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APPENDIX A

United States Court of Appeals for the Federal Circuit

GADSDEN INDUSTRIAL PARK, LLC,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Cross-Appellant

2018-2132, 2018-2147

Appeals from the United States Court of Federal Claims in No. 1:10-cv-00757-EGB, Senior Judge Eric G. Bruggink.

Decided: April 22, 2020

EDWARD LEVICOFF, The Levicoff Law Firm, PC, Pittsburgh, PA, argued for plaintiff-appellant.

KENNETH DINTZER, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-cross-appellant. Also represented by ERIC JOHN SINGLEY, JOSEPH H. HUNT, ROBERT EDWARD KIRSCHMAN, JR., FRANKLIN E. WHITE, JR.

Before WALLACH, TARANTO, and STOLL, *Circuit Judges*.

STOLL, *Circuit Judge*.

This appeal and cross-appeal concern an alleged taking by the U.S. Environmental Protection Agency (EPA) from Gadsden Industrial Park (GIP) of certain steelmaking material located on a parcel of real property in Gadsden, Alabama. GIP appeals the trial court's just compensation awards, arguing that they should be increased. The Government appeals the trial court's conclusion that GIP had a cognizable property interest in certain material the EPA recovered from the parcel. For the reasons set forth below, we affirm-in-part, reverse-in-part, and vacate-in-part.

BACKGROUND

This case involves GIP's takings claim for "slag," "kish," and "scrap." The parties do not dispute the trial court's definitions of these terms. Slag, a byproduct of steel manufacturing, is "a non-ferrous material that separates during smelting." *Gadsden Indus. Park, LLC v. United States*, 138 Fed. Cl. 79, 92 (2018) (*Decision*). Kish is "a ferrous byproduct of a blast furnace operation in various sizes that has economic value." *Id.* at 94. Scrap refers to "metal of various sizes that may or may not be ferrous, but that can be either recycled into steel manufacturing or sold for other purposes. It is typically finished steel product . . . and is thus not a byproduct." *Id.* at 92.

I

In 2002, GIP purchased certain real and personal property at an auction of a steel mill's bankruptcy estate, as reflected in the bankruptcy trustee's Bill of Sale. GIP specifically omitted some real property from the purchase, including a parcel known as the "Eastern Excluded Property." GIP did, however, purchase certain personal property located on the Eastern Excluded Property. Alabama law governs the contract covering GIP's asset purchase.

Relevant to this appeal, the Eastern Excluded Property contains two large piles of material, comprising, among other things, large quantities of slag, kish, and scrap. At the time of GIP's purchase, each pile occupied more than ten acres of land, contained an estimated three to four million cubic yards of material, and was more than eighty feet high. J.A. 3091 ¶ 4. Each pile was a state-licensed industrial landfill. Transcript of Proceedings at 209:10–210:13, *Gadsden Indus. Park, LLC v. United States*, No. 10-757 (Fed. Cl. June 26, 2017), ECF No. 169;[1] J.A. 3091 ¶¶ 2–4, 3106.

The bankruptcy trustee identified the assets for sale in the auction as "[a]ll materials, whether raw materials or by-products, situated within the boundaries of the real property being sold, including kish and scrap."[2] J.A. 2586. The identified assets included "inventory," which itself included "by[-]products of manufacturing including but not limited to kish and miscellaneous other materials and assorted scrap." J.A. 2612. Prior to making its purchase, GIP drafted a "Purchaser's Itemization of Excluded Items

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[1] The Court of Federal Claims held a seven-day trial in two waves, first from June 26–29, 2017 and then from July 26–28, 2017. The transcript of the trial proceedings is consecutively paginated across seven volumes, with each day corresponding to a separate volume. Transcript of Proceedings, *Gadsden Indus. Park, LLC v. United States*, No. 10-757 (Fed. Cl. June 26–29, 2017 & July 26–28, 2017), ECF Nos. 169, 171, 173, 175, 178, 180, 182. We hereinafter refer to trial testimony by citing the transcript page or pages where it appears using "Trial Tr."

[2] "[T]he real property being sold" refers to all of the real property of the steel mill's bankruptcy estate offered for sale to the highest bidder in the bankruptcy auction. *See* J.A. 2581, 2586, 3092 ¶¶ 5–9, 3173 ¶¶ 5–6, 3180–89 ¶¶ 1,10, 13, 20, 26, 31, 32A.

from Sale." J.A. 2639. Relevant here, GIP excluded certain items from "inventory":

> 1. With reference to the property identified in "ATTACHMENT 5 – INVENTORY," Purchaser excludes:
>
> A. All miscellaneous other materials.
>
> B. *All by-products of production other than kish and 420,000 cubic yards of slag* which are located on the Excluded Real Property as is described on Exhibit B to the deed from Seller to Purchaser of even date herewith, together with a reasonable period of time to remove such items.

Id. (emphasis added).

In 2003, the EPA began investigating claims of contaminants leaching from the piles on the Eastern Excluded Property. Over the course of several years, the EPA determined that contaminants from the piles were migrating from the Eastern Excluded Property and began communicating with GIP regarding ownership and environmental remediation issues. At the same time, GIP began discussing with Watkins Metal Co. the separation of recoverable metals from the Eastern Excluded Property. GIP and Watkins drafted, but did not consummate, an "Agreement to Process Kish," which provided that for $70 per ton of output, Watkins would "separate and screen the Kish in order for [GIP] to reclaim and sell the metals in the Kish." J.A. 2861 ¶¶ 3, 5. Under the non-finalized agreement, Watkins would have had an exclusive right to separate recoverable metals from the piles so long as Watkins reclaimed 500 tons of metal per month, in addition to the right to withdraw from the agreement should recovery become unprofitable. J.A. 2862 ¶ 12.

In October 2008, the EPA decided to remediate the environmental problems on the Eastern Excluded Property by having contractors reduce the size of the piles through

recovery and sale of saleable material from the piles. Once the contractors had extracted saleable material, the EPA planned to cap what was left of the piles.[3] From October 2009 to February 2013, contractors recovered material from the piles, selling 245,890 tons of material for about $13.5 million. J.A. 3093–94 ¶¶ 15–16. The EPA and its contractors also recovered and used 92,500 cubic yards of slag onsite for environmental remediation. Trial Tr. 1367:5–8.

Mr. Casey, the owner of GIP, testified at trial that prior to the start of the EPA's recovery operation, GIP had removed about 15,000 cubic yards of its allotment of slag, using some, selling some, and giving some away. Trial Tr. 206:17–207:9. As of March 2008, GIP had not removed any kish from the Eastern Excluded Property.

In 2013, the project became unprofitable, and the EPA shut it down. At that point, the EPA contractors had processed approximately 50% of the material in the piles. Ultimately, the EPA contractors spent $14.5 million on the recovery operation, about a million more than income from sales. Trial Tr. 1242:18–1243:6. The EPA never capped the piles. Instead, the EPA "compacted the materials to minimize leachate," leaving further remediation to state environmental authorities. J.A. 3086. GIP did not attempt its own recovery operation during the EPA's remediation project.

II

GIP sued the Government in the United States Court of Federal Claims, alleging a Fifth Amendment takings

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[3] Capping each pile would involve regrading it to allow placement of a clay cap over the entire pile to stop hazardous leachate from seeping from the pile. *See* Trial Tr. 640:25–642:25.

claim for the slag, kish, and scrap[4] recovered from the Eastern Excluded Property by the EPA. At trial, GIP sought damages of $755,494 for 92,500 cubic yards of slag. Applying a fair market value theory, Mr. Gleason, GIP's damages expert, calculated just compensation for the kish and scrap taken by the EPA at around either $9.8 million or $10.4 million, depending on the geographic market used in the calculation.[5] Trial Tr. 1277:10–18.

Mr. Gleason valued the kish and scrap taken by estimating their net present value as of June 4, 2008, the date GIP alleges the takings occurred.[6] *See* Trial Tr. 1225:19–1226:7, 1260:24–1261:20. Two elements of Mr. Gleason's damages calculation are relevant here:

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[4] The Government contends that GIP "did not allege a taking of 'scrap'—as distinct from the alleged takings of 'kish' and slag'—until it filed its post-trial brief." Appellee's Br. 61–62. The Court of Federal Claims considered the Government's position and concluded that GIP's takings claim for scrap was tried by consent. While we see no error in the trial court's conclusion, we need not reach this issue because we affirm the trial court's award of no damages as discussed below.

[5] Mr. Gleason also offered a lost profits damages theory, which the trial court rejected as "not the appropriate measure of just compensation." *Decision*, 138 Fed. Cl. at 97 (citing *United States v. Gen. Motors Corp.*, 323 U.S. 373, 379 (1945)). Addressing the merits, the trial court found that "Mr. Gleason's lost profit calculation suffers from many of the same defects discussed" with respect to his fair market value calculation "due to the unreliable calculation of avoided costs." *Id.* at 97 n.5. Our discussion of avoided costs applies equally to both of Mr. Gleason's damages theories.

[6] The Government did not offer a competing date of taking at trial.

revenue and costs. To calculate revenue, Mr. Gleason approximated a June 2008 price for the kish and scrap and applied that price to the actual volume of material recovered by the EPA contractors. Trial Tr. 1262:7–1263:10. Mr. Gleason also estimated GIP's avoided costs—the costs GIP hypothetically would have incurred by partnering with Watkins to conduct its own recovery operation. *See* Trial Tr. 1230:4–14, 1242:12–17, 1330:7–1331:17. To get a net present value of the kish and scrap as of June 4, 2008, Mr. Gleason subtracted avoided costs from revenue and applied a discount rate to that number. *See* Trial Tr. 1259:18–1262:15, 1276:4–1277:14.

To approximate the June 2008 price, Mr. Gleason used an industry publication to relate the contractors' sales price to the market price of a comparison metal over the course of the EPA's remediation project. *See* Trial Tr. 1267:3–1268:11, 1270:11–1271:15. Mr. Gleason then applied that relationship to the average market price of the comparison metal from April 2008 to June 2008, which yielded a price of $483 per ton. *Id.*; Trial Tr. 1262:20–1263:12. At trial, Mr. Gleason conceded that his approximated June 2008 price was "historically . . . a very high price" that lasted only "[f]ive or six months" before taking a dive. Trial Tr. 1262:20–1264:6, 1265:19–1266:3. Overall, Mr. Gleason projected the revenue from a June 2008 sale of kish and scrap to be $19,873,418, significantly more than the EPA contractors' $13.5 million in revenue. Trial Tr. 1273:17–21; J.A. 3094 ¶ 16.

To determine GIP's avoided costs, Mr. Gleason assumed that GIP would have consummated its agreement with Watkins to process kish for $70 per ton. Trial Tr. 1239:24–1240:23. He further relied on a purported oral modification to the agreement under which GIP would not pay Watkins anything for recovered material that GIP sold for less than $70 per ton. Trial Tr. 1247:14–1248:18. Because GIP already employed sales and administrative personnel, Mr. Gleason assumed that GIP would incur no

additional administrative, sales, or overhead costs as a result of partnering with Watkins. Trial Tr. 1257:12–1258:3. He also assumed that the sales price of the recovered materials would include freight. Trial Tr. 1256:22–1257:3. Mr. Gleason concluded that GIP's avoided costs were about $4.9 million. Trial Tr. 1258:4–6.

The Government argued that Mr. Gleason's fair market valuation suffered from at least two flaws. First, the Government asserted that Mr. Gleason's use of the historically high June 2008 sales price for all material was improper because the material was sold over a longer period of time, during which a purchaser would have expected the price to fall. Second, the Government maintained that Mr. Gleason's reliance on the Watkins agreement to calculate avoided costs was unfounded due to critical distinctions between Watkins and the EPA contractors. For example, the evidence did not suggest that Watkins had a similar processing capacity as the EPA contractors, and Watkins had the right to walk away from the project if it became unprofitable.

Following a seven-day trial, the Court of Federal Claims concluded that "GIP purchased kish, assorted scrap, and 420,000 cubic yards of slag at the bankruptcy auction," that "each material was present on the Eastern Excluded Property[,] and that it was used or sold by EPA." *Decision*, 138 Fed. Cl. at 90. Additionally, the trial court held that the EPA's remediation project effected a compensable taking of GIP's slag, scrap, and kish. *Id.* Accordingly, the trial court awarded GIP $755,494 for the EPA's taking of 92,500 cubic yards of slag. *Id.* at 100.

Regarding the scrap and kish, however, the Court of Federal Claims found that GIP had failed to provide "sufficient reliable proof of what a willing buyer would have paid for the scrap and kish." *Id.* First, the trial court agreed with the Government that Mr. Gleason's "construction of an artificial sales price as of June 2008 for

materials sold later was inappropriate," because a buyer would know that it would not instantly recover the value of the materials sold and "would be presumed to know that the price in June 2008 was abnormally high." *Id.* at 99. Second, the trial court deemed Mr. Gleason's avoided costs calculations flawed at least because they assumed that all of the risk in GIP's hypothetical recovery project "would have been borne by Watkins, which, in actuality, maintained the right to walk away from the recovery operation by the terms of the draft agreement." *Id.* The trial court further criticized GIP's avoided costs calculation, characterizing assumptions drawn from the EPA contractors' records as "highly questionable," due to differences in the EPA contractors' processing capacity and the capacity required of Watkins to maintain exclusivity. *Id.* at 99–100. The trial court also concluded that GIP would have experienced other costs unaccounted for by Mr. Gleason. *Id.* Unable to calculate just compensation with reasonable certainty, the trial court awarded GIP zero damages for the EPA's taking of GIP's kish and scrap. *See id.* at 100.

The Government and GIP appeal. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

The Government asserts that the Court of Federal Claims erred in concluding that the EPA took GIP's slag. For its part, GIP contends that the trial court should have awarded just compensation for 405,000 cubic yards of slag rather than only 92,500 cubic yards of slag. GIP further argues that the trial court erred by awarding GIP no just compensation for its kish and scrap after concluding that the kish and scrap had value and that the EPA had taken them. We address these arguments in turn, first considering the parties' arguments with respect to slag, and then turning to their arguments regarding kish and scrap.

We review the Court of Federal Claims' legal conclusions de novo and its fact findings for clear error. *Holland v. United States*, 621 F.3d 1366, 1374 (Fed. Cir. 2010) (citing *Cal. Fed. Bank, FSB v. United States*, 245 F.3d 1342, 1346 (Fed. Cir. 2001)). A fact finding is "clearly erroneous" when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1371 (Fed. Cir. 2004) (quoting *Glendale Fed. Bank, FSB v. United States*, 239 F.3d 1374, 1379 (Fed. Cir. 2001)).

I

The Government asserts that the trial court erred in holding that GIP had proven the requisite property interest to establish a takings claim for slag. "Whether a taking under the Fifth Amendment has occurred is a question of law with factual underpinnings." *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (citing *Alves v. United States*, 133 F.3d 1454, 1456 (Fed. Cir. 1998)). The plaintiff in a takings case bears the burden to demonstrate a protectable property interest. *See Palmyra Pac. Seafoods, L.L.C. v. United States*, 561 F.3d 1361, 1364–65 (Fed. Cir. 2009).

According to the Government, the Court of Federal Claims erred when it concluded "that the Government took [GIP's] slag—as differentiated from the tons of slag that remain on th[e] property." Cross-Appellant's Br. 32. GIP does not dispute that following completion of the EPA's remediation project, slag remains on the Eastern Excluded Property. Instead, GIP responds that the presence of slag is "irrelevant to whether a taking occurred," because the EPA "embalm[ed] permanently" all remaining materials at the conclusion of its remediation project, thereby preventing GIP from recovering its full allotment of slag. Appellant's Resp. Br. 32, 35 (quoting *Decision*, 138 Fed. Cl. at 96). Accordingly, GIP seeks increased just

compensation to account for 405,000 cubic yards of slag—the amount remaining in GIP's allotment when the EPA's remediation project began. We agree with the Government.

GIP has not demonstrated that the EPA's presence and operations on the Eastern Excluded Property intruded on any of GIP's property rights to slag. GIP specifically excluded from its purchase "[a]ll by-products of production other than kish and 420,000 cubic yards of slag." J.A. 2639. As a matter of law, the Exclusion List that GIP itself drafted conveyed title to GIP in 420,000 undifferentiated cubic yards of slag on the Eastern Excluded Property. *See Wheeler v. First Ala. Bank of Birmingham*, 364 So. 2d 1190, 1194 (Ala. 1978) ("The construction of a written document is a function of the court. If the document is unambiguous, its construction and legal effect is a question of law." (citations omitted)). As GIP concedes, slag is fungible, and the Bill of Sale included no limitations that would restrict GIP's 420,000 cubic yards of slag to any particular subset of the whole of the slag on the Eastern Excluded Property. Appellant's Resp. Br. 24. Nothing in the Bill of Sale granted GIP first rights to mine slag from the piles, the right to exclude others from the Eastern Excluded Property, or any other property right that the EPA could take by merely temporarily excluding GIP from the Eastern Excluded Property. Indeed, GIP repudiates any notion that the Bill of Sale granted it the right to mine the piles, *id.* at 1–3, and GIP specifically excluded the Eastern Excluded Property parcel from its purchase of real property, J.A. 3092 ¶ 8. GIP was entitled to no more than 420,000 cubic yards of slag, and the evidence overwhelmingly indicates that even after the EPA's remediation project, sufficient slag remained on the Eastern Excluded Property for GIP to recover its full allotment. *See* Trial Tr. 545:3–24, 1365:12–1366:1; J.A. 3091 ¶ 4.

GIP argues that the EPA prevented it from recovering its full allotment of slag because, as the trial court found, the EPA "embalm[ed] permanently" all material remaining in the Eastern Excluded Property piles after concluding its recovery operation. Appellant's Resp. Br. 35 (quoting *Decision*, 138 Fed. Cl. at 96). On this record, however, the trial court's finding is clearly erroneous.

The Court of Federal Claims did not cite any evidence to support its finding that the remaining material was "embalm[ed] permanently." *Id.* Indeed, the trial court elsewhere noted that the EPA had not capped[7] the piles after concluding its recovery operation. *Id.* at 90. Nor did GIP cite any evidence to support the trial court's finding that materials were "embalm[ed] permanently." During oral argument, counsel for GIP pointed to Mr. Casey's testimony that when the EPA contractors left the site, the slag on the Eastern Excluded Property was "mixed with trash and therefore is unusable." Oral Arg. at 5:03–37, 30:44–31:01 (citing J.A. 265–66). In the same discussion, however, Mr. Casey admitted that at the time of purchase, the piles were "industrial landfills" into which the bankrupt steel mill had deposited "about ten different types of trash." Trial Tr. 209:20–210:13. He further testified that during the EPA's recovery operation, the EPA "took the slag and put it over with the trash that they weren't using from the north and south pile." *Id.* Therefore, the trial court's finding that the slag was unusable after the EPA's remediation project is belied by the record.

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[7] During oral argument, counsel for GIP acknowledged that the EPA never capped the piles. Oral Arg. at 6:50–7:18, http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2018-2132.mp3. Counsel interpreted the trial court's use of the phrase "embalm[ed]" to mean that the material was "unusable." *Id.*

GIP's argument that the finding was supported by the trial judge's firsthand observations during a site visit is easily disposed of. Appellant's Resp. Br. 7, 35. The trial court's opinion does not mention any site visit, let alone rely on a site visit to support its finding that materials were "embalm[ed] permanently." The only discussions of a site visit during trial do not mention "embalmed" material and instead support the notion that recoverable material remains on the Eastern Excluded Property. *See, e.g.*, Trial Tr. 1092:24–1093:4 (trial judge noting "[t]he piles have been gone through since [the EPA contractors] left, and yet what's left seems to be a lot of ferrous kind of material that's magnetic"); Trial Tr. 1170:24–1173:15 (noting site visit observation of leachate on the south Eastern Excluded Property pile, and trial judge's observation that the EPA's leftover material on a third pile was still adhering to a magnet).

Additional witness testimony further supports the notion that after the conclusion of the EPA's remediation project, the Eastern Excluded Property piles contained recoverable material. For example, Mr. Brady, who worked on the Eastern Excluded Property piles as a site manager for an EPA contractor, testified that he was sure that metal and a significant amount of slag remain in the piles following the conclusion of the EPA's remediation project, and that he did not know of anything that would prevent a party "willing to make the investment" from "mining the rest of the material" in the piles. Trial Tr. 1008:9–22. And a project manager for an EPA contractor who worked on the Eastern Excluded Property when the EPA began winding down its recovery operation testified that at the end of the project, the EPA "just ensur[ed] that the piles were rounded and that runoff would go into the ditch." Trial Tr. 894:1–12. We find no record support for the trial court's finding that material was "embalm[ed] permanently" at the conclusion of the EPA's project.

Because GIP has no claim to any particular subset of slag on the Eastern Excluded Property and the trial court erred in finding that the EPA somehow prevented GIP from recovering its full allotment of slag, GIP cannot establish a cognizable property interest in the slag that the EPA recovered. Accordingly, we vacate the trial court's award of damages for 92,500 cubic yards of slag.

II

Regarding kish and scrap, GIP argues that the trial court "was duty-bound to fashion an appropriate damage award," and "had no discretion to award zero damages as just compensation" after it found that the kish and scrap the EPA recovered had value.[8] Appellant's Br. 38–40. But "[o]nce a taking has been established, it is the [property]owner who bears the burden of proving an actual loss has occurred." *Otay Mesa Prop., L.P. v. United States*, 779 F.3d 1315, 1323 (Fed. Cir. 2015) (citing *Bd. of Cnty. Supervisors of Prince William Cnty. v. United States*, 276 F.3d 1359, 1364 (Fed. Cir. 2002)). "To carry its burden, the [property]owner must show actual damages 'with reasonable certain[t]y,' which 'requires more than a guess, but less than absolute exactness.'" *Id.* (quoting *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 833 (Fed. Cir. 2010)). We hold that the trial court in a takings case is not obligated to fashion its own award when a plaintiff has not provided evidence sufficient to determine just compensation with reasonable certainty.

We find no takings cases—nor does GIP cite any—supporting the notion that the trial court must fashion its

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[8] We agree with the trial court that GIP had a cognizable property interest in all of the kish and scrap on the Eastern Excluded Property. The Bill of Sale did not limit the amounts of kish and scrap that GIP purchased. J.A. 2586, 2612, 2639.

own award in the absence of evidence sufficient to determine an appropriate measure of just compensation with reasonable certainty. The cases identified by GIP merely stand for the proposition that the trial court has the discretion to make its own findings on damages rather than adopting in full either party's damages theory.

GIP relies on *Whitney Benefits,* which cites *Almota Farmers* for the proposition that "[w]hen private property is taken for a public purpose, the Constitution requires the taker to pay the owner 'just compensation' and *imposes on the court the duty of determining what compensation is just*." *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394, 407 (1989) (emphasis added) (citing *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973)); *see also* Appellant's Br. 25. As an initial matter, we note that as a decision from the Claims Court, *Whitney Benefits* is not binding authority on this court. *See K-Con, Inc. v. Sec'y of Army*, 908 F.3d 719, 726 (Fed. Cir. 2018). Additionally, *Whitney Benefits* did not address a situation where the plaintiff had failed to prove just compensation with reasonable certainty. Rather, the trial court in *Whitney Benefits* largely adopted the plaintiffs' just compensation calculation, making modifications as it deemed appropriate based on extensive evidence from both parties regarding valuation of the subject property. 18 Cl. Ct. at 407–16. Similarly, *Almota Farmers* does not obligate a trial court to calculate just compensation. Rather, *Almota Farmers* merely holds that, for just compensation purposes, improvements to leasehold property should be assessed at their fair market value in place on the leasehold property over their useful life, without regard to the remaining term of the lease. 409 U.S. at 473. Nothing in *Almota Farmers* suggests that the plaintiff did not present sufficient evidence to allow the trial court to determine just compensation with reasonable certainty.

GIP's reliance on *Otay Mesa* for the same proposition is similarly unavailing. In *Otay Mesa*, we affirmed the Court

of Federal Claims' independent formulation of a just compensation award when it "was confronted with conflicting evidence and relatively extreme valuations" from the plaintiff and the Government. 779 F.3d at 1326. "We detect[ed] nothing inappropriate with the Court of Federal Claims looking at the evidence as a whole and using its own methodology to calculate a damages award." *Id.* We further noted "that it is both correct and important for a trial court to use its flexibility to tailor a fair and reasonable result *based on the evidence it credits or rejects*." *Id.* (emphasis added) (citing *Precision Pine*, 596 F.3d at 832–33). GIP correctly notes that, in endorsing the trial court's use of its own methodology to determine just compensation, we stated: "the [trial] court had few options in determining a just compensation award other than creating its own valuation." *Id.* But we did not hold that the trial court *must* fashion its own award; rather, we held that it *may* do so. Moreover, the *Otay Mesa* trial court had sufficient record evidence to fashion an award that was "within the range of credible testimony" and "reasonable on the evidence." *Id.* at 1327. Contrary to GIP's suggestion, *Otay Mesa* did not hold that a trial court must fashion its own just compensation award when not presented with sufficient evidence to do so with reasonable certainty.

Consistent with these principles, the Court of Federal Claims in this case acknowledged that it "may award damages, even if [it] does not fully credit [a] party's methodology." *Decision*, 138 Fed. Cl. at 100 (quoting *Precision Pine*, 596 F.3d at 833). It found, however, that it was "not given sufficient reliable proof of what a willing buyer would have paid for the scrap and kish" to independently determine a damages award. *Id.* On this record, the trial court did not err.

The trial court found Mr. Gleason's calculations unreliable due to his reliance on what it deemed ill-founded assumptions to calculate avoided costs and his use of an inflated June 2008 sales price to calculate revenues for

material sold later. We cannot say that the Court of Federal Claims erred in these findings. On this record, a reasonable fact finder may well have been able to approximate the revenues from sales of kish and scrap using a more accurate methodology not presented by Mr. Gleason. But there is little in the record to allow any calculation with reasonable certainty of GIP's avoided costs, a critical component of the just compensation calculation under both a fair market value theory and a lost profits theory.

The only evidence GIP offered to prove just compensation was Mr. Gleason's testimony regarding his calculations based on the non-finalized Watkins agreement. The record also contained evidence of the EPA contractors' recovery costs. It was not unreasonable for the trial court to conclude that neither provided sufficient evidence to calculate just compensation with reasonable certainty.

The trial court reasonably found that certain assumptions underlying Mr. Gleason's avoided costs calculations rendered them unreliable. By crediting the oral addendum to the Watkins agreement, Mr. Gleason assumed Watkins would willingly provide GIP with free labor to recover any material from the piles which GIP could not sell for a profit. The trial court did not err in finding this assumption unreasonable. Mr. Gleason also assumed that Watkins would process the same amount of material at the same capacity as the EPA contractors regardless of market prices. Mr. Gleason thus essentially discarded the provision allowing Watkins to walk away if the agreement became unprofitable, thereby shifting all the risk of a drop in prices to Watkins while assuming Watkins would complete the contract. Trial Tr. 1247:14–1248:18, 1330:7–18. The trial court did not err in finding this second assumption unreasonable.

Further undermining Mr. Gleason's avoided costs calculations, the evidence does not support the notion that Watkins had the same capacity to process material as the EPA contractors. Watkins thought it would take at least ten years to process the piles, while the EPA contractors processed half the piles in approximately four years. Trial Tr. 384:8–13, 545:3–18; J.A. 3094 ¶ 16. And if Watkins processed the minimum tonnage required under the Watkins agreement, it would take Watkins around forty years to process the same amount of material that the EPA contractors processed in approximately four years. Trial Tr. 1312:1–14. Mr. Gleason acknowledged that if it took Watkins longer to process the piles, there would be a longer period of discounting for his fair market valuation, resulting in reduced value for the same volume of material. *See* Trial Tr. 1353:8–1354:17. Nonetheless, Mr. Gleason assumed that Watkins would follow the same material processing schedule as the EPA contractors, at around a third of their costs. Trial Tr. 1247:14–1248:18, 1258:4–6, 1330:7–18. The trial court did not err in finding this assumption unreasonable.

Mr. Gleason also did not account for additional costs GIP would have incurred had it run its own recovery project, such as those associated with supervising the Watkins operation and loading, marketing, and selling recovered material. Trial Tr. 1257:12–1258:3, 1349:19–1350:16. The trial court did not err in noting this deficiency.

With respect to evidence of the EPA contractors' costs, even GIP concedes that they are not an appropriate proxy to assess GIP's avoided costs. Mr. Gleason testified that the EPA and GIP ran "two totally different operations" on the Eastern Excluded Property with "different activities, different goals, [and] objectives," and "that account for different costs." Trial Tr. 1299:20–1300:9. It was therefore reasonable for the trial court to conclude that neither the

Watkins agreement nor the EPA contractors' costs provided competent evidence of GIP's avoided costs.

As the Court of Federal Claims recognized, Mr. Gleason's calculations arbitrarily lowered GIP's avoided costs at every turn. At a minimum, Mr. Gleason's unreliable calculations left open too many variables for the trial court to resolve on its own with reasonable certainty based on the evidence available. Left without competent evidence relating to a critical component of the damages calculation, the trial court did not err in determining that that it could not independently fashion a just compensation award. We therefore affirm the trial court's award of zero damages for the Government's taking of kish and scrap.

CONCLUSION

We have considered the parties' remaining arguments and do not find them persuasive. For the foregoing reasons, we reverse the Court of Federal Claims' decision that GIP had a cognizable property interest in the slag recovered by the EPA, vacate the trial court's award of just compensation for 92,500 cubic yards of slag, and affirm the trial court's award of zero just compensation for kish and scrap.

AFFIRMED-IN-PART, REVERSED-IN-PART, AND VACATED-IN-PART

COSTS

No costs.

United States Court of Appeals for the Federal Circuit

GADSDEN INDUSTRIAL PARK, LLC,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Cross-Appellant

2018-2132, 2018-2147

Appeals from the United States Court of Federal Claims in No. 1:10-cv-00757-EGB, Senior Judge Eric G. Bruggink.

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

AFFIRMED-IN-PART, REVERSED-IN-PART, AND VACATED-IN-PART

ENTERED BY ORDER OF THE COURT

April 22, 2020

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

APPENDIX B

In the United States Court of Federal Claims

No. 10-757L
(Filed: May 18, 2018)

* *

GADSDEN INDUSTRIAL PARK, LLC,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Takings Clause; inverse condemnation; U.S. Const. amend. V; cognizable property interest; just compensation.

* *

Kent E. Baldauf, Jr., Pittsburgh, PA, with whom were *Bryan P. Clark, Anthony W. Brooks,* and *Edward Levicoff* for plaintiff.

Eric John Singley, United States Department of Justice, Civil Division, Commercial Litigation Branch, Washington, DC, with whom were *Kenneth M. Dintzer* and *Margaret J. Jantzen* for defendant.

OPINION

BRUGGINK, *Judge*.

This is a takings claim brought by Gadsden Industrial Park, LLC. Plaintiff asserts that the Environmental Protection Agency ("EPA") took kish[1], slag, and scrap belonging to it. Plaintiff alleges that it purchased the materials at a bankruptcy auction from a defunct steel mill and that EPA either used the materials itself or permitted its contractors to remove them despite GIP's ownership. Trial was conducted in Birmingham, Alabama, from July 25 through 28, 2017. We hold that EPA's actions constituted a compensable

[1] Kish is a byproduct of the steel-making process. We defer a more particularized definition for now, as the meaning is disputed between the parties.

taking under the Fifth Amendment Takings Clause, although we find that plaintiff's proof of the compensation to which it is entitled fails in most respects.

BACKGROUND

The personal property in which plaintiff claims an interest is kish, slag, and scrap located on a 761-acre site in Gadsden, Alabama. The site was used for many years as a steel mill, most recently by Gulf States Steel, which went into bankruptcy in 1999, leaving all personal and real property at the site to be disposed of by the Trustee in Bankruptcy.

A north-south road transects the property. To the west side of this road, Gulf States Steel housed its steel-making operation, including a coke plant, blast furnace, and basic oxygen furnace, among other equipment. To the east side of this road ("Eastern Excluded Property"), there were two settlement lagoons, landfills, and two large areas where Gulf States Steel deposited materials generated by steel-making, along with other discarded materials. The parties referred to these areas where Gulf States Steel deposited steel-making byproducts, scrap, and trash as the north and south piles.

When Gulf States Steel operated the mill, it contracted with Heckett, a metal recovery company, to recover reusable or saleable materials from the Eastern Excluded Property. Heckett screened material dumped on the Eastern Excluded Property and returned recovered metals to Gulf States Steel to recycle into its steel-making process or to sell. Heckett's operation could not keep pace with Gulf States Steel's steel-making, however. Thus, a stockpile of materials accumulated primarily on the Eastern Excluded Property. There were two piles of stockpiled material. Each occupied more than ten acres and contained an estimated total of three to four million cubic yards of material. Each was more than eighty feet high.

Gulf States Steel filed a Chapter 11 bankruptcy petition in 1999 that was converted to Chapter 7 in 2000. It ceased operations in 2000. Heckett's metal recovery ceased at the same time. Another metal recovery project occurred on the property during the course of the bankruptcy proceeding, however. Ableco Finance LLP ("Ableco") enforced its senior security interests and liens and received the necessary authorization to attempt to collect amounts Gulf States Steel owed it. Ableco held "a first priority and perfected lien on the kish iron" and chose to contract with Regional Recycling in November 2001 "to recover and remove kish iron and other ferrous materials from the slag heaps at the Gulf States Steel facility on a 'constant and continuing basis[.]'" Letter from Jeffrey Hermann, Ableco's Counsel, to Carrie Casey, GIP (Jan. 31, 2003), Pl.'s Ex. 15 at 3.

When Gulf States Steel filed its bankruptcy petition, a group of former Gulf States Steel employees worked to secure the plant and catalogue assets. A Gulf States Steel bondholder formed the Gulf States Reorganization Group to purchase some of the assets in order to restart part of the plant. An entity named DoveBid conducted a first auction, selling the blast furnace, railroad tracks, cranes, and cold finishing mill. The remaining assets were catalogued, including those that the Gulf States Reorganization Group wanted to buy. Thereafter, the bankruptcy trustee, James Henderson, filed a motion for an order to establish bidding procedures for the sale of the remaining Gulf States Steel assets in July 2002 ("Bidding Motion"). Two instruments described the property to be sold. The Bidding Motion first generally described the assets:

> Tangible property, including real, personal and mixed property, all situated at or adjacent to the site where the debtor [Gulf States Steel] formerly conducted its manufacturing operations, consisting of approximately 600 acres of real property and the improvements thereon, easement rights appurtenant thereto, inventory and equipment. The property that is the subject [of] this sale is generally described in Exhibit A hereto.

Bidding Motion, Joint Ex. 1 at 1.

Exhibit A to the Bidding Motion was prepared by Gulf States Reorganization Group. It included a general description providing that both real and personal property would be auctioned. The real property included the Eastern Excluded Property. The personal property for sale included "[a]ll materials, whether raw minerals or by-products, situated within the boundaries of the real property being sold, including kish and scrap." *Id.* at 6. The Bidding Motion explained that Gulf States Reorganization Group had offered to purchase a list of assets detailed in an asset purchase agreement, Exhibit 1 to which included units that the group proposed to purchase:

> ATTACHMENT 5 – INVENTORY
>
> BY PRODUCTS OF MANUFACTURING INCLUDING BUT NOT LIMITED TO KISH AND MISCELLANEOUS OTHER MATERIALS AND ASSORTED SCRAP.

Id. at 32.

The bankruptcy trustee did not sell the assets to Gulf States Reorganization Group because the presence of other bidders, including Don Casey, required Mr. Henderson to open bidding to the public. Mr. Casey is the proprietor of Casey Equipment, a family-owned business based in Pittsburgh, Pennsylvania, since 1961. Casey Equipment is in the business of buying and

selling steel mill equipment and had worked with Gulf States Steel prior to its bankruptcy. Mr. Casey, on behalf of Casey Equipment, participated in the first bankruptcy auction. He became aware that Gulf States Reorganization Group was interested in purchasing the remaining assets in the second auction and inquired into partnering with the group. Ultimately, Mr. Casey determined that his best option was to bid on the assets independently. To participate in the second auction, Mr. Casey formed plaintiff Gadsden Industrial Park, LLC ("GIP"). GIP was a bidder in the second auction. Carrie Casey, Mr. Casey's daughter who worked for Casey Equipment until her retirement in 2016, represented GIP in the second auction process.

Attached to the Bidding Motion for the second auction was the asset purchase agreement and the asset list drafted by Gulf States Reorganization Group and set out above. GIP did not want to purchase all of those assets. GIP thus requested a bidding procedure modification to permit competing bidders to bid on a more limited set of assets. The bankruptcy court granted the request. During the bidding process, on September 19, 2002, Mr. Casey emailed Ms. Casey, "[W]e want to buy the rights to mine the slag piles[.] [D]on't let me forget[.]" Pl.'s Ex. 5.

GIP submitted an all-cash bid of $6.3 million for most, but not all, of the remaining estate assets. The bankruptcy court found that GIP offered the highest and best bid and directed Mr. Henderson to close the sale to GIP. Mr. Henderson and GIP executed an asset purchase agreement on September 30, 2002, which was consummated on December 3, 2002. The trustee reported the sale on December 13, 2002.

GIP purchased both real property and personalty. The Trustee's Bill of Sale and the Trustee in Bankruptcy Deed describe the real property that GIP purchased as more than 400 acres of land and the buildings on them, but it was not the entire real property estate. GIP purposely omitted approximately 200 acres, including the Eastern Excluded Property, although, as indicated below, it purchased personal property present on the excluded acreage. It did this in order to avoid potential environmental responsibility.

The personal property GIP purchased is described in part in the Trustee's Bill of Sale, which included Exhibit A, the Bidding Motion, with its general description of personal property: "[a]ll materials, whether raw minerals or by-products, situated within the boundaries of the real property being sold, including kish and scrap." Joint Ex. 19 at 67. Exhibit A, the list of property units sold, included "Attachment 5 – Inventory:"

> BY PRODUCTS OF MANUFACTURING INCLUDING BUT NOT LIMITED TO KISH AND MISCELLANEOUS OTHER MATERIALS AND ASSORTED SCRAP.

Id. at 117. This material had accumulated on the land that GIP did not buy.

Exhibit B to the Trustee in Bankruptcy Deed not only carved out the eastern portion of the site, but it also excluded certain personal property ("Exclusion List"):

> 1. With reference to the property identified in "ATTACHMENT 5 – INVENTORY," Purchaser excludes:
>
> A. All miscellaneous other materials.
>
> B. All by-products of production other than kish and 420,000 cubic yards of slag which are located on the Excluded Real Property as is described on Exhibit B to the deed from Seller to Purchaser of even date herewith, together with a reasonable period of time to remove such items.

Id. at 120.

Ms. Casey wrote the Exclusion List. She testified that the Exclusion List was the only part of the bankruptcy sale contract that GIP had participated in writing and that she "cut and pasted" terms in the Exclusion List. Trial Transcript ("Tr.") at 105. Ms. Casey did not discuss the reasonable period of time language with the bankruptcy trustee. She added the reasonable period of time language because she was in the habit of including such a term in contracts she was involved in negotiating for Casey Equipment. She did not know how long GIP would require to retrieve the materials it bought and thus added language that she believed would secure GIP's right to access the Eastern Excluded Property to retrieve the materials.

Following the bankruptcy sale, GIP began work at the site and became aware of Regional Recycling's metal recovery operation on behalf of Ableco. GIP believed that Ableco had recovered and sold materials GIP purchased. Thus, on January 2, 2003, GIP wrote a letter to Ableco informing it that GIP purchased "the kish and scrap metal located at the former Gulf States Steel site." Letter from Carrie Casey, GIP, to Jeffrey Hermann, Ableco's Counsel (Jan. 2, 2003), Pl.'s Ex. 14 at 1. GIP demanded "restitution in an amount equal to the value of the assets sold[.]" *Id.* Ableco responded, contesting any liability to GIP for the materials recovered and sold, explaining that Regional Recycling ran its recovery operation until December 2002 "at which time Ableco terminated the Kish Iron Contract based upon Ableco's understanding

that the Trustee . . . had agreed to transfer to GIP the right to remove kish iron after the date of the Closing . . . ." Letter from Jeffrey Hermann, Ableco's Counsel, to Carrie Casey, GIP (Jan. 31, 2003), Pl.'s Ex. 15 at 3.

Immediately after the bankruptcy sale, GIP found tenants for some of the buildings and dismantled others and found purchasers for some of the steel mill equipment it had purchased. GIP used slag from the Eastern Excluded Property to fill the below-ground-level voids left after the removal of equipment. It also sold additional slag. In total, Mr. Casey estimated that GIP used or sold approximately 15,000 cubic yards of slag, which he estimated was ten percent of the slag on the Eastern Excluded Property.

In 2004 and 2005, GIP brought Watkins Metals Co., Inc. ("Watkins"), on site to recover metal from a pile of slag located in the northwest corner of the real property that GIP had purchased, not from the piles on the Eastern Excluded Property. Watkins is located in Birmingham, Alabama, and is in the business of metal recovery, scrap processing, and recycling. To recover metal from GIP's real property, Watkins used separating equipment, weighed the recoverable metal, and loaded it into railcars for GIP. During the one-year project, Watkins recovered metal pieces ranging from six inches to four feet in size. Watkins received $35 per ton of metals retrieved and loaded for its work recovering the metal, but GIP retained ownership of the metals. GIP later contracted with Watkins to complete another recovery project near the middle of GIP's property from which Watkins recovered items such as steel beams and metal mixed in with slag.

After a request from the Alabama Department of Environmental Management and pursuant to an Action Memorandum relating to potential Superfund sites, EPA began its first removal action on the site in 2003. EPA investigated a claim that contaminants were leaching out of the piles and from nearby lagoons. Barbara Scott, EPA's on-scene coordinator from 2003 to 2006, determined that the piles as well as the lagoons were causing environmental problems. Specifically, EPA was concerned that environmental contaminants associated with the piles and lagoons, such as oil and leachate, were migrating from the Eastern Excluded Property. Although EPA did endeavor to remove as much oil as possible, Ms. Scott determined that simply removing the oil from the lagoons would not be a long-term solution, because the equipment to maintain the lagoons had deteriorated, and solids within the lagoons also posed a problem. The EPA's on-scene coordinator for 2007 and 2008, Randy Nattis, and the remedial project manager, Jordan Garrard, elected to fill one of the lagoons with on-site slag as a way to reduce contaminated overflow.

In 2006, MultiServ, a mill service company that is a division of the Harsco Corporation ("Harsco"), contacted the EPA Remedial Project Manager, Amy McLaughlin, regarding recovering materials from the piles on the Eastern Excluded Property. She had reviewed GIP's bankruptcy sale contract and informed MultiServ: "It looks like the Gadsden Industrial Park has the mining rights for the slag at the Gulf States Steel Property. If you are interested in reclaiming the slag, I suggest contacting Don Casey." Email from Amy McLaughlin, Remedial Project Manager, EPA, to Ken Orndoff, Business Development Manager, MultiServ (Feb. 13, 2006), Pl.'s Ex. 25. MultiServ subsequently made a proposal to GIP to process the piles, but the two parties did not move beyond initial discussions.

In 2007, EPA inquired into ownership of the piles and materials stockpiled on the Eastern Excluded Property in connection with its efforts to address environmental concerns. This began a series of communications between EPA and GIP that fueled confusion regarding what GIP had purchased from the bankruptcy estate. EPA sent GIP a request for information through Mike Stevenson, counsel for EPA, under section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act[2] ("CERCLA"). Pl.'s Ex. 37. The request noted that, "GIP purchased what is now operated as the Gadsden Industrial Park as well as two large slag piles located on the remaining Gulf States Steel property and that are adjacent to the waste lagoons and Black Creek." *Id.* at 1. EPA asked if Gadsden had "conducted or arranged for any environmental cleanup or management of hazardous materials" and whether GIP had taken action to stop or prevent "any continuing releases of hazardous substances." *Id.* at 6.

Thereafter, a series of emails and meetings follow, some of which we set out herein. Initially, Mr. Casey responded by email to Mike Stephenson, EPA counsel, on January 29, 2008, explaining, "In your cover letter it is mentioned that GIP bought two large slag piles adjacent to the lagoon. My understanding is Gadsden does not own the two remaining slag piles but does have the right to mine them." Pl.'s Ex. 39. He provided details regarding various aspects of GIP's operation on the site and closed by writing,

> It is to GIP's best interest that the GIP property and the surrounding estate owned properties be remediated. GIP will continue to remediate its property and has already volunteered to work with the EPA to discuss ways to more efficiently clean up the coke plant area. Outside of the coke plant area, GIP will

[2] 42 U.S.C. §§ 9601–9675 (2012).

> continue to help the clean up of the estate property by continuing to reduce the size of the two slag plies. In addition GIP is now studying ways to reduce the very large and very ugly Kish piles[.]

Id. at 3.

On February 4, 2008, Mr. Casey emailed Mr. Stephenson again to discuss alleged environmental concerns on the Eastern Excluded Property. He wrote:

> The two big piles are kish or furnace dust which is ferrous oxide and is not basic[.] Slag piles are basic with high PH[.] I am not sure what slag piles remain or where they are located[.] We bought the right to mine 400[,]000 cu ft which we may have already used. We used a lot for filling the PM pits and other pits around the park. We let the city of Gadsden take truck loads. We sold some and gave away truck loads to churches for use on their parking lots.

Pl.'s Ex 41.

Mr. Casey's communications with GIP's attorneys at this time recited that GIP was "presently negotiating a contract for the sale of the kish which is the name [GIP] uses for the 'red dirt' in the landfill and which is ferrous oxide or rust." Pl.'s Ex. 45. Mr. Casey noted that "the purchase agreement is clear that GIP did not buy anything else in the landfill[,] none of the other GSS by products." *Id.*

Thereafter Mr. Stevenson requested that Mr. Casey meet with EPA to discuss leachate that was accumulating in a collection ditch bordering the north and south piles. During a March 4, 2008 meeting, Mr. Casey informed EPA that GIP had purchased kish and 420,000 cubic yards of slag and had a reasonable amount of time to remove it. GIP communicated during the meeting that it was planning to begin recovering metal from the Eastern Excluded Property in the near future. Mr. Nattis and Mr. Garrard understood through this meeting that kish was ferrous oxide, which Mr. Casey referred to as red dirt. In his contemporaneous summary of the meeting, Mr. Casey wrote that GIP might be able to work with EPA if a reasonable amount of time is defined as when "the EPA is ready to go to work on the piles." Pl.'s Ex. 46. This would give GIP time to remove some Kish and if possibly [sic] some more slag helping to reduce the sizes of the piles, a win win for both parties[.]" *Id.*

Mr. Casey followed up with EPA via email on March 19, 2008, reminding EPA of GIP's plans to start removing kish in the near future. Pl.'s Ex. 51 at 2. In that email, he wrote, "I believe I already answered you concerning the Kish or red dirt as we call it[.] GIP has not removed any Kish or red dirt to date. . . . GIP plans to start removal of Kish in the very near future." *Id.* Mr. Casey then provided an explanation regarding GIP's use of slag by separating slag into "Arc Furnace Slag" and "Blast Furnace Slag," writing that the former has little market value and GIP used it to fill pits or gave it away to the city or churches, whereas the latter has market value and GIP had been selling it. *Id.* Mr. Casey explained that "no records are kept" of how much slag was taken. *Id.* These communications are silent regarding scrap.

Further dissection of the communications between GIP and EPA concerning plaintiff's ownership rights is unnecessary. They can be summarized as a desultory and imprecise conversation, the substance of which was that GIP claimed the right to extract kish and slag, and that EPA persisted in demanding to know of plaintiff's intentions and plans. Given Mr. Casey's imprecise characterizations of what GIP bought, we are not surprised that he did not itemize scrap. The communications are best seen in the context of EPA's concern about environmental issues, and GIP's lack of precision about title matters is hardly surprising. The issue of what GIP owned is one of law, which we explore below.

At the same time that Mr. Casey was communicating with EPA regarding what GIP owned and GIP's own remediation efforts, GIP was making plans to recover materials from the Eastern Excluded Property and sell them. GIP negotiated with Metawise Group to purchase C fines, which are small pieces of ferrous material less than one inch in size, for $4.50 per ton after loading costs. In 2007, GIP reached out to Watkins to discuss whether it would be interested in recovering the materials GIP believed to be in the piles on the Eastern Excluded Property. It proposed the same $35 per ton agreement as GIP and Watkins had on the previous recovery project. *See* Pl.'s Ex. 55. The projects that Watkins had completed on the northwest corner of GIP's property had been smaller in scale, but Danny Stevens, Watkins' owner, was familiar with the piles on the Eastern Excluded Property. He agreed with GIP that recyclable material could be extracted.

Mr. Stevens rejected the $35 per ton proposal, however. Instead, Mr. Stevens proposed to recover metal at Watkins' own expense and pay GIP a commission after the sale of recovered materials. Mr. Stevens explained that reclaiming materials from the piles on the Eastern Excluded Property would

be "a lot more labor intensive and is not as easy to get the iron out as that northwest corner was." Tr. 373. Mr. Stevens wrote in his letter to GIP that Watkins would list the products it hoped to recover and develop a pricing formula to avoid confusion regarding the amount of commission for each material. Pl.'s Ex. 55.

GIP did not accept Watkins' proposal, so Watkins proposed an alternative in which GIP would pay Watkins a fee per ton of recovered metal with GIP retaining ownership of the metal along with responsibility for its sale. This proposal was memorialized in a draft "Agreement to Process Kish." Pl.'s Ex. 71. The agreement recited, "This agreement details the processing of Kish, more commonly known as Red Dirt which consists of various size metals. The Kish is located on the landfill East of the Park on property owned by the defunct Gulf States Steel." *Id.* Watkins agreed to provide the equipment and labor to "separate and screen the Kish in order for [GIP] to recover and sell the metals in the Kish." *Id.* The draft identified six categories of recoverable materials: four metal sizes ranging from "less than one inch (fines)" to metals greater than three feet along with two categories of scrap. *Id.*

The proposal involved GIP paying Watkins seventy dollars per gross ton to screen, separate, and load metals that were more than one inch in size.[3] Watkins also proposed to screen, separate, move, and pile the smaller fines at no cost to GIP. Watkins would obtain an option to purchase separated piles of fines for ten dollars per ton. Watkins also would obtain the exclusive right to recover materials from the piles "so long as Watkins reclaims 500 gross tons of material each month." *Id.* The proposal would permit Watkins to withdraw after a two-week written notice if the quantity of material available for processing did not allow for profitable operations.

Mr. Stevens anticipated being able to begin within a month after an agreement was reached. At trial he described how Watkins would have performed the work. The basic process for metal recovery was to excavate the material, pull out the larger pieces of visible metal, and run the smaller materials over a magnetized conveyor belt that would separate and screen out

[3] Plaintiff's damages expert, Mark Gleason, incorporated into his analysis an oral revision to the agreement that Mr. Casey and Mr. Stevens communicated to him in his preparation: GIP would not have paid Watkins for materials that GIP ultimately sold for less than $70 per ton. This term does not appear in the draft agreement, and it also was not referenced in Mr. Casey's or Mr. Steven's testimony. We find that the oral provision was not proven.

the metal. The leftover nonmetallic material would be re-piled on the Eastern Excluded Property. Watkins had bulldozers, magnetic cranes, screens, magnetic conveyors, and trucks. It had five or six local employees. If it was necessary to increase the rate of processing the piles, Watkins could bring in a second set of equipment or purchase additional equipment. Mr. Stevens expected the job to take ten years or more.

As GIP and Watkins negotiated their metal recovery agreement, EPA had tasked an on-site contractor, CMC Inc., with addressing environmental issues, including how to stop calcium in the slag from precipitating out as leachate. EPA's initial plan was to remove slag from the site. EPA also considered other alternatives to a massive removal of slag. It considered capping the piles as they stood and simultaneously improving the surrounding drainage ditches. Mr. Casey testified that GIP had offered to improve these same ditches at no cost to the government. Another alternative, and the one EPA ultimately adopted, was to reduce the size of the piles by removing saleable metal, and then capping what was left of the piles. In order to pursue the latter alternative, EPA sought bids to perform an investigation into the feasibility of recovering saleable materials from the piles to offset the cost of CMC's remediation work. There was no testimony that EPA employees believed the materials GIP purchased constituted an environmental hazard. By this time, EPA officials understood that the metal in the piles had value.

In April 2008, representatives from MultiServ toured the site. Afterwards Mr. Nattis informed members of the EPA team via email in May 2008 that he had "a firm very interested in taking ALL the Slag / Kish from the site for reuse, but [that] is [contingent] on taking all of it, including the before mentioned Kish." Pl.'s Ex. 65 at 1. Mr. Nattis noted in this email, however, that "GIP claims they own the right to 'some' of the material (Kish) within the pile." *Id.*

As a result of EPA's exploration of a metal recovery operation of its own, Watkins ultimately declined to enter an agreement with GIP. Mr. Stevens met with EPA's on-site coordinator, Mr. Nattis, and through that meeting understood that EPA was planning to recover the metals in the piles by hiring its own recycling contractor. Mr. Stevens recalled the meeting occurring in May or June of 2008. Mr. Nattis' records indicate that he interacted with Mr. Stevens on June 4, 2008. As a result of these communications with EPA, Mr. Stevens believed that, as of June 4, GIP would not be permitted to perform its own recovery operation. GIP and Watkins thus did not consummate the draft agreement, and Watkins never began recovery

of metals from the piles. Watkins was also among the contractors who submitted a bid to EPA to conduct EPA's recovery operation.

By late June 2008, GIP knew from Mr. Stevens that EPA planned to hire a recycling contractor and that Watkins did not believe GIP had the authority to conduct its own recovery operation. Mr. Casey emailed counsel for EPA on June 29, 2008, stating that GIP had become aware that EPA intended to recover the metal but that GIP would be contracting with Watkins to extract the same materials. Mr. Casey again asserted GIP's right to kish and requested a meeting with EPA to resolve "any differences between the EPA and GIP concerning the Kish." Pl.'s Ex. 82 at 5. Mr. Greg Luetscher, counsel for EPA, responded via email on June 30, 2008, proposing a conference call at which the parties would discuss "the nature, extent, and derivation of GIP's rights to the kish" and "administrative mechanisms under which persons other than EPA might typically perform removal work at a Superfund site." *Id.* at 4. After Mr. Luetscher's email, Mr. Casey met with Mr. Nattis in October 2008, and learned from him that EPA did not want GIP to leave hazardous materials behind after extracting valuable materials. The only hazardous materials, of course, were associated with the same slag that EPA proposed to leave on site.

EPA ultimately chose MultiServ to complete the project. On October 21, 2008, EPA's contractor CMC entered a "Site Investigation Agreement" with MultiServ, which provided for a pilot study of the Eastern Excluded Property to determine whether a metal recovery operation was economically feasible. The pilot study took place in 2009. During the site investigation, EPA sent a second Request for Information to GIP in April 2009, inquiring into what GIP's interest was in the landfills. GIP's response claimed that it had rights to kish and slag, referencing the bankruptcy sale contract.

Based on its pilot recovery test, MultiServ determined that it was economically feasible to conduct a full scale metal recovery operation. It thereafter entered into a "Slag Processing Agreement" with CMC in October 2009, which gave MultiServ the right to mine the north and south piles to recover metal and other valuable material. MultiServ also had the authority to market and sell what it recovered. The remaining materials, mainly slag, would then be capped by CMC. At the time, MultiServ issued a press release stating that it believed a $50 million recovery was possible.

Under the agreement, MultiServ would pay CMC fifteen percent of the gross proceeds MultiServ received from the sale of the recovered materials for the first twelve calendar months of the agreement and twenty percent of the gross proceeds in each calendar month thereafter. That payment was expected

to relieve EPA from paying for CMC's remediation activities. CMC determined the percentage based on the total estimated revenue from MultiServ's metal recovery and its estimated cost to complete the capping process. MultiServ would retain the balance of the proceeds from the sale of any materials.

MultiServ's metal recovery process was basically the same as that which Watkins anticipated using, although MultiServ apparently began with more equipment and employees. Larger pieces of metal, such as ingots, slabs, and I-beams were removed before the other material was processed to capture smaller pieces of metal. MultiServ sold the ferrous materials on a freight-on-board basis at Gadsden. To complete the project, MultiServ built a maintenance facility and a large processing plant near the north pile. MultiServ had approximately twenty employees working on site when processing the north pile. When work expanded to the south pile in late 2011, MultiServ added four hourly equipment operators. It ran two shifts, totaling sixteen hours of production per day, five days per week. MultiServ processed 450 tons of material per hour at the north pile. Michael Brady, Harsco's site manager, testified that such a processing plant would cost approximately $150,000 per month to rent. MultiServ used a second, lower capacity processing plant at the south pile.

MultiServ had help from CMC, which extracted mixed material and placed it in a location from which it could be loaded for processing. CMC also moved nonmetallic materials out of the processing zone for storage on site. Mr. Brady estimated that CMC performed approximately forty percent of the work.

MultiServ sold recovered materials beginning in October 2009. Throughout the course of the project, it processed and sold 245,890 tons of material, grossing more than $13.5 million of metal-bearing materials. Out of the $13.5 million in gross sales, MultiServ paid CMC approximately $2.4 million. According to MultiServ's sales report, it recovered the following categories of materials: 1" x 0" slag; 3" x 1" slag; A scrap; B scrap; three types of C fines; C scrap; ingots; manganese scrap; miscellaneous; oversized scrap; oversized skulls; plate; skulls; slabs; slag "overbur:" small pit scrap; small skulls; steel fines; steel pit scrap; and wire rope.

During the course of MultiServ's work, GIP did not attempt its own recovery operation. Instead, GIP purchased slag from MultiServ for five to six dollars per ton, or approximately twelve dollars per cubic yard. The total volume of slag GIP purchased from MultiServ is not set out in the record.

MultiServ and CMC continued the recovery project through January 2013, when recovery from saleable materials became insufficient to fund CMC's remediation work. MultiServ project managers estimated that it had processed approximately seventy percent of the north pile and twenty percent of the south pile by the time it ceased working. Peter Mazzarella, who is the North American sales manager for Harsco Metals & Minerals and who joined Harsco in 2008, estimated that fifty percent of the piles remained. Neither CMC nor any other EPA contractor ever capped the piles.

DISCUSSION

After reviewing the bankruptcy sale contract, we find that GIP purchased kish, assorted scrap, and 420,000 cubic yards of slag at the bankruptcy auction. GIP successfully proved that each material was present on the Eastern Excluded Property and that it was used or sold by EPA. We hold that EPA's actions constituted a compensable taking under the Fifth Amendment Takings Clause. We find, however, that plaintiff's proof of the compensation to which it is entitled fails regarding kish and assorted scrap. We thus award plaintiff compensation for EPA's taking of 92,500 cubic yards of slag.

I. Was There A Taking?

GIP claims that the government took from it kish, 92,500 cubic yards of slag, and assorted scrap, all of which it claims to have purchased from the Trustee in Bankruptcy. The complaint and GIP's pre-trial materials assert that the only materials as to which a taking is claimed were those actually used by EPA and sold by MultiServ. In other words, GIP is not claiming a taking of all materials in the piles as of a particular date, only those removed by the government.

Preliminarily, the government argues that plaintiff did not include assorted scrap in its taking claim until the post-trial briefing stage and thus any claim for just compensation for scrap is not properly before the court. We disagree. GIP pled that EPA took plaintiff's property purchased at the bankruptcy sale, a claim which fairly encompasses kish, slag, and assorted scrap. The original complaint alleges the government took its property on the Eastern Excluded Property, and specifically mentions kish. Plaintiff's amended complaint states that it purchased "kish and other materials." Pl.'s Am. Compl. ¶ 12. Even if a claim for assorted scrap had not been pled specifically before trial, the issue was tried by consent. Rule of United States Court of Federal Claims 15(b)(2). Both parties' witnesses testified to the differences between kish and scrap, whether GIP owned scrap, and whether EPA took kish, scrap, or both. *See, e.g.*, Tr. 86–88 (C. Casey), 103 (C. Casey),

263–70 (D. Casey), 494–97 (Clayman), 618–20 (Garrard), 757–58 (Nattis). The government did not object to that testimony at trial.

With respect to slag, as of trial, plaintiff only sought compensation for 92,500 cubic yards of slag that EPA used to fill the lagoon on the Eastern Excluded Property, and the report of its compensation expert was limited in that respect. In its post-trial brief, plaintiff adds a separate calculation for slag it expects to require in the future (113,000 cubic yards), which counsel estimates to be worth between $1.3 and $6.7 million. Since plaintiff's additional damages calculation for slag was introduced post-trial and was not tried by consent, we decline to consider it. As we explain below, moreover, the post-trial claim for additional slag raises a more general problem about how GIP approached its claim.

There is no question that the materials at issue—kish, slag, and assorted scrap—may constitute personal property for purposes of a takings claim. *Horne v. Department of Agriculture*, 135 S. Ct. 2419, 2425–28 (U.S. 2015). To decide whether the government owes GIP compensation, we must determine whether GIP had a cognizable property interest in the materials the government removed.

The government contends that GIP purchased a non-exclusive right for a limited period of time to retrieve only kish, which it characterizes as a worthless, non-ferrous material, along with 420,000 cubic yards of slag. It asserts that the valuable ferrous materials EPA's contractor removed do not constitute kish, that GIP excluded scrap from the materials it purchased, and that any right GIP had to retrieve the limited materials it did buy had expired by the time MultiServ performed its work. Plaintiff responds that kish is a blast furnace byproduct that does have valuable ferrous content and that it did not exclude scrap from its purchase. Finally, it contends that its right to retrieve the materials had not expired when MultiServ was on site. To determine what GIP purchased, we return to the bankruptcy sale contract.

The relevant language is found in the Trustee's Bill of Sale Exhibit A clause "Attachment 5 – Inventory:" "By products of manufacturing including but not limited to kish and miscellaneous other materials and assorted scrap." Joint Ex. 19 at 117. This provision is then modified by the Exclusion List written by Ms. Casey:

> 1. With reference to the property identified in "ATTACHMENT 5 – INVENTORY," Purchaser excludes:
>
> A. All miscellaneous other materials.
>
> B. All by-products of production other than kish and 420,000

> cubic yards of slag which are located on the Excluded Real Property as is described on Exhibit B to the deed from Seller to Purchaser of even date herewith, together with a reasonable period of time to remove such items.

Id. at 120.

The asset purchase agreement attached to the Trustee's Bill of Sale states that it "shall be governed by and construed in accordance with the laws of the State of Alabama[.]" *Id.* at 75. Alabama applies the general rule of contract construction that "the intention of the parties controls in construing a written contract, and the intention of the parties is to be derived from the contract itself, where the language is plain and unambiguous." *Loerch v. Nat'l Bank of Commerce of Birmingham*, 624 So. 2d 552, 553 (Ala. 1993); *see also Homes of Legend, Inc. v. McCollough*, 776 So. 2d 741, 746 (Ala. 2000) ("[T]he intent of the contracting parties is discerned from the whole of the contract."). Moreover, "if there exists inconsistency between two clauses of a contract which cannot be reconciled, the inconsistency must be resolved in favor of the prior clause, unless an intention to thereafter qualify is plainly expressed." *City of Fairhope v. Town of Daphne*, 208 So. 2d 917, 924 (Ala. 1968).

The government reads Attachment 5 to include a single category of property: byproducts of manufacturing, which include but are not limited to kish, miscellaneous other materials, and assorted scrap. This interpretation reads all the words following "including but not limited to" as types of byproducts. Because GIP excluded "all by-products" except for kish and a portion of slag, defendant concludes that GIP excluded assorted scrap.

GIP reads Attachment 5 to include three categories of property: byproducts of manufacturing, miscellaneous other materials, and assorted scrap. GIP argues that the Exclusion List excluded miscellaneous other materials and narrowed byproducts of manufacturing to only kish and 420,000 cubic yards of slag, but did not affect GIP's purchase of assorted scrap.

The parties agree that the language of Attachment 5 and the Exclusion List unambiguously provides that GIP excluded from its purchase any "miscellaneous other materials." The instruments also provide that GIP purchased only two byproducts of manufacturing: "kish" and "420,000 cubic yards of slag." The remaining term in Attachment 5 is "assorted scrap." The Exclusion List is silent regarding assorted scrap. Given that "assorted scrap" was first listed in Attachment 5 as purchased property, and GIP did not qualify its purchase by placing assorted scrap on the Exclusion List, it follows that GIP purchased "assorted scrap" at the bankruptcy sale. We note as well that

the testimony at trial was that scrap is typically a finished product, something like an I-beam, for example, and not a byproduct intended for discard.

The structure of GIP's Exclusion List also contradicts the government's construction that kish, miscellaneous materials, and assorted scrap are all byproducts of manufacturing. Although miscellaneous other materials is listed after "including but not limited to" in Attachment 5, along with kish and assorted scrap, the Exclusion List does not treat miscellaneous other materials as a byproduct. Instead, miscellaneous other materials is a category called out in its own provision. If all terms following "including but not limited to" were byproducts, then miscellaneous other materials would have been excluded by the second sentence of the Exclusion List. Because miscellaneous other materials was not treated as a byproduct on the Exclusion List, it is not reasonable to lump the term "assorted scrap" from Attachment 5 into byproducts. Thus, at the bankruptcy sale, GIP purchased kish, 420,000 cubic yards of slag, and assorted scrap.

Even though we find that GIP purchased kish, scrap, and slag, important questions remain: what are these materials, do they have any value, and did the government take them from plaintiff?

The bankruptcy sale contract did not define these terms. Moreover, the bankruptcy trustee did not communicate with GIP before, during, or after executing the sale instruments regarding the definition of kish, or the other materials GIP purchased, slag and assorted scrap. Where the meaning of an undefined word or phrase must be ascertained, "the court should simply give the undefined word or phrase the same meaning that a person of ordinary intelligence would give it." *Twin City Fire Ins. Co. v. Alfa Mut. Ins. Co.*, 817 So. 2d 687, 692 (Ala. 2001). Additionally, "[p]arties to a contract will not be imputed with using language that is meaningless or without effect." *Black Diamond Dev., Inc. v. Thompson*, 979 So. 2d 47, 51 (Ala. 2007). Each material can be defined by drawing on the language of the agreement, communications between EPA and GIP after the bankruptcy sale, and testimony from those involved with recovery projects on the Eastern Excluded Property.

The most straightforward term to define is "slag." The language of the bankruptcy sale contract lists slag as a byproduct of manufacturing. Trial testimony from those familiar with steel production defined slag as a non-ferrous material that separates during smelting. *E.g.*, 89–90 (C. Casey), 176–80 (D. Casey), 479–95 (Clayman), 875–76 (Kingham). After being siphoned away, the slag hardens. It consists primarily of calcium oxide and

silicon dioxide, the material that EPA associated with pollution problems on site.

According to the Caseys, assorted scrap is metal of various sizes that may or may not be ferrous, but that can be either recycled into steel manufacturing or sold for other purposes. It is typically finished steel product, like an I-beam, a railroad car, or wire, which has been discarded in a finished form and is thus not a byproduct.

The parties hotly contest the meaning of "kish." The bankruptcy contract describes kish as a byproduct of manufacturing. After GIP's purchase, Mr. Casey characterized kish to EPA representatives as red dirt with fifty percent or more iron content. Similarly, EPA's on-scene coordinator Mr. Nattis testified that through meetings with Mr. Casey he understood kish to be ferrous material with resale value. Mr. Nattis testified that the piles held both what he perceived as kish and scrap metal.

Both Ms. Casey and her father testified to their understanding of kish. Ms. Casey explained that kish is metal siphoned off with slag during steel manufacturing. Mr. Casey differentiated between ESP kish, which is a fine metallic that resembles rust or red dirt, and larger chunks of ferrous material that accumulates in the smelting process and is siphoned off with the slag. He stated that it was his intent at the time of the purchase to purchase all the recyclable metals left in the north and south piles, whether they were what he termed kish or scrap metal.

The Casey's use of the term kish is consistent with both the draft Watkins agreement and the Ableco recovery contract. Prior to the GIP purchase, the Ableco recovery contract with Regional Recycling, denominated a "Kish Iron Contract," provided that Regional Recycling would "recover and remove kish iron and other ferrous materials from the slag heaps." Pl.'s Ex. 15 at 3. The draft "Agreement to Process Kish" between GIP and Watkins defined kish as "more commonly known as Red Dirt which consists of various size metals." Pl.'s Ex. 71. Both of these agreements reflect the understanding that kish is or contains recoverable metal of various sizes.

Mr. Stevens of Watkins testified as someone familiar with the recovery process. He viewed kish as a metal that could be recovered from the slag piles and recycled. He explained that he had heard the term "kish iron" used by Mr. Casey and others in the metal recovery industry and that he took it to be "steel and iron" that could be recovered, regardless of its size. Tr. 377. Mr. Stevens testified that he did not personally use the term "kish," but that his goal was to extract and process metals from the pile, whatever the metal was called.

Similarly, Harsco's sales manager Mr. Mazzarella testified that he understood kish to be the same thing as kish iron, a byproduct of the blast furnace process. Kish, he testified, is a grade of iron, but he had never sold it and did not know if it was in the piles. He explained that MultiServ made no distinction between kish and other recoverable materials. Instead, MultiServ's goal was to extract all metals within the piles. Stevens and Mazzarella thus indicated that, from the perspective of recycling contractors, "kish" referred to a metal byproduct of manufacturing; it was just another metal to be recovered. We note that, consistent with testimony from those familiar with the metal recycling industry, MultiServ referred to iron byproduct on its sales report not as kish but as A scrap, B scrap, C scrap, and fines, depending on the size of the metal recovered.

Both parties also offered expert testimony on the definition of kish. Plaintiff's expert on the meaning of kish within the metal recycling industry was Charles Brown, who had experience in metal recovery and had worked with both Gulf States Steel and Regional Recycling. He testified that kish was a term used in the metal recycling industry. He testified that kish is "iron containing slag." Tr. 1195. He explained that the terms kish, kish iron, and foundry kish were interchangeable as long as the recovered material contained a minimum percentage of iron. Mr. Brown testified that when recovering kish, the recovery might include material that was almost 100% iron, which would be classified as A, B, or C scrap according to its size and iron content (A scrap being the largest and highest in iron content). He explained that the recycling would remove ferrous materials of all sizes, but that kish was essentially a catch-all term for iron mixed with slag.

Moreover, plaintiff's expert on the metal recycling market, Gary Clayman, who is employed by a scrap metal processing company, testified that kish is a metallic byproduct of the blast furnace operation that is generated when skimming byproducts out of the iron ore. He defined it as "iron off of the blast furnace. It comes from an integrated mill that has a blast furnace. There is no other word for this but kish. US Steel calls it kish." Tr. 474. He explained that kish is a chunky material that may be recovered in different sizes and may be sold under names such as A scrap, 3-foot iron, or blast furnace iron.

The only witness on the meaning of kish who testified that it was not a ferrous byproduct of a blast furnace operation was the government's expert, Dr. R. Fruehan. Dr. Fruehan holds a Ph.D. in metallurgical engineering. He served as a scientist for US Steel and has been a professor at Carnegie Mellon

and director of its Center for Iron and Steelmaking Research. Dr. Fruehan defined kish as graphite flakes without iron content or resale value.

We do not doubt Dr. Fruehan's expertise in the craft of steel manufacturing, but his understanding of the meaning of kish was plainly not how the Caseys, persons associated with the bankruptcy, other steel companies or metal recovery companies, and EPA employees used the term. Contracting parties are entitled to reach their own understanding of the meaning of technical terms in an industry. That is plainly what happened here. Although the trustee did not testify as to his understanding of kish, he and those assisting him in obtaining value from the bankrupt estate clearly were offering for sale materials that they understood bidders such as GIP were interested in recycling. There is certainly no evidence offered by the government, which appears as a third party to the agreement, that there was no meeting of the minds. In buying kish from the trustee, GIP purchased material that both parties understood to be a ferrous byproduct of a blast furnace operation in various sizes that has economic value.

The government's final argument regarding GIP's property interest is that, according to the reasonable period of time language in the Exclusion List, GIP only purchased a license to explore the Eastern Excluded Property, which was too indefinite to enforce or had expired by the time EPA used or sold materials on the site. We disagree. The Trustee's Bill of Sale states,

> [The] Trustee does hereby grant, bargain, sell and convey, as is, unto Gadsden Industrial Park, LLC, all right, title and interest which the bankrupt Debtor had on the date of the commencement of the proceedings in bankruptcy on the following property referenced in [the Bidding Motion] and more particularly described [in the asset purchase agreement] less and except those items set forth on an exclusion list, prepared by the purchaser . . . to have and to hold all the right, title and interest in and to said property unto the said Gadsden Industrial Park, LLC, and to its assigns forever.

Joint Ex. 19 at 59 (emphasis omitted). This is not a license. It is an outright sale of personalty, and it is not shared with anyone else.

Admittedly, GIP introduced confusion in the contract when it wrote a provision in the Exclusion List that states,

> All by-products of production other than kish and 420,000 cubic yards of slag which are located on the Excluded Real Property as is described on Exhibit B to the deed from Seller to Purchaser

> of even date herewith, *together with a reasonable period of time to remove such items*.

Joint Ex. 19 at 120 (emphasis added). This is clearly a limitation on what was *not* excluded. As a limitation on the excluded materials it would be useless language. So we can safely presume it is a limitation on plaintiff's right to take possession of what it purchased, which is understandable, as the personalty was located on land GIP did not own. Although the provision is a limitation on GIP's time to remove the materials, we find that GIP's time to remove its materials had not expired by the time EPA used or sold those materials and that the government is not the proper party to determine when GIP's access to the Eastern Excluded Property ended.

First, the government contends that the reasonable period of time language is too indefinite to be enforceable. Defendant cites to cases in which the Supreme Court of Alabama struck down lease extension provisions in coal-mining leases that it determined were too indefinite to be enforceable. *Drummond Co., Inc. v. Walter Industries, Inc.*, 962 So. 2d 753, 758 (Ala. 2006) (lessee under four coal-mining leases brought claims against lessor based on a will-extend clause that the court found too indefinite to enforce); *Linton Coal Co. v. South Central Resources, Inc.*, 590 So. 2d 911, 912 (Ala. 1991) (coal-mining lessee's assignees brought action for specific performance of a lease after royalty arrearage was paid and the court held that the lease term was too indefinite to be ascertained). In those cases both parties to the lease were the parties before the court, disputing the term of the lease. Here, the owner of the underlying real property is not a party and there is no evidence that it has challenged GIP's access to the Eastern Excluded Property. It is therefore unnecessary for this court to inquire into definiteness of the reasonable period of time provision's end date.

Alternatively, the government maintains that GIP's time to enter the Eastern Excluded Property expired either when the bankruptcy estate closed or within six years of GIP's purchase. It argues that, because the agreement that GIP could enter the Eastern Excluded Property to remove its materials was made between the bankruptcy trustee and GIP, when the bankruptcy estate closed, GIP's reasonable period of time ended as well. This is incorrect. The bankruptcy trustee acts as the representative of the estate in the bankruptcy process, which includes sales of property to reduce the estate to money. 11 U.S.C. §§ 541(a), 701-704 (2012). When the bankruptcy estate is closed, any property scheduled but not administered is abandoned to the debtor. *Id.* §§ 554(c), 726(a)(6). Thus, GIP continued to own the materials it had purchased after the close of the bankruptcy proceeding. The proper party to dispute when

GIP's reasonable time ends is the underlying real property owner, who, as noted above, did not limit GIP's access prior to the EPA using or selling materials from the Eastern Excluded Property. Relatedly, the government argues that the six years that GIP owned the materials prior to MultiServ's recovery operation was a reasonable time to remove the materials. This expiration argument is an additional red herring: GIP's reasonable period of time was not constrained by the government's perception, as a stranger to the contract, of when that period ended.

Finally the government suggests that Mr. Casey's confused communications with EPA amounted to abandonment of its property interest. Under Alabama law, "[a] determination whether certain personalty is abandoned stems from a consideration of the nature of the particular property, the intent to abandon, and some external act evidencing this intent." *Milford v. Tennessee River Pulp & Paper Co.*, 355 So. 2d 687, 698-90 (Ala. 1978). Moreover, "ordinarily there exists a presumption that one does not intend to abandon his property," but this presumption does not exist "where the article claimed to have been abandoned is generally considered valueless." *Id.* The government relies on *Milford* as an example of abandonment, but in that case "Milford admit[ted] he considered the coal valueless and that all purchasers had refused future shipments of it." *Id.* GIP, on the other hand, assigned value to the materials at the time of the bankruptcy auction, maintained a right to the materials as evidenced by its correspondence with Ableco, EPA, and Watkins, and attempted to recover those materials.

In sum, we are satisfied that GIP purchased the materials outright and that GIP was within its reasonable period of time to remove its materials when EPA used and sold materials from the Eastern Excluded Property.

Having found that GIP bought kish, 420,000 cubic yards of slag, and assorted scrap, and was within its reasonable period of time to remove those materials at the time of MultiServ's recovery operation, we now turn to "whether the government action at issue amounted to a compensable taking of that property interest." *American Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004). A compensable taking may occur when the government invades or physically appropriates a claimant's property. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014–15 (1992). EPA does not dispute that it did not purchase any of the property at issue but nevertheless used and sold materials from the Eastern Excluded Property.

As for scrap, MultiServ's sales report indicates it sold materials expressly classified as scrap as well as assorted other metals such as plate, skulls, slabs, or ingots that were not byproducts of steel manufacturing but

were metals Gulf States Steel had discarded in the piles. MultiServ's sales report does not list materials sold as "kish," but it does list several materials such as A scrap, B scrap, C scrap, and fines that overlap with the sizes and terms used for kish in trial testimony. Plainly EPA took GIP's scrap and kish.

Regarding slag, GIP purchased 420,000 cubic yards. EPA contractors used 92,500 cubic yards during the clean-up of at least one lagoon. MultiServ's sales records also reflect that it sold 9392 tons of slag; presumably some or all of this was purchased by plaintiff, although we do not know the amount. Although the government hints that, slag being fungible, we cannot be certain that *GIP's* slag was used, we reject that defense. Although Ms. Casey testified that 420,000 cubic yards was not all the slag on site, the government offers no evidence as to who owns any slag beyond the 420,000 cubic yards plaintiff purchased, nor of any permission EPA or any other party obtained to remove slag. We note as well that EPA sculpted the remaining piles to minimize pollutant runoff in such a way as, for all practical purposes, to embalm permanently all remaining materials, including slag.

Thus, GIP demonstrated that EPA used and sold slag, kish, and scrap. Plainly, by the time MultiServ had concluded its operation, EPA had taken those quantities of slag and metal that Mr. Gleason attempted to value. That does not answer the question of when the taking or takings occurred, however.

The date of asserted taking for kish, scrap, and slag is June 4, 2008. This is the date on which plaintiff asserts EPA precluded it from beginning its own recovery operation. We agree that June 4, 2008, can be used as the date of taking for scrap and kish, because Mr. Casey legitimately concluded at that time that GIP would be barred from beginning its own recycling operation. We note, however, that by June 4, 2008, the slag for which plaintiff seeks compensation had already been taken by EPA. Although plaintiff may have chosen to propose an earlier date, it is therefore also correct to say that the taking occurred no later than June 4, 2008. The government does not present a competing date of taking.

As discussed earlier, plaintiff's taking claim is limited to the value of the material the government took from the Eastern Excluded Property. If plaintiff had sought compensation for the value of materials in place, it would have had to present evidence of what a willing buyer would have paid for those materials immediately before access ended, even though the precise quantity was unknowable. It chose instead to quantify the volume taken by limiting its claim to materials actually removed, but then valued those materials as of June 4, 2008. This is a problem. The price of recycled material in June 2008 happens to coincide with a relatively brief but significant spike

in the price of recycled steel. Even though GIP has limited the quantity taken by valuing only what MultiServ sold, the abnormal prices in June 2008 make that date an unfair one for valuation purposes. It would only be a fair date if plaintiff also had undertaken to prove what a willing buyer would have paid for the *opportunity* to recover *all* the kish and scrap, and 420,000 cubic yards of slag. But GIP did not undertake that exercise. Although June 2008 is a legitimate date for asserting that EPA took all of plaintiff's rights to what it had purchased, GIP also did not then follow that line of proof by showing what a willing buyer would have paid as of June 2008, a date for which the evidence of quantity would be problematic.[4] Alternatively, GIP could have claimed a series of rolling dates of taking for specific quantities, beginning with EPA's use of slag before 2008, but then plaintiff would have had to value the taking on those dates. Once again, something it did not do.

II. Just Compensation

When the United States takes private property for public use, it must pay just compensation, which requires the government to pay the "equivalent in money of the property taken," to place the owner in the same pecuniary position as if the property had not been taken. *United States v. Miller*, 317 U.S. 369, 370–71 (1943); *see also United States v. Reynolds*, 397 U.S. 14, 16 (1970). The Supreme Court has emphasized that just compensation cannot be reduced to a specific formula and that compensation must be based on all relevant facts. *See United States v. Cors*, 337 U.S. 325, 332 (1949); *see also Jack Daniel Distillery v. United States*, 379 F.2d 569, 574 (Ct. Cl. 1967). When the government physically appropriates plaintiff's property, however, the general rule in measuring compensation is the fair market value of the property on the date it is appropriated. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 9–10 (1984) (citing *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511–513 (1979)). "Under this standard, the owner is entitled to receive 'what a willing buyer would pay in cash to a willing seller' at the time of the taking." *Id.* at 511 (quoting *United States v. Miller*, 317 U.S. 369, 374 (1943)).

Plaintiff offered two measures of just compensation: lost profits and fair market value. Because lost profits is not the appropriate measure of just compensation, *United States v. General Motors Corp.*, 323 U.S. 373, 379 (1945), we set that theory aside and turn to plaintiff's fair market value

[4] But not impossible, as MultiServ's site investigation would be available as some contemporaneous proof of quantity.

calculation.[5] As mentioned above, Mr. Gleason, determined the fair market value of the materials as of June 4, 2008.

Mr. Gleason's damage claim is calculated based only on materials recovered and sold by MultiServ, along with 92,500 cubic yards of slag which EPA used in the lagoons.[6] He explained that he was unaware of any reliable estimate on the volumes of recoverable materials as of the date of taking. "[Y]ou couldn't reasonably estimate what's in these piles or what's the yield or recovery in these piles." Tr. 1265 (Gleason). He therefore did not attempt to reconstruct what a willing buyer would have paid for materials in the piles using what was known or knowable at the time. Instead, he attempted to calculate the fair market value of the materials taken based on a projection using the earnings or income approach, which projects future earnings from the property and then discounts those future earnings to a specific point in time. Once again, however, he did not have actual figures to work with as of June 2008, other than the general projections by MultiServ. Instead, he used the actual figure for the volume of materials recovered between 2008 and 2013: 245,890 tons. As to price, he attempted to recreate what those materials would have been worth in June 2008. Against this calculation, he then applied his own calculation of avoided costs and discounted the results back to June 2008.

Because MultiServ's characterization of the various materials sold did not line up with the types of items that could be priced from publicly available records, Mr. Gleason calculated an assumed 2008 price by picking a comparison metal to the metal that MultiServ sold. To calculate a selling price for kish and scrap, he drew from a publication of the American Metal Market, which collects and publishes price lists for various types of metal on a monthly basis. The comparison metal he chose was "No. 1 heavy metal" or "heavy melt," which Mr. Gleason explained was a close equivalent to the "scrap" that MultiServ sold. He then projected selling prices for A scrap, B scrap, miscellaneous scrap, small pit scrap, skulls, plate scrap, oversized scrap, ingots, and manganese.

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[5] We note, however, that Mr. Gleason's lost profit calculation suffers from many of the same defects discussed below due to the unreliable calculation of avoided costs.

[6] There was testimony that plaintiff had to buy other slag from MultiServ for its own use. Unless the purchased amount is included in the 92,500 cubic yards, the specific quantity of purchased slag does not appear to surface in Mr. Gleason's calculations.

The projected selling price was the result of multiplying the average relationship of MultiServ's price to the quote price for heavy melt in Birmingham by the average quoted price for heavy melt in Cleveland in April, May, and June 2008. Mr. Gleason found that MultiServ sold A scrap at an average discount of approximately sixty-eight percent of the Birmingham quoted market price for June 2008 and then multiplied that by the average Cleveland heavy melt price from April to June 2008 to reach $486.67 per ton.

Mr. Gleason conceded that $486 per ton was historically a high value per ton and that the 2008 price spike was relatively short-lived. If the taking date were set twelve months later, in 2009 when the metal recovery operation began, for instance, the market price would have fallen much lower. Or if the taking had been, for example, in the 2000 to 2002 period, the price per ton would have been approximately $100.

That calculus accounts for the vast majority of materials. For the C fines, Mr. Gleason input GIP's agreement with Metawise Group to purchase C fines for $4.50 per ton after loading costs. For other materials, he estimated selling price as of June 2008 to be the actual average selling price reported by MultiServ. Mr. Gleason concluded that the projected revenue stream as of June 2008 would have been $19,873,418. We note, by way of comparison, that MultiServ actually only recovered $13.5 million during the nearly five years of its recovery efforts.

For the avoided costs, Mr. Gleason assumed that GIP and Watkins would have executed their Agreement to Process Kish. He thus applied the cost structure in that draft agreement: GIP would pay Watkins $70 per ton for materials recovered in excess of one inch in size (e.g., A scrap). GIP would not pay Watkins anything for materials less than one inch in size. He also assumed, based on Mr. Casey's explanation to him, that he and Mr. Stevens modified the draft agreement orally so that GIP would not pay Watkins for recovered materials one inch or larger that sold for less than $70 per ton. In other words, if material sold for $69 per ton, GIP owed Watkins nothing. He assumed that materials were loaded as they were processed. Furthermore, the assumption was made that GIP had no other additional cost than freight because GIP would use its existing infrastructure. Using those terms, he determined that the avoided cost based on payments to Watkins was $4.5 million. Mr. Gleason also included a freight adjustment to account for GIP's cost to ship the material. He calculated the price to ship to Birmingham or to Cleveland, since Cleveland was approximately $20 more per ton. Total avoided costs for payments to Watkins and freight were $4,928,603.

Using these inputs, Mr. Gleason concluded that the projected revenue for GIP was $19,873,418, avoided costs were $4,928,603, and the total net $14,944,815 recovered over an approximately 5-year period, from June 2008 to February 2013. To establish the present value of that revenue as of June 4, 2008, Mr. Gleason applied a discounted cash flow analysis. He used a weighted average cost of capital approach with a twenty-one percent discount rate. Ultimately, Mr. Gleason found that the fair market value of the metal taken as of the date of taking, and net of all costs, was either $9,780,560, using a Birmingham freight adjustment, or $10,446,005, using a Cleveland freight adjustment.

Mr. Gleason separately valued the slag used by EPA. Mr. Gleason's understanding was that EPA had taken 92,500 cubic yards of slag as part of its environmental remediation efforts. He applied a conversion from cubic yards to tons, totaling 137,363 tons. He then applied an estimated price term between five and six dollars per ton, using the sales price applied when MultiServ sold slag to GIP, to determine that EPA had taken $755,494 of slag.

The government challenges several aspects of plaintiff's fair market value calculation. The government contends that the relevant question is "what a would-be miner would have paid Gadsden for the purported right to dig in the waste piles." Def.'s Post-Trial Br. at 64, ECF No. 193 (Jan. 5, 2018). In other words, the government argues that plaintiff would only be owed the equivalent of what a buyer would have paid GIP to explore the piles for retrievable materials in 2008.

On Mr. Gleason's calculations, defendant argues that his analysis is not based on information known at the time of the taking because it relies on quantity figures drawn from what MultiServ's eventually recovered. Regarding the price term, the government argues that a buyer of the right to process the piles would not have assumed that the spike in prices contemporaneous with the time of taking would continue indefinitely. Mr. Gleason and Mr. Clayman readily acknowledged that scrap iron prices were high in mid-2008 and that they could have been expected to, and in fact did, fall throughout the course of MultiServ's recovery project.

The government also challenges GIP's reliance on the unexecuted Watkins agreement as a basis on which to calculate avoided costs. It was a draft rather than a contract, and Watkins had not completed recovery work on these piles in the past. The draft cost structure only guaranteed payment per ton for material sold in excess of one inch in size and, if the purported oral modification were taken into account, sold for at least $70 per ton. The government notes that plaintiff lumped B scrap in with small, less than $70 per

ton materials, altering the amount GIP hypothetically would have paid Watkins by up to $3 million. Even assuming that Watkins would be able to sustain a recovery project under such terms, the agreement, if it had ever been executed, also contained a walk-away provision that would allow Watkins to terminate the contract in its discretion, which presumably it would do if it became unprofitable.

We sympathize with Mr. Gleason in putting together a damage calculation. It would have been difficult to measure with any precision what was actually recoverable in the piles as of June 2008, either at that time or subsequently. What is not disputable, however, is that every single witness involved in processing the piles before, during, and after the bankruptcy sale agreed that the piles concealed recoverable materials, including EPA, which was able to persuade MultiServ to undertake an exploratory operation, which produced favorable enough results for the agency to enter into a sales contract. At the time, the parties to that arrangement touted the possibility of $50 million in recoverable metals. We are thus persuaded that a buyer would have paid something for the opportunity to retrieve the materials from the piles. Determining what that value would have been, however, is not an exercise Mr. Gleason undertook.

We agree with the government that there are a number of problems with Mr. Gleason's approach. The government, we believe, is correct that Gleason's figures are seriously distorted in at least two ways. First, his construction of an artificial sales price as of June 2008 for materials sold later was inappropriate. Although these figures may accurately reflect values as of the date sold, they do not reflect the reality that a buyer would know that it would not recover that value instantly; in fact, the recovery operation itself did not result in sales until 2009. And a buyer also would be presumed to know that the price in June 2008 was abnormally high. The evidence from Mr. Clayman and Mr. Gleason was that it was known in the industry that prices would not remain inflated in the long term, or at least not for a years-long recovery operation. A purchaser could not rely on receiving those high prices over the years required to go through the piles. A buyer would discount value to account for the virtual certainty that prices would decline.

The second defect in Mr. Gleason's calculation concerns how he calculated the costs to retrieve the materials. He based his cost figures on the assumption that the agreement between plaintiff and Watkins would have been performed, i.e., that plaintiff would only have to pay $70 per ton for qualifying materials and that qualifying materials did not include materials sold for less than $70 per ton. All of the risk in this hypothetical arrangement would have

been borne by Watkins, which, in actuality, maintained the right to walk away from the recovery operation by the terms of the draft agreement. Nevertheless, building size and price limitations into GIP's payment obligation results in GIP paying Watkins, at most, for 64,285 tons of processed material, whereas MultiServ processed 245,890 tons. Mr. Gleason, in effect, is assuming that GIP is getting a substantial amount of Watkin's labor at no cost. Without crediting the oral addendum, GIP would have paid Watkins an additional $2 to $3 million. Applying the $70 per ton cost to both A scrap and B scrap uniformly results in $5.6 million avoided costs for those two materials alone. When the $70 per ton cost is applied to all materials other than C scrap or fines, the avoided costs before considering freight are at least $7 million.

We also find that it is not likely that the balance of the draft agreement would have been performed as written. The draft agreement required Watkins to process 500 tons per month to maintain exclusivity. MultiServ was able to process nearly that amount per hour. Thus Mr. Gleason's reliance on assumptions drawn from MultiServ's records are highly questionable. Even if we assumed Watkins could maintain such an operation, the government correctly points out that GIP would have experienced other costs. GIP retained the ownership of the saleable materials, meaning it would have had to market and sell those materials in addition to the possibility of paying for loading the materials as well as supervising the Watkins operation. GIP may have worked within its existing infrastructure to sell the materials, but like any other business, there would be some costs associated with marketing and delivering the materials.

The government's expert on damages, Steven Dowd, did not place an estimate on those costs, but he aptly observed that "to assume that there's no cost to that of any type, zero, I think is unreasonable." Tr. 1677. EPA had two contractors handling the materials pre- and post-processing that, at its height, involved two processing plants and nearly two dozen employees just to assist in MultiServ's processing. This is not including what the remediation contractor, CMC, was doing to facilitate the MultiServ recovery operation. Despite CMC's help, MultiServ terminated the recovery operation because it was no longer profitable. *See* Pl.'s Ex. 195.

Ultimately, plaintiff asks the court to accept that a hypothetical buyer would have projected that the piles held at least 245,890 tons of material and that the buyer would incur substantially less costs than that actually incurred by MultiServ and CMC. We find these assumptions unsupportable. Although a trial judge "may award damages, even if he does not fully credit that party's methodology," *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817,

833 (Fed. Cir. 2010), we are not given sufficient reliable proof of what a willing buyer would have paid for the scrap and kish.

We have a different view of the slag EPA actually used. GIP purchased 420,000 cubic yards of slag. Mr. Casey estimated at trial that GIP had used 15,000 cubic yards, prior to EPA's use of slag for environmental clean-up.[7] Thus, GIP had not used all the slag it had purchased before EPA took 92,500 cubic yards, or 137,363 tons, for environmental clean-up. Mr. Gleason valued the 92,500 cubic yards of slag at $755,494, using the five to six dollars per ton rate at which MultiServ actually sold slag to GIP. In the case of the slag, we know both what GIP owned and what EPA took, and plaintiff presented a credible valuation of the taking. Thus, we award plaintiff $755,494 for the taking of its slag.

III. Prejudgment Interest

In addition to the value of the property taken, just compensation includes interest from the date of the taking to the date of payment in order to place plaintiff in "as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation." *Kirby Forest Indus., Inc.*, 467 U.S. at 10–11. GIP did not present a calculation of interest at trial, and the government did not argue for a particular rate of interest. This court, however, consistently has employed the rate set forth in the Declaration of Takings Act ("DTA"), 40 U.S.C. § 3116 (2012), as the proper interest rate in a takings claim. *See, e.g.*, *Waverley View Investors, LLC v. United States*, No. 15-371L, 2018 WL 1193439, *3–*4 (Mar. 8, 2018); *Textainer Equip. Mgmt. Ltd. v. United States*, 99 Fed. Cl. 211, 223 (2011); *Vaizburd v. United States*, 67 Fed. Cl. 499, 504 (2005). Thus, we find that plaintiff is entitled to interest at the DTA rate from the date of the taking, June 4, 2008, to the date of payment.

CONCLUSION

In sum, we hold that EPA's actions constituted a taking compensable under the Fifth Amendment Takings Clause and hold that GIP is entitled to just compensation in the amount of $755,494, together with interest calculated

[7] We recognize that this is inconsistent with some of his email correspondence with EPA in 2008, in which he speculates that GIP may have used up all its allotment. We find Mr. Casey to be a credible witness, however, and rely on his trial testimony. GIP did not do any recovery operations on the Eastern Excluded Property and, in any event, kept no records to support the email estimate.

from June 4, 2008, to the date of payment in accordance with 40 U.S.C. § 3116. The Clerk is directed to enter judgment for plaintiff.

s/Eric G. Bruggink
Eric G. Bruggink
Senior Judge

APPENDIX C

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

GADSDEN INDUSTRIAL PARK, LLC,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Cross-Appellant

2018-2132, 2018-2147

Appeals from the United States Court of Federal Claims in No. 1:10-cv-00757-EGB, Senior Judge Eric G. Bruggink.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, and STOLL, *Circuit Judges**.

PER CURIAM.

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* Circuit Judge Hughes did not participate.

ORDER

Appellant Gadsden Industrial Park, LLC filed a combined petition for panel rehearing and rehearing en banc. A response to the petition was invited by the court and filed by Cross-Appellant United States. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on September 18, 2020.

FOR THE COURT

September 11, 2020
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

APPENDIX D

of what happened on the ground, that I don't have any problem with him testifying about.

BY MR. BALDAUF:

Q. Yeah. Don't tell us what you think Harsco was thinking. Just, did they separate the garbage from the slag?

A. No. They took all the slag and dumped it with all the garbage over in the third -- newly created third pile.

Q. The way the slag is today, is this slag that you can sell in its present state?

A. No.

Q. How much slag do you still --

A. You can't sell it as slag, no.

Q. How much --

THE COURT: I'm sorry. Why is that?

THE WITNESS: It's all mixed in with the trash. And they didn't size it. They just threw it all in a big pile with the trash.

THE COURT: All right. Now, what is trash if it's not slag? If the metal is taken out, what --

THE WITNESS: Okay. These were -- we didn't know this at the time. We have learned it since. But these were industrial landfills, permitted landfills, monitored by ADEM, Alabama Department of Energy

Management -- Environmental Management.

THE COURT: Environmental management.

THE WITNESS: And they had to preapprove everything that went in those piles. And Gulf States Steel put in about ten different types of trash into those piles, all approved by ADEM. Nothing hazardous. They had to give up T clips which are ways to melt metal to make sure they're not hazardous metals. And that was all in those two piles.

And when they took their kish -- the iron out of the kish, they took the slag and put it over with the trash that they weren't using from the north and south pile.

BY MR. BALDAUF:

Q. How much slag do you think you're still going to need in this property?

A. I have since found out, and I didn't realize this when they took my deposition, but we have four big pits under our motors, our motor areas, four motor pits, huge. We're going to need 75,000 cubic yards, more or less, pretty close to that, of slag, about 150,000 tons to fill those pits.

Q. And how much would that cost if you had to buy it?

A. If we buy slag from U.S. Steel in Birmingham,

think he could drive a certain distance.

THE COURT: Or somebody could drive him. Well, don't press him on it, but if that turns out to be convenient. I'm going to call down there and see if that really is a problem. I don't mean his situation, I mean the courthouse. And I don't know that there's space in the -- there's -- there is a new courthouse in Tuscaloosa. There's an old one in Gadsden. But I -- if it turns out that there's space there, it might be -- been many years since I've been in the Jefferson County courthouse, but it was not a congenial experience.

MR. SINGLEY: Might be a good time to mention, Your Honor, we think -- we'd like to suggest that maybe the Court do a site visit in this case if it would be of help. That's in Gadsden. I don't know if --

THE COURT: Right. Hmm.

MR. SINGLEY: -- if that would be something that --

THE COURT: Well, I'll call down there and find out what the situation in Gadsden is. And meanwhile, you find out if Mr. Henderson, if he'll -- it's about 50 miles from Birmingham.

MR. SINGLEY: Yes, Your Honor.

Q. And can you describe the difference to me.
A. The iron dust looked like red dirt. It was -- there was some significant deposits up on the eastern portion of the south pile. There was this red -- mounds of this red dirt all over the place.
Q. When you say "all over the place," was -- were both of the files -- piles full of red dirt or was it in certain sections of the piles?
A. I specifically remember, like, this red dirt being on top of the south pile. It was very evident that there was red dirt there. I mean, the piles were red because it was, you know, old, you know, metal out there that was rusting. So the piles were red.
But I specifically remember this -- you know, there was just mounds and mounds and mounds of this red dirt when you -- when you -- it was -- when you walked on it, you know, you'd slip and fall, so -- constantly.
Q. Did you talk about -- do you remember if anybody provided any documents during that meeting, if you guys were going through documents?
A. I believe there was some -- some purchase documents that were -- were handed out. I don't remember if I got a copy. I think the attorneys just got a copy of that.
Q. Do you remember talking about reasonable

time?

A. Yeah. We -- again, during those -- that interaction between Don and -- and Mike Stevenson talking about liability and ownership and operator liability, Mr. Izner, said again, well, we can -- he said that, you know, it could be argued that the reasonable time is already passed to assert any type of ownership rights to these piles.

THE COURT: If -- I'm sorry. Who's saying this?

THE WITNESS: Mr. Izner.

THE COURT: Inzer?

THE WITNESS: Inzer. I'm sorry.

THE COURT: Is saying what now?

THE WITNESS: He said that -- that -- that the -- a reasonable time period had already passed to -- to assert those -- those rights of ownership.

BY MR. SINGLEY:

Q. What did you believe about GIP's ownership of the piles after that meeting?

A. After that meeting, I believed that GIP was -- was washing their hands of it and that they didn't want to deal with the piles and any type of potential liability that would come with processing these piles.

Q. What did you do after the meeting? Did you take -- what tasks did you do after the meeting?

A. After the meeting, we moved forward, and I -- I asked Neville Kingham, the project manager for CMC at that time, to come up with some -- some potential remedies and -- and -- and cleanup alternatives for the slag piles.

Q. And I promised the judge that you would describe -- I promised the Court that you would describe the options that you eventually came up with. So please describe those.

A. The initial thought was we could process the piles and just take the slag material out, the actual material that was causing some of the issues.

THE COURT: Why was the slag causing any issues?

THE WITNESS: It was the calcium that was in the slag, that the water was coming through and -- and, you know, was increasing the pH at that point, so ...

THE COURT: So you would take the slag out?

THE WITNESS: The initial thought was, you know, we could take the slag. Neville had reached out to the National Slag Association. He had contacted cement manufacturers, shingle manufacturers to see if they could accept material. And -- and the information

Q. The Heckett area that you referred to, could you point that out again.
A. This area?
Q. Yes. And you can -- and you can sit down now, sir. Thank you.
THE COURT: What was Heckett's function out there when -- when the plant was in operation?
THE WITNESS: Heckett took the slag from the BOF production and they screened it, separated it into sizes, reclaimed the metal, and sent the metal back to us to reuse. They also -- on their north section, they had a burning oxygen torch system they could burn nearly any scrap that we could not turn. And we sometimes would take heavy scrap out there, and they would cut it into sizes that we could reuse on the plant.
THE COURT: How long, if you know, had that kind of operation been going on at the steel mill, that kind of reclamation as part of the -- the dumping process?
THE WITNESS: It was there in 1972 when I started work. And I would suppose it went back to when the BOFs were built at least, which was 1965. Some --
THE COURT: I'm not sure of the relevance of this, but there's an awful lot of material that was --

that was on our site visit that appeared to be magnetic. The piles have been gone through since Heckett left, and yet what's left seems to be a lot of ferrous kind of material that's magnetic.

Does that mean that there's some inefficiencies in the recycling process?

THE WITNESS: There could have been. It could have been material that was out there from the processing. And when the action was taken that EPA did, they moved them around into the piles in different areas. I don't know. Certainly there was always the possibility of metal -- small metal falling off on the side of the road. And when the -- they did a cleanup of the road and got the dirt and everything with it, you know, could have been some metal mixed in.

THE COURT: All right. Go ahead.

BY MR. BALDAUF:

Q. What type of metal was Heckett reclaim -- just -- strike that.

Was Heckett reclaiming metal the entire time you were working at Republic and then Gulf States Steel?

A. Yes.

Q. And what type of metal were they reclaiming for reuse in the furnaces?

appeared -- in other words, he would be able to say I relied on him because I thought it was useful information even if he was a witness, just -- experts aren't limited in terms of what kind of background they rely on.

MR. DINTZER: Thank you. Our main concern was the credibility part, Your Honor. Everything else --

THE COURT: Well, I think you're giving it a more specialized meaning than I'm giving it.

MR. DINTZER: Thank you, Your Honor.

THE COURT: I'm not treating this as credible just because this witness says he is. No offense.

Are you leading up to telling me that the -- the avoided costs is based on Watkins' anticipated costs?

THE WITNESS: Primarily, yes, Your Honor.

THE COURT: All right. Does that mean you did not have or -- or did not choose to use as an avoided cost what Harsco experienced?

THE WITNESS: That is correct. I reviewed it, and I didn't think that it was as relevant in this case.

THE COURT: Why would it not be more relevant as real experience versus anticipated experience?

THE WITNESS: There's about four or five reasons, if I could just go through them.

I think first, the financial information we had from Harsco was a -- an Excel spreadsheet with some numbers on it, total of $14 ½ million of costs over the life of the project.

THE COURT: Was it -- what's the magic word in terms of accounting? Was it certified by an accountant?

THE WITNESS: You know what, Your Honor, we don't know where it came from, who prepared it. It was just a listing of costs. And it was -- obviously when you look at the detail, had a lot of corporate overhead, a lot of supervisory overhead, you know, executive salaries. I mean, there's just all these categories included in it that made it truly a fully absorbed unsupported cost.

THE COURT: Do you know, was it prepared as a single document or as a summary document based on earlier rolling iterations of the same questions?

THE WITNESS: You know what, Your Honor, the interesting thing was, it was attached to an affidavit or a declaration that Peter Mazzarella had provided and he referenced it.

THE COURT: Who was that?

But what's the -- generically, what he's an expert at? What could he testify to?

MR. SINGLEY: The accounting and economics, Your Honor.

THE COURT: Thank you. Okay. Do we need to do any voir dire?

MR. BALDAUF: No, Your Honor. I'm just a little bit confused by the explanation. I have no objection to this man as an expert in accounting. I'm sure he's very qualified. But I just want to be clear.

He doesn't offer an independent valuation of anything in his report, so I want to make sure --

THE COURT: Right. That's correct, isn't it?

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

THE COURT: All right. He'll testify as an expert in, what did we say, finance and accounting? Is that right?

MR. SINGLEY: Yes, Your Honor.

THE COURT: All right. Thank you.

BY MR. SINGLEY:

Q. Mr. Dowd, what were you asked to do on this assignment?

A. I was asked to evaluate the damages claims of GIP.

Q. And what is your understanding of GIP's

APPENDIX E

Inverse Condemnation Cases Involving Personalty (1987-Present)

CASE NUMBER	SHORT CAPTION	DATE FILED	JUDGMENT DATE	AWARD DATE	AMOUNT OF AWARD
1:87-cv-00386-EGB	HOWARD, et al	6/29/1987	5/13/1994		
1:89-cv-00337-KRH	SKIP KIRCHDORFER	6/15/1989	6/18/1996		
1:89-cv-00670-MBH	B-WEST, INC.	12/13/1989	Notice of voluntary dismissal 11.02.1993		
1:90-cv-00616-WCR	SECURITY BANK	7/23/1990	7/29/1994		
1:90-cv-03864-JPW	MITCHELL ARMS, INC.	10/19/1990	4/14/1992		
1:91-cv-01086-LSM	TRANSPACE CARRIERS	4/15/1991	9/13/1995	9/13/1995	$700,000 (inclusive of any interest)
1:91-cv-01242-MRT	GOLDEN PACIFIC, et al	6/21/1991	4/28/1992		
1:91-cv-01534-DGS	COLBERT, et al	10/22/1991	11/29/1993		
1:91-cv-01559-RBA	ABN AMRO BANK N.V.	10/31/1991	8/28/1997	8/28/1997	$339,042
1:92-cv-00059-BAF	HAFEN, et al	1/28/1992	2/25/1994		
1:92-cv-00453-DGS	DICO, INC.	7/2/1992	2/26/1993		
1:92-cv-00477-JPW	CAL-ALMOND, INC., et al	7/13/1992	1/10/1994		
1:92-cv-00507-KRH	MOTT	7/28/1992	11/4/1993		
1:92-cv-00694-RHH	ORDNANCE DEVICES	10/5/1992	3/23/1994		
1:92-cv-00710-BAF	ROSE ACRE INC.	10/13/1992	8/13/2009		
1:92-cv-00721-LB	EAST CAPE MAY ASSOC	10/15/1992	12/11/2008		
1:92-cv-00736-UNJ	BENNETT	10/20/1992	1/6/1993		
1:92-cv-00766-KRH	RUBANA NO. CENTRAL, et al	11/4/1992	9/10/1996		
1:92-cv-00809-KRH	FALLINI, et al	11/24/1992	11/21/1995		
1:92-cv-00810-KRH	PACIFIC NATIONWIDE	11/25/1992	Consolidated with 92-766 02.22.1993		
1:92-cv-00813-KRH	CHANT LIMITED, et al	11/25/1992	Consolidated with 92-766 02.23.1993		
1:92-cv-00817-EJD	BAILEY, et al	11/30/1992	8/14/2002		

CASE NUMBER	SHORT CAPTION	DATE FILED	JUDGMENT DATE	AWARD DATE	AMOUNT OF AWARD
1:93-cv-00059-RHH	INTERSTATE CIGAR, et al	2/3/1993	9/22/1994		
1:93-cv-00115-KRH	NO. AMERICAN COMM.	3/1/1993	Consolidated with 92-766 04.21.1993		
1:93-cv-00125-LAS	FOLEY	3/4/1993	Notice of voluntary dismissal w/prejudice 09.08.1994		
1:93-cv-00133-CCM	BRANCH, et al	3/5/1993	9/30/1997		
1:93-cv-00208-MRT	HEIM	4/8/1993	4/23/1993		
1:93-cv-00219-CCM	HOOSIER BANCORP, et al	4/15/1993	9/16/1993		
1:93-cv-00268-MBH	KARTEN	5/3/1993	3/31/1994		
1:93-cv-00352-CCM	MOUNT	6/3/1993	9/21/1993		
1:93-cv-00403-LSM	YORKTOWN, BANK OF	6/29/1993	Notice of voluntary dismissal w/prejudice 12.12.1994		
1:93-cv-00473-CCM	KAJEWSKI	7/30/1993	Notice of voluntary dismissal 11.19.1993		
1:93-cv-00479-JPW	BIRD, et al	8/2/1993	12/29/1994		
1:93-cv-00593-RJY	BEASLEY	9/28/1993	9/30/1993		
1:93-cv-00664-RHH	UNIT DRILLING, et al	10/29/1993	Notice of voluntary dismissal w/o prejudice 10.21.1994		
1:93-cv-00710-LAS	OSPREY PACIFIC CORP.	11/19/1993	2/22/1999	2/22/1999	$550,000 (plus compound interest from take of taking 10.03.1990)

CASE NUMBER	SHORT CAPTION	DATE FILED	JUDGMENT DATE	AWARD DATE	AMOUNT OF AWARD
1:93-cv-00766-DGS	KATZ	12/15/1993	8/5/1994; case transferred to W.D. Tx. Dist. Ct. 09.09.1994		
1:94-cv-00108-DGS	MONTANA, STATE OF	2/22/1994	4/25/1995		
1:94-cv-00325-LAS	WHITNEY NATIONAL	5/16/1994	Notice of voluntary dismissal w/prejudice 04.10.1996		
1:94-cv-00447-RHH	LONGSHORE	7/12/1994	11/14/1994		
1:94-cv-00554-JTT	RUIZ	8/19/1994	12/16/1994		
1:94-cv-00633-RJY	PERSHING DIVISION	9/27/1994	Notice of voluntary dismissal 09.21.1995		
1:94-cv-00657-JPW	BOUCHER	10/11/1994	10/3/1995		
1:94-cv-00759-JPW	SPILMAN, THOMAS	10/18/1994	11/8/1995		
1:94-cv-00760-RHH	EDDLEMAN	10/18/1994	9/29/1995		
1:94-cv-00773-BAF	FIRST SOUTHWEST BANK	10/25/1994	8/22/1997		
1:94-cv-00970-MBH	YOCUM	11/2/1994	11/14/1994		
1:95-cv-00092-EGB	NWAEBO	2/7/1995	2/9/1995		
1:95-cv-00314-EGB	RINCON	4/26/1995	6/16/1995		
1:95-cv-00317-LAS	BRADFIELD	4/28/1995	Case transferred to W.D. Tx. Dist. Ct. 04.05.1996		
1:95-cv-00373-RBA	PRINCE	5/30/1995	10/9/1996		
1:95-cv-00554-MRT	SCARANO	8/14/1995	2/22/1996		
1:95-cv-00570-JFM	LUEDTKE, et al	8/22/1995	7/30/1996		
1:95-cv-00610-LSM	PHILPOTT	9/11/1995	Notice of voluntary dismissal 02.16.1996		
1:95-cv-00611-WCR	GUY	9/11/1995	Notice of voluntary dismissal 02.14.1996		

CASE NUMBER	SHORT CAPTION	DATE FILED	JUDGMENT DATE	AWARD DATE	AMOUNT OF AWARD
1:95-cv-00684-DGS	HEDRICK	10/16/1995	9/29/2004		
1:95-cv-00696-EGB	CROCKER	10/20/1995	1/16/1997		
1:95-cv-00744-RHH	BLACKMAN	11/8/1995	11/16/1995		
1:96-cv-00001-CCM	J & E SALVAGE, et al	1/2/1996	2/11/1997		
1:96-cv-00065-RBA	MAY	2/6/1996	3/20/1996		
1:96-cv-00107-WCR	WILSON	2/22/1996	3/26/1997	3/26/1997	$5,599
1:96-cv-00121-RBA	HORNBACK	2/29/1996	10/7/1996		
1:96-cv-00231-LAS	SNYDER	4/26/1996	3/5/2003		
1:96-cv-00256-LAS	VEREDA LTDA.	5/6/1996	1/25/2002		
1:96-cv-00292-LAS	VEREDA LTDA	5/23/1996	8/12/1998		
1:96-cv-00302-RHH	PLATT	5/29/1996	5/31/1996		
1:96-cv-00370-BAF	RAY	6/25/1996	5/30/1997		
1:96-cv-00387-MBH	TURCK	7/1/1996		9/30/2009	$16,100,741 (appealed and reversed 05.06.2011)
1:96-cv-00408-LAS	INNOVAIR AVIATION	7/10/1996	9/30/2009		
1:96-cv-00411-RHH	AMERICAN COMMERCE, et al	7/12/1996	7/11/1997		
1:96-cv-00487-WCR	OTITEH	8/7/1996	3/27/1997		
1:96-cv-00495-RHH	WESTPOINT APARTMENTS, et al	8/9/1996	Stipulation of voluntary dismissal w/prejudice 03.28.2001		
1:96-cv-00619-JFM	PERRY, et al	9/30/1996	Case transferred to Court of International Trade 05.12.1998		
1:96-cv-00781-LSM	LARSON	12/13/1996	3/25/1999		
1:97-cv-00324-BAF	BENOIST	5/5/1997	6/30/1997		

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1:97-cv-00634-CCM	HOBBS	9/23/1997	7/16/1998		
1:97-cv-00679-JFM	THUNE	10/8/1997	6/8/1998		
1:97-cv-00823-DGS	BAUER	12/2/1997	8/21/1998		
1:98-cv-00188-DGS	MARTINSON, et al	3/19/1998	Case transferred to E.D. Pa. Dist. Ct. 04.08.1998		
1:98-cv-00192-ECH	A-1 AMUSEMENT CO., et al	3/20/1998	3/21/2001		
1:98-cv-00507-CFL	THEISEN VENDING CO.	6/15/1998	10/22/2003		
1:98-cv-00504-EJD	BOARD MACHINE, INC.	6/15/1998	5/10/2001		
1:98-cv-00505-RHH	LAKE COUNTY MUSIC	6/15/1998	11/9/2000		
1:98-cv-00506-ECH	PAVLIC VENDING SERVI	6/15/1998	3/19/2001		
1:98-cv-00508-RJY	KRUEGER VENDING	6/15/1998	5/14/2001		
1:98-cv-00509-CCM	ASCO VENDING, INC.	6/15/1998	Stipulation of Voluntary dismissal w/o prejudice 04.26.2001		
1:98-cv-00510-LJB	SHIVE	6/15/1998	Stipulation of voluntary dismissal 04.26.2001		
1:98-cv-00511-DGS	BRUBAKER AMUSEMENT	6/15/1998	3/12/2001		
1:98-cv-00512-EJD	A.L.D. SERVICES, INC	6/15/1998	5/10/2001		
1:98-cv-00513-MBH	GLASSCOCK ENTERPRISE	6/15/1998	4/30/2001		
1:98-cv-00514-RJY	SUEMNICHT	6/15/1998	Stipulation of voluntary dismissal w/o prejudice 04.26.2001		
1:98-cv-00599-CFL	NARRANGANSET VENDING	7/21/1998	10/22/2003		
1:98-cv-00595-EJD	POWELL	7/21/1998	5/10/2001		
1:98-cv-00596-ECH	AUTOMATED SERVICES	7/21/1998	3/19/2001		
1:98-cv-00597-EJD	MANOR VENDING CO.	7/21/1998	5/10/2001		
1:98-cv-00598-RHH	B & G ENTERPRISES	7/21/1998	3/22/2001		

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1:98-cv-00600-RJY	ANDERSON COFFEE	7/21/1998	5/14/2001		
1:98-cv-00601-MBH	MJS VENDING	7/21/1998	4/26/2001		
1:98-cv-00708-LSM	BRADSHAW	9/4/1998	Notice of voluntary dismissal 11.15.2000		
1:98-cv-00939-JPW	HARVEY	12/28/1998	1/5/1999		
1:99-cv-00106-LMB	LISTY'S LTD.	3/4/1999	2/12/2004		
1:99-cv-00143-BAF	MAYDAK	3/18/1999	Settlement agreement 07.01.1999		
1:99-cv-00272-CCM	SOMMERS OIL COMPANY	5/3/1999	Stipulation of voluntary dismissal w/prejudice 10.19.2001		
1:99-cv-00442-EJD	ACME MUSIC & VENDING, et al	7/7/1999	5/10/2001		
1:99-cv-00485-RBA	KEELS	7/26/1999	7/27/1999		
1:99-cv-00791-NBF	BYERS	9/30/1999	7/26/2000		
1:99-cv-00933-CFL	ADAMS	11/12/1999	6/19/2000		
1:99-cv-00957-CCM	POPE	11/24/1999	6/12/2000		
1:99-cv-00986-EJD	CRITEL, et al	12/9/1999	2/16/2000		
1:99-cv-00989-UNJ	STECKLER	12/10/1999	3/13/2000		
1:00-cv-00263-MBH	BURTON ELECTRONICS, et al	5/5/2000	11/14/2003		
1:00-cv-00354-BAF	PARADISSIOTIS	6/22/2000	3/27/2001		
1:00-cv-00375-LMB	IOANE, et al	7/6/2000	7/2/2003		
1:00-cv-00463-LSM	DIERICKX VENDING CO.	8/2/2000	3/18/2004		
1:00-cv-00465-RBA	RIVIELLO	8/4/2000	Notice of voluntary dismissal 01.02.2001		
1:01-cv-00073-MBH	SAN JUAN CITY COLLEG, et al	2/13/2001	11/22/2006		
1:01-cv-00184-NBF	KILEY	3/30/2001	4/18/2001		
1:01-cv-00238-RJY	SULAIMAN	4/20/2001	4/27/2001		

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1:01-cv-00327-EJD	FONTROY	5/29/2001	4/16/2002		
1:01-cv-00356-CCM	AZERA	6/13/2001	10/15/2003	10/15/2003	$130,000 (and retain champagne)
1:01-cv-00447-LJB	AKINRO	8/1/2001	10/23/2002		
1:01-cv-00571-BAF	COMMUNITY BANK	10/3/2001	6/9/2004		
1:01-cv-00583-BAF	ADAMS	10/10/2001	2/5/2002		
1:01-cv-00600-MBH	R.T. BURTON, et al	10/15/2001	11/14/2003		
1:02-cv-00019-BAF	SCHWASINGER	1/7/2002	1/28/2002		
1:02-cv-00068-CCM	OLAVE, et al	1/25/2002	6/4/2002		
1:02-cv-00083-DGS	HAWKINS	1/30/2002	12/30/2002		
1:02-cv-00109-LJB	SCHWASINGER	2/7/2002	2/14/2002		
1:02-cv-00117-NBF	WARD	2/8/2002	8/20/2002		
1:02-cv-00118-SLW	SCHWASINGER	2/8/2002	4/2/2002		
1:03-cv-00635-CCM	WILSON	3/25/2003	12/4/2003		
1:03-cv-01618-TCW	CARTER	7/1/2003	Stipulation of dismissal w/prejudice 03.16.2006		
1:04-cv-00007-CCM	BROWN	1/5/2004	9/10/2004		
1:04-cv-00239-FMA	O'DONNELL	2/23/2004	1/5/2005		
1:04-cv-00694-GWM	HDM CORP,	4/20/2004	Stipulation of dismissal w/prejudice 04.27.2006		
1:04-cv-01460-LSM	WILSON	9/15/2004	2/17/2005		
1:04-cv-01560-RHH	ACADIA TECHNOLOGY, INC.	10/15/2004	5/13/2005		
1:05-cv-00543-EGB	PROVAN	5/12/2005	10/13/2006	10/13/2006	$250 (and return all possession to plaintiff in Germany)

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1:05-cv-00776-MMS	AG-INNOVATIONS, INC.,	7/22/2005	Stipulation of dismissal w/prejudice 06.25.2009		
1:05-cv-01015-FMA	DYE	9/20/2005	11/3/2005		
1:05-cv-01242-NBF	SANTOS	11/30/2005	2/17/2006		
1:06-cv-00136-NBF	SANTOS	2/22/2006	12/13/2006		
1:06-cv-00290-GWM	MICHELS	4/12/2006	9/1/2006		
1:06-cv-00439-CFL	EVANS	6/1/2006	12/22/2006		
1:06-cv-00800-TCW	CHEATHAM-BEY	11/28/2006	6/12/2007		
1:06-cv-00926-MMS	EVANS	12/29/2006	3/29/2007		
1:07-cv-00148-RHH	WESTINE	3/5/2007	4/27/2007		
1:07-cv-00537-LJB	STEWARD	7/16/2007	2/28/2008		
1:08-cv-00136-TCW	AKINS	3/6/2008	9/9/2013		
1:08-cv-00368-RHH	YOWELL	5/22/2008	4/29/2009		
1:08-cv-00475-RHH	ADVANCED FUTURE GROUP INT	6/27/2008	11/6/2009	11/6/2009	$2,216,592 (plus interest from 12.08.2006)
1:08-cv-00482-LJB	STORM	7/2/2008	Case transferred to OH Dist. Ct. 07.09.2008		
1:08-cv-00610-NBF	TEXTAINER EQUIPMENT MANAC	9/2/2008	5/9/2017	5/4/2017	$869,771.15 ($857,839.22 attorneys' fees; $11,930.93 costs)
1:08-cv-00647-ECH	PHANG	9/12/2008	6/12/2009		
1:08-cv-00676-EGB	AMERICOPTERS, LLC	9/24/2008	10/28/2010		
1:08-cv-00671-EGB	JAN'S HELICOPTER SERVICE, INC	9/24/2008	Stipulation of dismissal w/prejudice 06.28.2012		
1:08-cv-00860-CFL	LANKSTER	12/3/2008	7/22/2009		

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1:09-cv-00008-MMS	RHABURN	1/5/2009	8/5/2009		
1:09-cv-00003-LJB	THYKKUTTATHIL	1/5/2009	8/4/2009		
1:09-cv-00074-SGB	HUSBAND	2/6/2009	Opinion re: MTD; transfer case to Indiana Dist. Ct. 10.30.2009		
1:09-cv-00130-CFL	DEL RIO	3/3/2009	6/26/2009		
1:09-cv-00564-JPW	DAVIS	8/26/2009	10/28/2009		
1:10-cv-00043-CFL	DEL RIO	1/22/2010	6/8/2010		
1:10-cv-00291-CCM	ELLIOTT	5/13/2010	3/2/2011		
1:11-cv-00010-VJW	CLARK	1/5/2011	7/28/2014		
1:11-cv-00320-EJD	WILBURN	5/19/2011	10/7/2011		
1:11-cv-00466-SGB	WAGSTAFF	7/18/2011	8/1/2013		
1:11-cv-00543-MCW	LONE STAR INDUSTRIES, INC	8/29/2011	3/4/2013		
1:11-cv-00857-EJD	TRINCO INVESTMENT COMPANY	12/7/2011	7/16/2012; Stipulation of dismissal w/prejudice 11.19.2019		
1:11-cv-00906-MCW	SHAPIRO	12/27/2011	6/13/2012		
1:12-cv-00056-TCW	SCRASE	1/27/2012	5/10/2012		
1:12-cv-00157-LJB	INTERNATIONAL FEDERATION C	3/6/2012	5/29/2013		
1:12-cv-00425-MBH	PERRY	6/28/2012	12/26/2012		
1:12-cv-00524-CCM	MOORER	8/20/2012	12/18/2012		
1:12-cv-00525-NBF	PERRY	8/20/2012	6/6/2013		
1:12-cv-00628-EJD	MESCHKOW	9/24/2012	1/10/2014		
1:13-cv-00038-MCW	LITTLE	1/14/2013	10/24/2013		
1:13-cv-00464-EDK	FILLER	7/9/2013	5/16/2014		
1:13-cv-00839-SGB	IRWIN	10/28/2013	3/21/2014		
1:13-cv-00925-EJD	MEZA	11/22/2013	12/5/2013		

CASE NUMBER	SHORT CAPTION	DATE FILED	JUDGMENT DATE	AWARD DATE	AMOUNT OF AWARD
1:14-cv-00076-MMS	SCRASE	1/27/2014	8/12/2014		
1:14-cv-00206-SGB	SHIPMAN	3/13/2014	10/3/2014		
1:14-cv-00544-MBH	CYCENAS	6/25/2014	3/12/2015		
1:14-cv-00582-LB	ESTES	7/10/2014	1/22/2015		
1:14-cv-00710-PEC	GOLDEN	8/6/2014	10/6/2014		
1:14-cv-00948-TCW	SOWELL	10/6/2014	7/6/2015		
1:15-cv-00378-MCW	GLOBAL FREIGHT SYSTEMS CO.	4/14/2015	Notice of voluntary dismissal w/prejudice 08.07.2019		
1:15-cv-00697-LKG	KRAFT	7/6/2015	11/25/2015		
1:15-cv-00915-LAS	LION FARMS, LLC	8/21/2015	Notice of voluntary dismissal w/prejudice 02.03.2020		
1:15-cv-00926-MCW	BENARD	8/25/2015	Notice of voluntary dismissal w/o prejudice 03.29.2019		
1:15-cv-00938-LAS	CIAPESSONI	8/26/2015	10/25/2019		
1:15-cv-01539-BAF	CITIZENS CENTRAL BANCORP, I	12/17/2015	9/7/2017		
1:15-cv-01574-LAS	HICKMAN	12/28/2015	Notice of voluntary dismissal w/o prejudice 10.23.2017		
1:16-cv-00235-LKG	SCRUGGS	2/17/2016	6/22/2016		
1:16-cv-00494-LAS	ISAAC	4/20/2016	4/26/2016		
1:16-cv-00703-VJW	DOUCE AL-DEY	6/16/2016	6/22/2016		
1:16-cv-00821-SGB	JOSEPH	7/11/2016	2/21/2017		
1:16-cv-01626-SGB	COOK	12/5/2016	4/4/2017		
1:17-cv-00065-VJW	SANTOS-PINEDA	1/13/2017	2/28/2018		

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1:17-cv-00222-NBF	TREVINO	2/15/2017	6/5/2017		
1:17-cv-00220-EMR	KUWAIT PEARLS CATERING CON	2/15/2017	Case settled at ADR 05.29.2019		
1:17-cv-00817-EGB	PATTY	6/16/2017	Stipulation of dismissal w/prejudice 05.17.2019		
1:18-cv-00978-EDK	CHICHAKLI	7/9/2018	1/25/2019		
1:18-cv-01115-RAH	KING	7/31/2018	Case active		
1:18-cv-01240-SSS	QUINN OPPORTUNITIES MASTER	8/17/2018	Case active		
1:18-cv-01965-EDK	MCCUTCHEN	12/26/2018	9/27/2019		
1:19-cv-00449-LAS	THE MODERN SPORTSMAN, LLC	3/26/2019	10/24/2019		
1:19-cv-01817-RTH	PAKTIN CONSTRUCTION COMPA	11/27/2019	Case active		
1:20-cv-00368-LKG	MCDONOUGH FAMILY LAND, LP	3/31/2020	Case active		
1:20-cv-00954-MMS	MALLETT-EL	7/27/2020	9/29/2020		
1:20-cv-01145-DAT	STRAW	9/3/2020	1/12/2021		
1:20-cv-01154-DAT	STRAW	9/8/2020	1/12/2021		
1:20-cv-01157-DAT	STRAW	9/8/2020	1/12/2021		