IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: HAYES LEMMERZ INTERNATIONAL, INC., et al., Debtor.	Chapter 11 Case No. 01-11490 (MFW) Jointly Administered Relates to Case Docket Nos. 3813 and 3842

GENERAL ELECTRIC CAPITAL CORPORATION'S POST-TRIAL BRIEF IN SUPPORT OF APPLICATIONS FOR ALLOWANCE AND PAYMENT OF ADMINISTRATIVE EXPENSES

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GENERAL ELECTRIC CAPITAL CORPORATION ("GECC"), the movant and an administrative claimant in the above-captioned Chapter 11 case of Hayes Lemmerz International, Inc. and various of its affiliates and subsidiaries (collectively, "Hayes"), respectfully submits "General Electric Capital Corporation's Post-Trial Brief In Support Of Applications For Allowance And Payment Of Administrative Expenses". Concurrently herewith, GECC has filed "General Electric Capital Corporation's Proposed Findings Of Fact And Conclusions Of Law" (the "GECC F&C"), which are incorporated herein in their entirety in further support of GECC's applications for allowance and payment of administrative claims.[1]

I. INTRODUCTION.

Hayes holds itself out as a leading manufacturer of automotive wheels and other suspension components. It purportedly supplies automotive and commercial highway markets worldwide and has manufacturing facilities located throughout North America and Europe. In its manufacturing operations, Hayes utilizes various computer numerical controlled or "CNC" metal cutting machines, primarily lathes and drills. CNC machines are of complex design. They blend computer-controlled commands, precise movements, electrical components, and mechanical operations into machines capable of producing complex parts effectively and efficiently and which meet its customers' precise specifications. See GECC F&C at ¶¶47-51. GECC is in the business of, among other things, making equipment acquisition loans and leasing new equipment to end users such as Hayes. See GECC F&C at ¶7.

[1] GECC also incorporates herein by this reference the "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. Unless otherwise defined herein, capitalized terms will have the meanings ascribed to such terms in the GECC F&C.

GECC's administrative expense claims arise from various choices made by Hayes in the Case while under the management of sophisticated workout specialists who had been retained to manage the company through its financial difficulties. Hayes chose to file for protection under Chapter 11 to take advantage of the substantial relief and financial benefits afforded debtors under the Bankruptcy Code. Once in Chapter 11, Hayes then chose to retain forty-one (41) Machines on various Schedules (the "Group 1 Machines") past the first fifty-nine (59) days of the Case (the "Exposure Period"), preserving its ability to use the majority of GECC's Machines.[2]

However, just as the Bankruptcy Code affords Chapter 11 debtors substantial relief and financial benefits, it also imposes certain obligations. By choosing not to reject the Schedules prior to the Exposure Period, Hayes obligated itself, pursuant to 11 U.S.C. §365(d)(10), and without the need for any notice by GECC, to comply with all of its obligations to GECC under the Lease, including repair and maintenance, equipment return, notice and payment obligations. GECC is before the Court because Hayes consciously chose to ignore those obligations.

Hayes made certain conscious decisions which it now seeks to avoid. Hayes made the decision to cease doing regularly scheduled preventative maintenance and repairs on the vast majority of the Machines. Hayes made the decision not to repair Machines that were broken and in need of repair. Hayes made the decision that, instead of purchasing replacement parts to perform breakdown maintenance, it would rob parts off GECC's Machines to keep its own machines running and not replace those parts. Hayes made the decision to remove the

[2] As to the other nine (9) Machines (the "Group 2 Machines"), while Hayes rejected those Schedules prior to the Exposure Period, it basically destroyed most of those Machines.

Machines as it shut down manufacturing cells and leave them outside, exposed to the elements instead of working with GECC to coordinate the orderly and efficient de-installation and removal of the Machines as requested by GECC. In short, Hayes decided to ignore its obligations under the Lease. The decisions and choices that Hayes made are ones that the Bankruptcy Code lets a debtor make, but not without consequences. And in this matter, those consequences mean that GECC is entitled to the remedies agreed upon by the parties in the Lease to compensate it for damages caused by Hayes.

II. HAYES WAS REQUIRED TO TIMELY PERFORM ALL CURRENT OBLIGATIONS THAT AROSE UNDER THE LEASE WITH RESPECT TO EACH OF THE GROUP 1 MACHINES.

In amending 11 U.S.C. §365(d)(10), Congress determined that a debtor or trustee would have fifty-nine (59) days after filing a bankruptcy case to analyze its obligations under unexpired leases of personal property. See 11 U.S.C. §365(d)(10). If during that time, the debtor determines that performance of its obligations under a lease are too burdensome, undesirable or just simply unbeneficial to the estate, the debtor can reject the lease. However, if the debtor determines not to reject a lease prior to the Exposure Period, the debtor must timely perform all obligations that arise on a current basis under the lease. See 11 U.S.C. §§365(d)(10) and 1107(a); In re Fleming Companies, Inc., 308 B.R. 689, 692 (Bankr. D. Del. 2004); In re Muma Serv. Inc., 279 B.R. 478, 487-88, 92 (Bankr. D. Del. 2002).[3]

[3] If the debtor fails to comply with its obligations under the lease, the lessor's remedy is determined by reference to the terms of the lease and those damages are an administrative claim in the debtor's case. See Muma, 279 B.R. at 486-490 (Bankruptcy Court looks to contract between the parties to determine remedies for breaches of current obligations under an unexpired personal property lease.)

Hayes knowingly made the decision not to reject any of the Schedules relating to the Group 1 Machines prior to the Exposure Period. See GECC F&C at ¶¶24-44.[4] Therefore, with respect to each of the Group 1 Machines, Hayes was required to timely perform all obligations that arose on a current basis under the Lease, including: (a) repair and maintenance obligations;[5] (b) notice obligations; (c) equipment return obligations; and (d) payment obligations. See GECC F&C at ¶¶15-20.

III. HAYES BREACHED ITS REPAIR AND MAINTENANCE OBLIGATIONS UNDER THE LEASE WITH RESPECT TO EACH OF THE GROUP 1 MACHINES.

Section VII(a) of the Lease provides as follows:

> (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.

The obligation to maintain each Machine in good operating order arose everyday that Hayes had possession of the Machines. This is a continuing and current obligation not unlike the obligations reviewed by the Third Circuit in Centerpoint Properties v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.), 268 F.3d 205 (3d Cir. 2001). In the Montgomery Ward case, the Third Circuit considered whether the obligation to pay taxes

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[4] The Group 1 Machines are Machines 1, 2, 12-48, 50 and 51 which are subject to eighteen (18) different Schedules. The Group 2 Machines are Machines 3-11 on Schedules 38 and 40.

[5] This obligation required regular maintenance (including all preventative maintenance) necessary to keep the Machines in the same condition as when received by Hayes, normal wear and tear excepted.

(regardless of when the taxes accrued) on property leased by the debtor was a current obligation subject to 11 U.S.C. § 365(d)(3) or whether the taxes should be prorated.[6] The Third Circuit held an obligation arises under 11 U.S.C. § 365(d)(3) when the legally enforceable duty to perform arises under the lease. Id. at 211. Regardless of the fact that the taxes accrued and related to a prepetition period, the date on which the taxes were due to the landlord and not the date the taxes accrued or were paid by the landlord to the taxing authorities was the critical date for determination of whether the obligation was subject to 11 U.S.C. § 365(d)(3).

The repair and maintenance obligations and other obligations of Hayes under the Lease are analogous to the taxes in Montgomery Ward. In this matter, the legally enforceable duty to maintain the equipment in good operating condition order and repair arose everyday that Hayes was in possession of the Machines. Since those obligations became due everyday of the Lease, whether the damage occurred prepetition or postpetition is irrelevant for purposes of determining Hayes's obligations under 11 U.S.C. § 365(d)(10).[7] What is relevant is whether Hayes had rejected the Schedules for the Group 1 Machines prior to the Exposure Period (which it had not). Therefore, with respect to the Group 1 Machines, Hayes was obligated not only to maintain the Machine in good operating order but also to repair any Machine that had become damaged or inoperable prior to the Exposure Period, but which Hayes consciously decided to keep after the commencement of the Exposure Period.

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[6] As this Court and others have held, the law governing the obligations pursuant to 11 U.S.C. § 365(d)(3) is applicable to 11 U.S.C. § 365(d)(10). See Muma, 279 B.R. at 487.

[7] Hayes has argued that GECC has the burden of proof as to when the damage occurred. However, that argument rings hollow for two reasons. First, as discussed above, the date of the damage is irrelevant given Hayes's obligations that arose everyday it had the Group 1 Machines. Second, by Hayes's own admissions, 19 of the Group 1 Machines were damaged post-petition. Furthermore, much of the information was solely in control of Hayes who professed to have few records regarding repair, maintenance and condition of the Machines.

The facts regarding what Hayes did to the Group 1 Machines are really not in substantial dispute.[8] Hayes ceased its preventative maintenance programs after the Petition Date. See GECC F&C, ¶¶174, 178-186, 252, 257, 260, 269, 272, 281 and 285. Hayes was put on C.O.D. with its vendors and its access to replacement parts was restricted so it used many of the Group 1 Machines as a source of parts for its own machines and never replaced those parts. See GECC F&C ¶¶169-171. Hayes kept no records of what parts were taken off the Group 1 Machines post-petition or what parts were missing as of the commencement of the Exposure Period. See GECC F&C at ¶¶172-173. Hayes moved many of the Group 1 Machines outside and exposed the Group 1 Machines to the elements which caused damage to the Group 1 Machines. See, generally, GECC F&C at ¶¶176-244.

Machines which are missing parts are not capable of producing parts to the tolerances required by a customer or may not even be able to operate at all. See GECC F&C at ¶¶201, 225, 234 and 244. Machines that are in a state of disrepair or which haven't been maintained or repaired so that they are in good operating order as specified by the manufacturer are not in the condition required by the Lease. See GECC F&C at ¶¶15-20. Machines that are rusted can result in pitted or scored ways which, in turn, affects the ability of the machine to make parts to tolerance. See GECC F&C at ¶54.

As testified to by Mr. Kucklick, Hayes's retained expert, and John Josko, an employee of GECC, the critical capability of a machine tool is the ability to make parts to specifications. See GECC F&C at ¶50. Moreover, the value of CNC machines is in their ability

[8] Indeed most of the testimony regarding the condition of the Machines came either from Hayes's admissions (See Ex. M 256) or from testimony of Hayes's witnesses, its employees or its expert. In other instances Hayes presented no controverting evidence to dispute the inspection reports from inspectors hired by Meritage to inspect some of the equipment.

to accurately and repeatedly make parts to the tolerances and specifications the machine was capable of producing at the time it was manufactured. See GECC F&C at ¶51. Machine tools which are missing parts such as spindles, chucks, drive motors and other operational parts are not capable of producing parts to specification. Where the Machine is so damaged that it is incapable of performing its functions, such as when the ways or other parts are pitted or scored, the Machine is not capable of producing parts to specification. See GECC F&C at ¶¶53-56. This testimony did involve hypothetical situations.

The evidence at trial, summarized below, established that Hayes breached its obligations under Section VII of the Master Lease Agreement with respect to each of the Group 1 Machines. Therefore, GECC is entitled to the remedies set forth in Sections XII and XX(e) of the Master Lease Agreement.

A. The Group 1 Machines At La Mirada, CA.

Group 1 Machines 20-36[9] all were used by Hayes at the La Mirada, CA facility. See GECC F&C at ¶176. Although it appears that sometime prior to Hayes's financial problems it was attempting to put a regular preventative maintenance program in place, by June 2001 (six months prior to the Petition Date), Hayes fired Ellison Machinery Company, which had been responsible for preventative maintenance at La Mirada. This severely prejudiced Hayes's ability to do preventative maintenance. Later, in March 2002, Hayes made the decision to terminate the preventative maintenance program at La Mirada altogether.[10] See GECC F&C at ¶¶178-186.

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[9] Machines 28 and 29 also reached the end of the basic term of the lease prior to the rejection date. Accordingly, there are additional grounds upon which Hayes is liable to GECC as an administrative expense which are discussed in Section V below.

[10] Of the 17 Machines used by Hayes at the La Mirada facility, only Machine 30 on Schedule 35 was rejected before Hayes terminated its preventative maintenance program on or about March 24, 2002 (approximately three (3) months after the Petition Date). Hayes's

Hayes has admitted in its discovery responses, and other evidence at trial confirmed, that Machines 20-24, 26, 27, 31-34 and 36 all were returned to GECC missing parts and otherwise in a state disrepair. See Ex. M 256.[11] And, to the extent the Court deems the date of damage to be relevant which GECC disputes, with the exception of Machine 36, Hayes has admitted that the damage occurred post-petition. Id.

The few maintenance records that Hayes produced for La Mirada confirm that Hayes performed no preventative maintenance on Machines 21, 23-25, 27, 29, 30, 33, 34 and 36 after the Petition Date. The same records confirm that no preventative maintenance was performed on Machine 20 after February 20, 2002; on Machine 22 after January 21, 2002; on Machine 26 after March 11, 2002; on Machine 31 after January 21, 2002; on Machine 32 after February 20, 2002; and on Machine 35 after February 6, 2002. See GECC F&C at ¶¶176-235. In each case, Hayes quit performing preventative maintenance on the Machines months before the respective rejection dates. See GECC F&C at ¶44.

Post-petition, as cells were shut down or reconfigured, the Machines were disconnected and moved outside within the La Mirada facility. See GECC F&C at ¶¶176-235. But, Hayes did nothing to protect the Machines from the elements or to keep the Machines from rusting when they were put outside. As a result, many of the Machines were rusted, in addition to the other damage caused to those Machines by Hayes. Id. Furthermore, while outside, the

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preventative maintenance records reflect that no preventative maintenance was performed on Machine 30 after the Petition Date. See GECC F&C at ¶211. Hayes did not reject the other Group 1 Machines at La Mirada until, the earliest, July 2002 and the latest June 2003. See GECC F&C at ¶44.

[11] Attached hereto as Exhibit "A" is a chart summarizing the evidence of Hayes's breach of its repair and maintenance obligations under the Lease. As is evident from Exhibit "A", some of the Group 1 Machines fit into several categories of breach, including Machines that suffered a Casualty Occurrence.

Machines were readily accessible to Hayes employees seeking replacement parts for machines in production. See GECC F&C at ¶¶171-73, 189.

B. Group 1 Machines At Gainesville, GA.

Group 1 Machines 1, 2, 12, and 14-19 all were used by Hayes at the Gainesville facility. At Gainesville, Hayes ceased doing monthly, quarterly and semi-annual preventative maintenance on Machines 12, 14 and 15 after the Petition Date. Similarly, Hayes ceased doing any preventative maintenance on Machines 1, 2, 16-19 after the Petition Date.[12] Hayes admits that Machines 1, 2, 12 and 16-19 all were returned to GECC missing parts and otherwise in a state of disrepair. See GECC F&C at ¶¶245-278.

C. Group 1 Machines At Sedalia, MO.

Group 1 Machines 44 and 45 were used by Hayes at the Sedalia facility. Hayes performed no maintenance or repairs on Machines 44 and 45 post-petition. Hayes robbed parts off Machines 44 and 45 to keep machines owned by Hayes running in production. After Hayes stripped these Machines of parts they were moved to an outside storage yard. Hayes did nothing to protect these Machines from the elements or to keep the Machines from rusting when they were put outside. The evidence showed that Machines 44 and 45 were inoperable, in very poor condition and had been cannibalized of valuable parts. See GECC F&C at ¶¶236-244.

D. Group 1 Machines At Somerset, KY.

Group 1 Machines 13, 37-43 and 48 all were used by Hayes at the Somerset facility. No preventative maintenance was done at Somerset after the Petition Date. The only

[12] Hayes's preventative maintenance records reflect that no preventative maintenance was performed on the Okuma & Howas at Gainesville (Machines 1, 2 and 16-19), except for one (1) monthly preventative maintenance entry on January 28, 2002 for Machines 17, 18 and 19. See GECC F&C at ¶¶249, 252, 269-272.

maintenance that was done at Somerset after the Petition Date, if at all, was "breakdown maintenance". After Hayes ceased doing preventative maintenance, none of the Machines were thoroughly cleared in order to ensure that these Machines were cleared of the impacted chips from the inside of the Machine where the ball screws and other components are located. The only cleaning of the Machines that was done, if at all, was a superficial surface cleaning by the daily operators. See GECC F&C at ¶¶282-302.

Machine 13, which was moved from the Gainesville, GA facility to the Somerset facility without any notice to GECC, was stored in the back of the plant by the foundry and was used as a parts Machine to keep machines owned by Hayes running in production. None of the parts were replaced, nor was the Machine repaired. Machine 48 was in poor condition as of the Petition Date, but Hayes did nothing to repair the Machine after the Petition Date, although Hayes chose to retain the Machine during the Exposure Period. See GECC F&C at ¶¶294-299.

E. Group 1 Machines At Huntington, IN.

Machines 46 and 47 were used by Hayes at the Huntington, IN facility. Hayes performed no preventative maintenance on Machine 47 after the Petition Date; and, no preventative maintenance was done on Machine 46 after November 15, 2002, although the relevant Schedule was not rejected until June 13, 2003. See GECC F&C at ¶¶279-281.

F. Group 1 Machines At Howell, MI.

Machines 50 and 51 were used by Hayes at the Howell, MI facility. Hayes moved the Machines to a third-party storage warehouse in September 2001. The Machines sat unused in the warehouse until they were removed by GECC. At no time after September 2001 did Hayes power up the Machines or otherwise verify that they were capable of being operated in accordance with manufacturer's specifications. Hayes did not do any maintenance or repairs on the Machines after September 2001. Hayes did not apply cosmoline or any other similar substance to the bare metal parts on the Machines to prevent rusting during storage. As a result, the Machines rusted while stored in the warehouse. In April 2002, a used machine dealer in Pontiac, MI, observed that the Machines were sitting outside at the Ryan Industries warehouse and were missing many parts. See GECC F&C at ¶¶303-311.

IV. HAYES BREACHED THE NOTICE PROVISIONS OF THE LEASE WITH RESPECT TO EACH OF THE GROUP 1 MACHINES.

In addition to the obligations of Hayes to repair and maintain the Machines in good operating order in accordance with the manufacturers recommendations, the Lease imposes notice requirements[13] on Hayes relating to both the location and condition of the Machines. 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.

In addition, Section V(e) of the Master Lease Agreement provides that:

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[13] These are not the only notice requirements imposed on Hayes. As discussed in Section VII, infra, Hayes has an obligation to notify GECC when a Machine suffers a Casualty Occurrence.

> (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 Exhibit M 1.

Based on the evidence, it now is apparent that Hayes breached Sections V(d) and (e) of the Master Lease Agreement. There was undisputed testimony at trial that Machines 13, 48, 50 and 51 all were relocated by Hayes. Machine 13, a Chiron, originally was acquired for and located at Gainesville but was moved to Somerset.[14] Machine 48 was located at Huntington and later was moved to Somerset. And, Machines 50 and 51 were moved from the Howell facility to a third-party storage warehouse. See GECC F&C at ¶¶292, 298, 303-04.

Pursuant to Section V(d) of the Master Lease Agreement and 11 U.S.C. §365(d)(10), when Hayes elected not to reject Schedules 32, 35 and 59 prior to the Exposure Period, a current obligation on the part of Hayes arose to promptly notify GECC of the relocation of the Machines. When Hayes failed to promptly notify GECC, it breached Section V(d) of the Master Lease Agreement with respect to Machines 13, 48, 50 and 51.

Hayes also breached Section V(e) of the Master Lease Agreement with respect to each of the Group 1 Machines. Pursuant to Section V(e) of the Master Lease Agreement and 11 U.S.C. §365(d)(10), at the commencement of the Exposure Period, Hayes had a continuing obligation to promptly notify GECC if any Machine became damaged where the estimated repair costs would exceed ten percent (10%) of its then fair market value. See GECC F&C at ¶17.

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[14] It is noteworthy that apparently the purpose of moving Machine 13 was that the Gainesville plant did not have any other Chiron's; however, the Somerset plant used Chirons. Machine 13 was never put into production but was used as a parts machine to keep the other Chirons at Somerset (not leased from GECC) running. See GECC F&C at ¶¶294.

Based on the evidence, it is clear that each of the Group 1 Machines suffered substantial damage at the hands of Hayes. It is also undisputed that Hayes never notified GECC, in writing or otherwise, that any Machine had been damaged (in many cases deliberately by Hayes); and, that the damage to the Machines far exceeded ten percent (10%) of the then fair market value of the Machines. See, generally, GECC F&C. By failing to promptly notify GECC of the damage to the Group 1 Machines, Hayes breached Section V(e) of the Master Lease Agreement with respect to each of the Machines.

V. HAYES BREACHED THE RETURN PROVISIONS OF THE LEASE WITH RESPECT TO MACHINES 28, 29 AND 46.

Hayes also breached Section XI of the Master Lease Agreement with respect to Machines 28 and 29 on Schedule 34, and Machine 46 on Schedule 83. Section XI of the Master Lease Agreement provides in relevant part as follows:

> (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 (normal 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.

Schedules 34 (Group 1 Machines 28 and 29) and 83 (which amended Schedule 26 – Group 1 Machine 46) reached the end of their Basic Terms under the Lease on February 14, 2003 and October 14, 2002, respectively. See GECC F&C at ¶¶139, 158. When Schedules 34 and 83 reached the end of their Basic Terms, Hayes became obligated to comply with all applicable return provisions of the Lease, including Section XI of the Master Lease Agreement, paragraph F of Schedule 34 and the Rider to Equipment Schedule No. 26. See GECC F&C at ¶17. Thereafter, all of Hayes's other obligations under the Lease continued on a month-to-month basis until Hayes complied with the applicable return provisions.

Meritage's inspections of Machines 28, 29 and 46 confirmed that Hayes failed to comply with the return provisions of the Lease. Machine 28 was not operational and was not under power; it was very dirty and the exposed surfaces were rusty; it was missing many parts; the upper turret X axis of Machine 28 was pitted where way lube was not on the way; the OSP-5020 operator's panel was damaged; the electrical cabinet had many loose wires and many "jumper" wires and the electrical cabinets were dirty, which is not normal; the chip conveyor and coolant tank were dirty and rusty; the ASI chuck, which was the most valuable asset of the Machine, was missing; and it was determined that with an unknown amount of parts and labor, the Machine could be restored as a roughing machine only, absent a complete remanufacturing of the Machine. See GECC F&C at ¶¶147-151.

The condition of Machine 29 was such that it would have been economically infeasible to repair or rebuild the Machine. The Machine was stored outside, was extremely dirty and had many missing parts; the Machine was very rusty inside and outside; the ways were rusted and the ball screw was pitted; and the guards were missing. It was determined that the Machine "was not repairable and its value was for parts only, although, because this machine

had been used as a parts machine, the value of the parts was greatly diminished." See GECC F&C at ¶¶152-156.

Machine 46 also was not in the condition required by the Lease. At the time it was inspected, Machine 46 was not under power and the chip conveyor and hydraulic unit had been removed and stored in the weather for approximately three months. The way covers, way wipers, doors and paint were in fair condition. The Z axis motor was on the Machine, but the cables were not connected. See GECC F&C at ¶¶157-167.

Based on the evidence, it is clear that Hayes made no effort to comply with the return provisions of the Lease, including Section XI of the Master Lease Agreement, with respect to Machines 28, 29 and 46. Among other things, Hayes breached Section XI by failing to "perform any testing and repairs required to place the affected units of Equipment in the same condition and appearance as when received by Lessee (normal wear and tear excepted) and in good working order for their originally intended purpose".

Hayes's obligation to comply with the return provisions of the Lease did not arise as a result of the rejection of Schedules 34 and 83, but rather arose on a current basis under the Lease.[15] See Muma, 279 B.R. at 487-88. GECC is not contending that the obligation of Hayes to comply with the return provisions arose at the time of rejection. To the contrary, GECC is claiming and has established that Schedules 34 and 83 reached the end of the Basic Term and the obligation to comply with the return provisions became current obligations under the Lease many months prior to rejection. This obligation was wholly unrelated to the rejection. If Hayes wanted to avoid its obligation to comply with the return provisions, it only needed to reject

[15] Hayes did not reject Schedules 34 and 83 until June 13, 2003, months after each of the Schedules reached the end of their respective Basic Terms. See GECC F&C at ¶44.

Schedules 34 and 83 prior to the end of the Basic Term. The risk of loss and damage as a result of Hayes's decision should not fall on GECC. Hayes's breaches of the Lease entitle GECC to the remedies set forth in Sections XII and XX(e) of the Master Lease Agreement. See GECC F&C at ¶17.

VI. THE SALES PRICES OF THE MACHINES WHEN COMPARED TO WHAT THE MACHINES SHOULD HAVE SOLD FOR IF THEY HAD BEEN PROPERLY REPAIRED AND MAINTAINED ARE INDICATIVE OF THE CONDITION OF THE MACHINES.

At trial, GECC offered, and the Court admitted, evidence of the inspection, marketing, and sales process utilized by GECC to dispose of the machines in a commercially reasonable manner and in a manner designed to maximize GECC's recovery upon the resale of the Machines. See GECC F&C at ¶¶91-122. Evidence of the original cost to GECC to purchase the Machines and the total gross sales proceeds obtained by GECC on resale also was admitted. See GECC F&C at ¶¶317-360. Hayes presented no testimony or other evidence to contradict the meticulous process that Meritage and GECC used to try and sell the Machines for the highest price possible. Finally, uncontroverted evidence of what each of the Machines should have been worth upon their return to GECC, if the Machines had been properly maintained and repaired by Hayes and had been in reasonable condition for their vintage, was offered and admitted. See GECC F&C at ¶¶361-371. The low selling prices, as compared to what the Machines reasonably should have been worth, are indicative of the worn out, deteriorated and/or irreparably damaged condition of each of the Machines. The fact that they did not sell for a higher amount is not through the fault of GECC but through the deliberate damage and, in some cases, complete destruction, of the Machines by Hayes. The low selling prices are further evidence that Hayes failed to comply with its repair and maintenance obligations under the Lease with respect to each of the Group 1 Machines.

It is undisputed that the Group 1 Machines were purchased by GECC for Lease to Hayes at an original cost to GECC of over $11.5 million. It also is undisputed that in the condition in which the Machines were returned to GECC by Hayes they sold for a total of $304,000. See GECC F&C at ¶¶317-360. GECC's valuation expert testified that if the Group 1 Machines had been in reasonable condition for their vintage, they should have been worth at least $2.825 million, even after taking into account the unexpected significant decline in the machine tool market in 2002-2003. See GECC F&C at ¶¶361-371. Evidence that GECC was able to obtain only 10.76% of the fair market value of the Group 1 Machines on resale supports the conclusion that Hayes failed to properly maintain and repair the Machines in breach of the Lease.

VII. GROUP 1 MACHINES 13, 16, 18, 19, 28, 29, 31-34, 36, 44, 45, 50 AND 51 EACH SUFFERED CASUALTY OCCURRENCES WITHIN THE MEANING OF THE LEASE.

Section VIII of the Master Lease Agreement provides in relevant part as follows:

> 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 defined in the Master Lease as "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.

One of the issues that the Court must determine is the proper application of the definition of Casualty Occurrence under the Lease. Pursuant to Section VIII, supra, a Machine has suffered a Casualty Occurrence if it is or becomes "worn out, lost, stolen, destroyed, irreparably damaged in the reasonable determination of Lessee, or permanently rendered unfit for use." (emphasis added).

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*. Synonyms for "worn out" include "over used," "deteriorated," "dilapidated," "in disrepair" and "run down." Antonyms for "worn out" include "fixed," "mended," "reconditioned" and "repaired." See *Roget's Thesaurus, First Edition (v 1.1.1) (2004)*.

The Court should apply the plain meaning of terms contained in a contract in interpreting a contract provision. See In re Tops Appliance City, Inc., 372 F.3d 510, 514 (3d Cir. 2004) citing Watt v. Alaska, 451 U.S. 259, 266 n. 9, 101 S.Ct. 1673, 68 L.Ed.2d 80 (1981). Applying the plain meaning of the term "worn out" in a commercially reasonable way, the definition of Casualty Occurrence under the Lease would include Machines that are in a severely deteriorated condition and machines that must be either rebuilt or remanufactured.

Despite the plain language of Section VIII of the Master Lease Agreement, Hayes has taken an extreme position regarding the proper interpretation of a Casualty Occurrence under the Lease. Hayes has attempted to present evidence that the term "worn out" in the definition of Casualty Occurrence means "irreparably damaged or permanently rendered unfit for use."[16] And, Hayes contends that the Court should consider that a Machine can always be repaired or

[16] GECC has objected to the testimony and report of Mr. Kucklick. See, discussion Section XIII, infra.

rebuilt but the Court should not consider the economic feasibility of repairing or rebuilding a Machine when determining whether or not a particular Machine has been "irreparably damaged" or "permanently rendered unfit for use." If the Court adopted the interpretation offered by Hayes, it literally would be impossible for a Machine to suffer a Casualty Occurrence within the meaning of the Lease because the Machine always could be repaired or rebuilt. See GECC F&C at ¶¶380-385. Moreover, nowhere in the Lease does it require GECC to repair or rebuild a Machine. Indeed, the Master Lease Agreement specifically provides that the risk of loss, damage or destruction of any of the Machines, from any cause whatsoever, falls upon Hayes. See Ex. M 1, Section IX. Hayes's interpretation reads the term "worn out" out of the Lease and renders the majority of Section VIII meaningless. The interpretation offered by Hayes is not commercially reasonable and should be rejected.

On the other hand, the plain meaning interpretation of Section VIII offered by GECC is reasonable and gives effect to all of terms of the Lease. Therefore, the Court should hold that a Machine has suffered a Casualty Occurrence within the meaning of the Lease, if the Machine is found to be in a severely deteriorated condition or the Machine or critical parts thereof must be rebuilt or remanufactured. Radio Corporation of America v. Philadelphia Storage Battery Co., 6 A.2d 329, 334 (Del. 1939) ("[a] construction should be sought that will give force and effect to all of the provisions of the agreement…"); Bonds Purchase, L.L.C. v. Patriot Tax Credit Properties, L.P., 746 A. 2d 842, 855 (Ch. Del. 1999) ("If parties introduce conflicting interpretations of a term but one interpretation better comports with the remaining contents of the document or gives effect to all the words in dispute, the court may, as a matter of law and without resorting to extrinsic evidence, resolve the meaning of the disputed term in favor of the superior interpretation."). Based on that definition, the evidence established that

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

Hayes also breached Section VIII of the Lease Agreement by failing to promptly notify GECC that the Machines had suffered Casualty Occurrences with in the meaning of the Lease. Such a breach is a default under the Lease within the meaning of Section XII of the Master Lease Agreement.

The agreed upon remedy if a Machine suffers a Casualty Occurrence is the payment by Hayes of SLV.[17] Exhibit "A" details each Machine by Machine number that GECC contends suffered a Casualty Occurrence under the Lease, including references to findings that support a determination that the Group 1 Machines referenced in this Section each suffered a Casualty Occurrence.

VIII. GECC'S REMEDIES FOR HAYES'S BREACHES OF THE LEASE ARE DETERMINED BY REFERENCE TO SECTION XII OF THE MASTER LEASE AGREEMENT.

When a debtor fails to perform timely its obligations under an unexpired personal property lease in accordance with 11 U.S.C. §365(d)(10), the lessor's remedies are determined by reference to the contract between the parties. See Muma, 279 B.R. at 486-490. In this Case, GECC's remedies for default under the Lease are determined by reference to Sections XII and XX(e) of the Master Lease Agreement.

Section XII provides in relevant part as follows:

> (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

[17] Hayes has never disputed that GECC is entitled to SLV in the case of a Casualty Occurrence.

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 no 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 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.

Based on the evidence, Hayes breached one or more obligations under the Lease with respect to each of the Group 1 Machines. Pursuant to Sections XII(b) and XX(e) of the

Master Lease Agreement, GECC is entitled to recover, as liquidated damages stipulated to by the parties, the SLV of each of the Group 1 Machines, less the net proceeds received by GECC upon the sale, lease or other disposition of the Machines, plus unpaid rent (if any), interest and attorneys' fees. See Ex. M 1. A summary of the SLV calculations for the Group 1 Machines is attached as Schedule 1 attached to GECC F&C.

GECC first put Hayes on notice of its breach of the maintenance, repair and return provisions of the Lease on February 7, 2002 through the "Objection of General Electric Capital Corporation to Debtors' Second Motion for Order Authorizing Rejection of Executory Contracts". GECC then provided subsequent notices to Hayes through pleadings filed in the Case on February 28, 2002, March 27, 2002, January 31, 2003 and June 6, 2003. The Court entered orders authorizing Hayes's rejection of the Schedules at issue relating to the Group 1 Machines on February 14, 2002, March 7, 2002, April 3, 2002, July 19, 2002, February 28, 2003, March 24, 2003, May 12, 2003 and June 13, 2003. In each order, GECC reserved its right to seek allowance and payment of administrative expense claims with respect to Hayes's breaches of the Lease. GECC later timely filed its applications for allowance and payment of administrative expense claims, which now are at issue. See GECC F&C at ¶¶24-46. Under the circumstances, to the extent that any notice was required to alert Hayes of its obligations to GECC under the Lease and 11 U.S.C. §365(d)(10), the multiple pleadings filed by GECC, and the rejection orders entered by the Court in the Case, afforded Hayes more than adequate notice and an opportunity to cure.

Finding that the proper measure of damages in this matter is the agreed upon remedy under the Lease is consistent with other decisions of the Court on this issue. In Muma, certain leased containers had been lost by the debtor. In Muma, the agreed upon remedy under

the lease was, at the option of the lessee, to pay the replacement value of the containers or pay current rent on the lost units for the remainder of the lease term. When the Court determined that the debtor's 11 U.S.C. § 365(d)(10) obligations had been breached, the Court did not fashion a new remedy, it applied the bargained for remedy under the lease. 279 B.R. at 488. Similarly in Fleming, the issue was whether the sale by the debtor of a building in which certain equipment was located triggered a clause in the lease requiring the debtor/lessee to purchase that leased equipment. The debtor moved to reject the agreement after the sale of the building closed and the lessor objected contending that the obligation to purchase was an obligation to be fulfilled by the lessee/debtor pursuant to 11 U.S.C. § 365(d)(10). The Court granted the lessor's motion and determined that the debtor was obligated to buy the equipment. 308 B.R. 692. Again, the Court did not fashion a new remedy for the breach, it applied the bargained for remedy under the lease.

The breaches by Hayes fall into three main categories: (a) failure to comply with the maintenance and repair provisions of the Lease; (b) failure to comply with the return provisions of the Schedules which reached the end of their Basic Term months prior to rejection of the Schedules; and (c) allowing a Casualty Occurrence to occur. Even if the Court were to determine that any of the Machines which GECC contends suffered a Casualty Occurrence did not, there is no question that Hayes breached its obligation to maintain and repair the Machines, including all or any of the Group 1 Machines for which GECC claims a Casualty Occurrence. Such a breach is a default under the terms of the Lease. GECC F&C at ¶17. The bargained for remedy under the Lease is payment by Hayes of the SLV for each such Machine less any credits allowed pursuant to the Lease as noted above.

Because Hayes continued to pay rent on all Machines (with the exception of Machines 28, 29 and 48) through the respective rejection dates of the relevant Schedules, GECC

calculated the SLV for each of the Group 1 Machines as of the respective Schedule rejection dates. See GECC F&C at ¶¶412-433. The SLV for the Group 1 Machines totals $6,135,346.90. When a credit is given for the $304,000 of proceeds received by GECC for the sale of the Group 1 Machines, GECC's damages total $5,831,346.90 plus other charges recoverable under the Lease as a result of Hayes's defaults.

IX. GECC IS ENTITLED TO AN ALLOWED ADMINISTRATIVE CLAIM FOR THE DAMAGE DONE TO THE GROUP 2 MACHINES BY HAYES POST-PETITION.

Pursuant to 11 U.S.C. §503(b)(1), GECC is entitled to an allowed administrative expense claim based on Hayes's destruction of the Group 2 Machines (Machines 3-11) postpetition. The Group 2 Machines were located at the Hayes Gainesville facility. Hayes alleged that as of the Petition Date, two (2) of the nine (9) Group 2 Machines were in operating condition and the other seven (7) were in various states of disrepair and missing parts, or had been damaged. Hayes did not present any evidence to support the date the Group 2 Machines were damaged. On March 25, 2002, Larry Lundquist inspected the Group 2 Machines at Gainesville and took digital photographs detailing the deteriorated and non-operable condition of all of the Group 2 Machines. Information regarding the date of damage to the Group 2 Machines was not available to GECC. See GECC F&C at ¶¶312-16.

The evidence at trial established that Hayes engaged in the practice of cannibalizing parts from Machines and failing to take commercially reasonable steps to preserve the value of the GECC Machines. The photographs of the Group 2 Machines confirm that Hayes followed those practices with respect to the Group 2 Machines. Under the circumstances, based on Hayes's conduct, GECC is entitled to recover, as an allowed administrative claim, the difference between what the Machines would have been worth absent Hayes's conduct and the

amount GECC was able to recover from the Group 2 Machines on resale. See GECC Pre-Trial Brief at pp. 26-29.

GECC purchased the Group 2 Machines for lease to Hayes at an original cost to GECC of $3,317,375.00. See GECC F&C at ¶322. Mr. Hazelhurst testified that the Group 2 Machines should have been worth a total of $1,305,000.00 at the time the relevant Schedules were rejected by Hayes. See GECC F&C at ¶367. In the condition in which the Group 2 Machines were returned to GECC, they sold for a total of $36,000. See GECC F&C at ¶323. Accordingly, GECC is entitled to an Allowed Administrative Claim with respect to the Group 2 Machines in the amount of at least $1,269,000.00.

X. GECC IS ENTITLED TO RECOVER INTEREST AND ITS REASONABLE ATTORNEYS FEES AND COSTS PURSUANT TO THE LEASE AND 11 U.S.C. §365(d)(10).

GECC is entitled to recover pre-judgment and post-judgment interest on all sums due to GECC under the Lease, as well as its reasonable attorneys' fees and costs incurred in enforcing its rights under the Lease in a manner consistent with 11 U.S.C. §365(d)(10).[18] Section XII(c) of the Master Lease Agreement provides as follows:

> (c) The foregoing remedies are cumulative, and any or all thereof may be exercised in lieu 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.

In addition, Section XX(e) of the Master Lease Agreement provides that:

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[18] GECC is entitled to recover its litigation costs pursuant to the Lease and Fed.R.Civ.P. 54(d) and Fed.R.Bankr.P. 9014(c).

> 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 provision in this Agreement or Schedule which are in conflict with any statute, law or applicable rule shall be deemed omitted, modified or altered to conform thereto.

See Exhibit M 1.

Interest and attorneys' fees are current charges under the Lease that arose, not as a result of the rejection of the Schedules, but rather as a result of Hayes's numerous defaults under the Lease. Accordingly, consistent with the Court's holding in Muma, supra, these charges are recoverable by GECC pursuant to the Lease and 11 U.S.C. §365(d)(10). See Muma, 279 B.R. 488-89 (Administrative claimant is entitled to recover current charges under unexpired lease, including attorneys' fees undertaken to enforce rights in a manner consistent with 11 U.S.C. §365(d)(10)). Therefore, the Court should award GECC interest on the amounts allowed by the Court at the rate of eighteen percent (18%) per annum from the date of rejection to the date of payment on the amount awarded to GECC together with its attorneys' fees and costs to be determined upon the filing by GECC of a post-judgment statement of accrued interest, attorneys' fees and costs.

XI. DEPOSITION TESTIMONY OF THE HAYES EMPLOYEES THAT TESTIFIED AT TRIAL IS ADMISSIBLE AGAINST HAYES PURSUANT TO FED.R.EVID. 801(D)(2)(D).

On February 4, 2005, Hayes filed the "Reorganized Debtors' Objections To General Electric Capital Corporation's Deposition Designations". Among other things, in the objection, Hayes contends that GECC is not entitled to use any portion of the depositions of Jose Almeida, Martin Asberry, Billy Little or James Westerdale because each of these employees of Hayes testified live at trial. Hayes relies on Kolb v. Suffolk County, 109 F.R.D. 125 (E.D.N.Y. 1985) in support of the proposition that Fed.R.Evid. 801(d)(2)(D) does not provide an alternative basis for an opposing party to use deposition testimony of the other party's employees who are available to testify live at trial.

Hayes's reliance on Kolb, supra is misguided. The vast majority of courts and commentators that have addressed the issue have determined that deposition testimony of an opposing party's agent or servant, that is otherwise admissible pursuant to Fed.R.Evid. 801(d)(2)(D), should not be excluded on the basis of an argument that the witness is available at trial. See Globe Savings Bank, F.S.B. v. United States, 61 Fed. Cl. 91, 95-96 (2004) (deposition testimony is separately admissible under Rule 801(d)(2) even if the witness is available); Long Island Savings Bank, F.S.B. v. United States, 63 Fed. Cl. 157, 163-64 (2004) (court was unable to locate any decision that relied on Kolb, supra, for the proposition that Fed.R.Evid. 801(d)(2)(D) requires a showing of unavailability of the witness).

In this Case, Messrs. Almeida, Asberry, Little and Westerdale all are employees of Hayes. Accordingly, their deposition testimony may be admitted by the Court as party admissions of Hayes pursuant to Fed.R.Evid. 801(d)(2)(D) despite that fact that they testified live at trial. See Globe, supra; Long Island, supra.

XII. HAYES WAIVED ANY RIGHT TO NOW ASSERT AS AN AFFIRMATIVE DEFENSE THAT THE LIQUIDATED DAMAGES STIPULATED TO BY THE PARTIES IN THE LEASE CONSTITUTES AN UNENFORCEABLE PENALTY.

During opening statements at trial, counsel for Hayes referenced for the first time the liquidated damages provision in the Lease being an unenforceable penalty. The statement was made in the context of why GECC asserted a Casualty Occurrence with respect to the Machines. The statement by Hayes's counsel was that one of the reasons GECC asserted Casualty Occurrence in the Applications was that the SLV was a "penalty sum." See GECC F&C at ¶¶387-402. Prior to this mention, Hayes had not, in any pleadings, stated that the liquidated damages provisions of the Lease were unenforceable as a penalty. This statement does not even rise to the level of a statement that Hayes was asserting this as a defense. Because Hayes failed to raise this alleged affirmative defense, the issue has been waived even though Hayes is now apparently trying to claim it as a defense.

A challenge to the enforceability of a liquidated damages provision in a contract is in the nature of an affirmative defense that is waived if not timely raised. See In re Snelson, 305 B.R. 255, 262 (Bankr. N.D. Tex. 2003) (Debtor's allegation that liquidated damages provision in equipment lease was unenforceable penalty was in the nature of affirmative defense, which debtor waived by its failure to raise the defense in opposition to lessor's motion for administrative expense); Public Health Trust of Dade County v. Romart Construction, Inc., 577 So.2d 636, 638 (App. Fla. 1991) (A challenge to the enforceability of liquidated damages clause as unreasonable or unenforceable is an affirmative defense that is waived if not timely raised); Pace Communications, Inc. v. Moonlight Design, Inc., 31 F.3d 587, 594 (7th Cir. 1994) (party asserting penalty clause defense bears the burden of pleading and proving); Charpenter v.

Godsil, 937 F.2d 859, 863 (3d Cir. 1991) ("Failure to raise an affirmative defense by responsive pleading or by appropriate motion generally results in the waiver of that defense.").

In this Case, Hayes filed objections to each of GECC's applications for administrative expense. 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 GECC F&C at ¶387. 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 that 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 GECC F&C at ¶388.

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". 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 GECC F&C at ¶389. In none of the objections, did Hayes raise the issue that the liquidated damages provision in the Lease was an unenforceable penalty. See id.

Thereafter, 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". Hayes did not allege in any of those pleadings, that the liquidated damages, stipulated to by GECC and Hayes in the Lease, was an unenforceable penalty. See GECC F&C at ¶392-93.

Later, on September 3, 2004, GECC and Hayes filed the Joint Pre-Trial Statement. Section IV of the Joint Pre-Trial Statement lists "Issues of Fact To Be Determined At Trial" and Section V of the Joint Pre-Trial Statement lists "Issues of Law to be Determined at Trial." Nowhere in the Joint Pre-Trial Statement did Hayes allege, as a contested issue of law or fact, that the liquidated damages, stipulated to by GECC and Hayes in the Lease, constitutes an unenforceable penalty. What was listed and what the Court seemed to believe may have raised the issue appears to be the following:

> "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 . . . ."

See GECC F&C at ¶¶394-98. However, this issue was raised in the context of Hayes's allegations, raised in the motion for partial summary judgment and again in the Pretrial Statement, that GECC was not entitled to SLV as a remedy for a default under Section XII of the Master Lease Agreement because in order for GECC to receive SLV under that provision it had to give notice to Hayes of the default which Hayes claimed that GECC had not done.

Indeed in the "Reorganized Debtors' Pre-Trial Brief" filed December 13, 2004, the discussion went to the issue of notice and whether GECC was stayed from giving notice under 11 U.S.C. § 362(a) and, if not, whether GECC had given proper notice in order to be entitled to the bargained for remedy. Again, nowhere in its Pre-Trial Brief, did Hayes allege, as an affirmative defense or otherwise, that the liquidated damages that GECC and Hayes agreed to in the Lease constituted an unenforceable penalty. See GECC F&C at ¶¶399-400.

It is exactly to guard against this type of situation that applicable law requires that an affirmative defense such as this be specifically plead. Otherwise, the person against whom the defense is asserted is left to guess what the party allegedly asserting the defense means. See Snelson, 305 B.R. at 263 (holding that debtor failed to give administrative creditor anything resembling fair notice that it alleged that liquidated damages provision was an unenforceable penalty). The Third Circuit has recognized that the purpose of requiring a defendant to timely raise all affirmative defenses is to allow the plaintiff fair notice and a reasonable opportunity to respond to the affirmative defenses. See Robinson v. Johnson, 313 F.3d 128, 135 (3d Cir. 2002) citing Venters v. City of Delphi, 123 F.3d 956 (7th Cir. 1997) (Holding that defendant waived statute of limitations defense raised for the first time after an exhaustive discovery process and

less that a month before trial). Affirmative defenses must be raised as early as practicable, not only to avoid prejudice, but also to promote judicial economy. Id. at 137.

In this case, Hayes had every opportunity to raise its alleged affirmative defense before trial in any one of the numerous responsive pleadings, affirmative motions, and briefs that it filed. Hayes could have (and should) have articulated its alleged affirmative defense previously.[19] Hayes took advantage of none of those opportunities, choosing instead to "lay in the weeds" and spring the alleged defense on GECC on the first day of trial, months after the deadlines set for the disclosure of experts, and the completion of fact and expert discovery had passed. As a result, GECC was deprived of fair notice and a reasonable opportunity to respond to the alleged defense. GECC was deprived of the opportunity to conduct fact or expert discovery regarding the alleged defense and GECC was deprived of the opportunity to present evidence (including expert testimony) to rebut the issue. Under the circumstances, there is no question that GECC has been prejudiced. Accordingly, the Court should hold that Hayes waived any alleged defense that the liquidated damages, stipulated to by GECC and Hayes in the Lease, is an unenforceable penalty.

Even if the Court were to determine that the issue was properly raised by Hayes (which GECC disputes), Hayes still had the burden of proof on this factual question and did not carry that burden. Pace, 31 F.3d at 594. Hayes presented no evidence to support any contention that the bargained for remedy is not enforceable. Therefore, the Court should determine either that Hayes did not properly raise the issue (which GECC contends it did not) and has waived it or, alternatively, even if the Court determines that it was properly raised, that Hayes did not

[19] GECC does not concede that raising it in the Pre-Trial would have been timely notice, to the contrary it would not have been.

carry its burden in proving that SLV, the agreed upon and negotiated remedy under the Lease, is an unenforceable penalty.

XIII. THE TESTIMONY AND REPORT OF HAYES'S PROFFERED EXPERT ARE NOT PROPER EXPERT TESTIMONY PURSUANT TO FRE 702 AND 704, AND SHOULD BE EXCLUDED FROM EVIDENCE.

In connection with this matter, Hayes retained the services of Frederick Kucklick to provide expert testimony pursuant to Fed.R.Evid. 702. Mr. 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 and expert witness services. Hayes retained Mr. Kucklick as an expert witness to review documents and information in the Case and to render opinions regarding whether or not each of the Machines at issue had suffered a Casualty Occurrence within the meaning of the Lease. See GECC F&C at ¶¶372-386.

In forming his conclusions in this matter, Mr. Kucklick did not do any independent scientific or technical analysis. Mr. Kucklick did not view or inspect, at any time, any of the Machines at issue, nor did anyone inspect any of the Machines on his behalf. Although Mr. Kucklick had been retained in the past to provide expert testimony regarding the condition of machine tools, in every instance, the machine or machines at issue had been made available for inspection. Id.

All that Mr. Kucklick did in this Case 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. Most notably, a large portion of Mr. Kucklick's testimony was based on

Hayes's responses to discovery propounded by GECC, which although offered as evidence by Hayes, were not admitted by the Court.[20] Id.

Mr. Kucklick also sat through the first three and one-half days of trial and listened to the testimony. Then, when he was called as Hayes's last witness, Mr. Kucklick testified that his opinions and conclusions were based, in part, on the testimony he heard during trial, although he reached those same conclusions more than six (6) months earlier when he prepared his expert report for Hayes. In fact, on or about July 9, 2004, at the time Mr. Kucklick reached the conclusions stated in his expert report, he had only reviewed transcripts of three depositions taken in the case. Thereafter, although there were twenty-six additional depositions taken that he purportedly reviewed, his conclusions never changed. Id.

In addition to sitting in judgment of the evidence at trial, Mr. Kucklick also purported to interpret the definition of Casualty Occurrence in Section VIII of the Master Lease Agreement. 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," Mr. Kucklick testified that he interpreted "worn out" to mean "irreparably damaged or permanently unfit for use". By reading the term "worn out" out of the definition of Casualty Occurrence and ignoring the economic feasibility or repairing or rebuilding the Machines, Mr. Kucklick was able to testify that he could not conceive of a situation where any of the Machines at issue could suffer a Casualty Occurrence within the meaning of the Lease because the Machine always could be repaired or rebuilt, absent exposure to nuclear radiation or being sunk in a ship to the bottom of the ocean. Moreover, in determining whether or not any of the Machines had been rendered

[20] Ex. M 256 is a redacted version of Hayes's Discovery Responses which, although they are hearsay and are not admissible against GECC, were admitted as admissions of Hayes, pursuant to FRE 801(d)(2).

"irreparably damaged or permanently unfit for use," Mr. Kucklick elected never to take into account the economic feasibility of repairing or rebuilding any Machine. Id.

As the Court is well aware after sitting through almost a day and a half of testimony, Mr. Kucklick's proffered expert opinions and conclusions amounted to little more that legal argument. Counsel for Hayes walked Mr. Kucklick through select documents, soliciting various favorable comments, before finally eliciting in each case, Mr. Kucklick's testimony that the documents generally supported his foregone conclusion that the Machine at issue had not suffered a Casualty Occurrence within the meaning of the Lease. That type of testimony, simply is not proper expert testimony and is not admissible pursuant to Fed.R.Evid. 702 and 704.

Pursuant to Fed.R.Evid. 702, expert testimony is admissible only if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." See Fed.R.Evid. 702. Although Fed.R.Evid. 704 allows an expert to offer opinion evidence even if it embraces an ultimate issue to be determined by the trier of fact," Fed.R.Evid. 704 does not allow an expert to offer testimony that merely tells the trier of fact what result it should reach. See United States v. Simpson, 7 F.3d 186, 188 (10th Cir. 1993); Burger v. Mays, 176 F.R.D. 153, 156-57 (E.D. Pa. 1997). An expert witness also may not purport to state legal conclusions drawn by applying the law to the facts. See Evans v. Independent School District No. 25, 936 F.2d 472, 476 (10th Cir. 1991); Petersen v. City of Plymouth, 60 F.3d 469, 475 (8th Cir. 1995). Similarly, expert testimony that does no more than impermissibly state legal argument in the form of testimony also is not admissible. See Laverdi v. Jenkins Township, 49 Fed.Appx. 362, 365 Fn. 1 (3d Cir. 2002) citing United States v. Leo, 941 F.2d 181, 196 (3d Cir. 1991).

As discussed above, Hayes retained Mr. Kucklick to review documents and information in the Case and to render his opinions and conclusions regarding whether or not each of the Machines at issue had suffered a Casualty Occurrence within the meaning of the Lease. That is not the proper subject of expert testimony. Whether or not a particular Machine suffered a Casualty Occurrence within the meaning of the Lease is a legal conclusion for the Court based on the applicable facts and the Court's interpretation of the terms of the Lease. GECC submits, that Mr. Kucklick's opinion regarding the proper interpretation of the Lease and his conclusions based on the evidence presented (and various other materials, which were inadmissible as evidence) are not helpful to the Court. Mr. Kucklick's testimony was no more that legal argument as he attempted to tell the Court how it should rule. Accordingly, the Court should not admit Exs. D 251, 275 and 276, which together comprise Mr. Kucklick's report, into evidence, and further asks that the Court strike his testimony at trial.

XIV. CONCLUSION.

When all of the facts are broken down and analyzed, this matter is really pretty simple. Hayes decided it wasn't going to reject the Schedules for the Group 1 Machines before the Exposure Period. However, having made that decision, it now takes the position that the consequences of that decision fall on GECC and not on Hayes. That isn't what the Bankruptcy Code provides and that isn't what a Court of equity should decide. GECC didn't cause the damage, Hayes did, and the evidence shows that in most cases, the damage was deliberate. Hayes, a successfully reorganized entity, should not benefit from its actions at the expense of GECC.

Therefore, based on all of the foregoing, GECC respectfully requests that the Court grant GECC Allowed Administrative Claims in the Case as follows:

A. An Allowed Administrative Claim with respect to the Group 1 Machines in the amount of $5,831,346.90, as liquidated damages for Hayes's breaches of Sections V(d), V(e), VII(a), VIII and XI of the Master Lease Agreement calculated as the total SLV for the Group 1 Machines less the sales proceeds received by GECC pursuant to Sections VIII and XII(b) of the Master Lease Agreement;

B. An Allowed Administrative Claim in the amount of $1,269,000.00 for damages suffered by GECC based on Hayes's damage to the Group 2 Machines post-petition, calculated as the difference between the fair market value that the Group 2 Machines should have brought after crediting the sales proceeds for the Group 2 Machines;

C. An Allowed Administrative Claim for interest on the foregoing sums from the date of rejection of each of the applicable Schedules until the date of payment by Hayes at the rate of eighteen percent (18%) per annum with respect to the Group 1 Machines and at the applicable judgment rate with respect to the Group 2 Machines;

D. An Allowed Administrative Claim for GECC's attorneys' fees and costs incurred in enforcing its rights and remedies under the Lease in a manner consistent with 11 U.S.C. §365(d)(10), in amount to be determined by the Court upon application by GECC; and

E. Granting GECC such other and further relief as the Court deems just under the circumstances.

Respectfully Submitted,

Wilmington, Delaware
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Exhibit "A"

Hayes Group 1 Machines
Machines on Lease Schedules Rejected More Than 60 Days After The Petition Date

No.	Schedule	Preventative Maintenance Not in Accordance with Lease	Hayes Admits Machine Damaged and Not Repaired	Machine Suffered Casualty Occurrence	Comments
1	32	X	X		Machine could not be powered up or tested; CRT in poor condition; slides damaged; way covers, doors, way wipers and paint all were in poor condition
2	37	X	X		Machine could not be powered up or tested; way covers, way wipers, doors and paint all were in poor condition; electrical Seal-Tite, cables and duct work all were in poor condition; slides damaged; in overall poor condition.
12	59		X		Required motor replacement.
13	59		X	X	Machine used as a parts machine by Hayes; missing at least the gear box off of the turntable, the servo axis for the axis motor and the tool arms, but Hayes kept no record of what parts were removed.
14	47(97)	X			After the Petition Date, Hayes ceased performing monthly, quarterly and semi-annual preventative maintenance.

No.	Schedule	Preventative Maintenance Not in Accordance with Lease	Hayes Admits Machine Damaged and Not Repaired	Machine Suffered Casualty Occurrence	Comments
15	47(97)	X			After the Petition Date, Hayes ceased performing monthly, quarterly and semi-annual preventative maintenance.
16	43(98)	X	X	X	The doors and the chip auger needed to be repaired, and the slides needed to be rebuilt.
17	41(102)	X	X		Needed a new transformer, the covers needed to be replaced and the doors were damaged.
18	41(102)	X	X	X	The slides needed to be rebuilt and its doors were damaged.
19	41(102)	X	X	X	The slides needed to be rebuilt and its doors were damaged.
20	30	X	X		Missing an input head stock and other parts whose identities are unknown.
21	30	X	X		Missing an unknown amount of parts.
22	30	X	X		Missing an unknown amount of parts.

No.	Schedule	Preventative Maintenance Not in Accordance with Lease	Hayes Admits Machine Damaged and Not Repaired	Machine Suffered Casualty Occurrence	Comments
23	31	X	X		Missing at least the spindle drive.
24	31	X	X		Missing an unknown amount of parts.
25	31	X			No preventative maintenance after the Petition Date.
26	31	X	X		Missing an unknown amount of parts.
27	31	X	X		Missing an unknown amount of parts.
28	34	X	X	X	Machine was very dirty and the exposed surfaces were rusty and was missing many parts; the upper turret X axis was pitted where lubricant was not on the way; OSP-5020 operator's panel was damaged; the electrical cabinet had many loose wires and many "jumper" wires and the electrical cabinets were dirty, which is not normal; the chip conveyor and coolant tank were dirty and rusty; the ASI chuck was missing; required complete remanufacturing.

No.	Schedule	Preventative Maintenance Not in Accordance with Lease	Hayes Admits Machine Damaged and Not Repaired	Machine Suffered Casualty Occurrence	Comments
29	34	X	X	X	Machine stored outside, was extremely dirty and had many missing parts; very rusty inside and outside; the ways were rusted and the ball screw was pitted; was missing guards; had major rust on the doors; there were loose cables on the VAC spindle drive which indicated that it was replaced with a defective unit; and the headstock pulley was rusted. Machine was not repairable.
30	35	X			No preventative maintenance after March 24, 2002.
31	36	X	X	X	Machine was missing a table and spindle; had wear and tear on the axis; was missing some guards; Fanuc 21M Controller was not functional; missing all manuals, the spindle unit and tool changer; box ways for the X and Z axis were in poor condition.
32	48	X	X	X	machine was missing a spindle, spindle drive, axis drives, guarding and table.

No.	Schedule	Preventative Maintenance Not in Accordance with Lease	Hayes Admits Machine Damaged and Not Repaired	Machine Suffered Casualty Occurrence	Comments
33	48	X	X	X	Machine was missing spindle motor, spindle assembly, tool changer, Y axis motor, X, Y, Z Fanuc drive, spindle drive all manuals, guards; had rust and turkite problems; Fanuc 21M controller was not functional; way covers, doors, way wipers and paint all were in poor condition, and the doors and covers were damaged.
34	62	X	X	X	Machine missing its table, spindle, drives and guarding; Machine was stripped of its main parts and was rendered useless.
35	62	X			No preventative maintenance after February 6, 2002.
36	62	X	X	X	Missing a turret, ball screws, spindle drives, axis drives, motors and guarding.
37	92	X			No preventative maintenance after the Petition Date.
38	92	X			No preventative maintenance after the Petition Date.
39	92	X			No preventative maintenance after the Petition Date.

No.	Schedule	Preventative Maintenance Not in Accordance with Lease	Hayes Admits Machine Damaged and Not Repaired	Machine Suffered Casualty Occurrence	Comments
40	92	X			No preventative maintenance after the Petition Date.
41	92	X			No preventative maintenance after the Petition Date.
42	92	X			No preventative maintenance after the Petition Date.
43	92	X			No preventative maintenance after the Petition Date.
44	80	X	X	X	Cannibalized of parts and discarded to outside storage yard; required complete rebuild.
45	80	X	X	X	Cannibalized of parts and discarded to outside storage yard; required complete rebuild.
46	83	X	X		The chip conveyor and hydraulic unit stored outside in the weather for three (3) months behind the factory, out in the open and uncovered.
47	32	X			No preventative maintenance after the Petition Date.
48	32	X	X		Machine was in very poor condition on the Petition Date and was never repaired thereafter.

No.	Schedule	Preventative Maintenance Not in Accordance with Lease	Hayes Admits Machine Damaged and Not Repaired	Machine Suffered Casualty Occurrence	Comments
50	35	X	X	X	Machine found sitting outside at the Ryan Industries warehouse, rusted and missing many parts.
51	35	X	X	X	Machine found sitting outside at the Ryan Industries warehouse, rusted and missing many parts.