	40	1997	1/15/2002	\$ 145,000	\$ 110,000
Motch	MVSL450CNC	VT-2961102-97	40	1997	1/15/2002	\$ 145,000	\$ 110,000
Motch	MVSL450CNC	VT-2961103-97	40	1997	1/15/2002	\$ 145,000	\$ 110,000
✓ Niigata	SPN 40	46680079	47	1998	5/12/2003	\$ 85,000	\$ 65,000

### XI. Equipment Listing

Niigata	SPN 40	46680084	47	1998	5/12/2003	\$ 85,000	\$ 65,000
Niigata	SPN 40	46680086	59	1998	4/3/2002	\$ 85,000	\$ 65,000
✓ Chiron	WM-02	448-23	59	1998	4/3/2002	\$ 40,000	\$ 30,000