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March 8, 2010

VIA ELECTRONIC MAIL

The Honorable Robert E. Gerber
United States Bankruptcy Judge
Southern District of New York
One Bowling Green
New York, New York 10004-1408

Re: *Official Committee of Unsecured Creditors of Motors Liquidation Company v. JPMorgan Chase Bank, N.A., et al., Adv. Pro. No. 09-00504*

Dear Judge Gerber:

We represent the Official Committee of Unsecured Creditors (the "Committee") of Motors Liquidation Company in the above-referenced adversary proceeding (the "Action"). Pursuant to Local Bankruptcy Rule 7056-1(a), we respectfully write to set forth the issues to be presented in the Committee's forthcoming partial summary judgment motion and to request a pre-motion conference with the Court. According to the scheduling order in this Action, summary judgment motions are due to be served on March 15, 2010.

Summary of the Action

Among other relief sought in the Action, the Committee seeks to avoid as unperfected the lien (the "Lien") asserted by lenders under the term loan agreement with Motors Liquidation Company f/k/a General Motors Corporation ("Old GM"), dated as of November 29, 2006, as amended on March 4, 2009 (the "Term Loan"), and to recover more than \$1.5 billion in payments made to the Term Loan lenders from the DIP financing provided by the United States Department of the Treasury and Export Development Canada.¹

On October 30, 2008, a UCC termination statement (the "Termination Statement") was filed with the Secretary of State of Delaware. On its face, the Termination Statement terminated

¹ Paragraph 19(d) of the DIP Financing Order dated June 25, 2009 granted standing to the Committee to pursue claims challenging the security interest of the Term Loan lenders and avoid such liens to the extent they were not properly perfected as of the date that Old GM commenced its chapter 11 case.

the Delaware UCC financing statement that previously had perfected the Lien of the Term Loan lenders. The Termination Statement identified JPMorgan Chase Bank, N.A. (“JPMorgan”), administrative agent for the Term Loan, as “THE SECURED PARTY OF RECORD AUTHORIZING THIS AMENDMENT.” (capitalization appears in Termination Statement).

As set forth in the Complaint in this Action, because the Term Loan lenders’ security interest was unperfected on the chapter 11 petition date, the Lien is subject to avoidance under Section 544(a) of the Bankruptcy Code; all post-petition transfers to the Term Loan lenders are subject to avoidance and recovery under Sections 549 and 550 of the Bankruptcy Code; and all prepetition interest payments made during the 90-day preference period under the Term Loan are subject to avoidance and recovery under Sections 547 and 550 of the Bankruptcy Code.

Issue Presented

The sole question to be presented for resolution by the Court in the Committee’s summary judgment motion is: whether the filing of the Termination Statement caused the Lien to become unperfected. As a matter of law, the answer to this question is “yes.”

Summary of Argument

Under the Uniform Commercial Code, the filing of a termination statement renders ineffective the financing statement to which the termination relates and causes the subject lien to become unperfected. See U.C.C. § 9-513 and § 9-510; see also *In re Kerner Printing Co., Inc.*, 178 B.R. 363, 370 (Bankr. S.D.N.Y. 1995) (bank’s lien became unperfected upon filing of termination statement). If a security interest is unperfected prepetition, it will be trumped by the statutory lien of the trustee (or debtor-in-possession) upon the filing of the bankruptcy petition. See, e.g., *In re Kitchin Equip. Co. of Va., Inc.*, 960 F.2d 1242, 1251 (4th Cir. 1992).

Here, JPMorgan contends that the Termination Statement was not legally effective because it was filed by mistake. Even if true, this contention makes no legal difference. Lenders are bound by the effects of UCC termination statements, even when such termination statements are filed in error. See generally *In re Kitchin*, 960 F.2d at 1245-1246 (holding that bankruptcy trustee could avoid lien under 11 U.S.C. § 544(a) because the effect of a termination statement “on a secured interest is dramatic and final,” even though the box marked “termination” was checked in error); *In re Pac. Trencher and Equip., Inc.*, 27 B.R. 167, 168 (B.A.P. 9th Cir. 1983), *aff’d*, 735 F.2d 362 (1984) (holding that “pursuant to clearly articulated authority,” the creditor’s “prior U.C.C. filings lost even marginal sufficiency upon the filing of a termination statement, albeit erroneous, and that in turn effected a lapse in perfection”); *In re Silvernail Mirror and Glass, Inc.*, Case No., 85-3686-8P7, 142 B.R. 987 (Bankr. M.D. Fla. 1992) (creditor’s security interest became unperfected upon filing of termination statement, even though termination statement was filed in error); *Rock Hill Nat’l Bank v. York Chem. Indus., Inc. (In re York Chem. Indus., Inc.)*, 30 Bankr. 583, 586 (Bankr. D.S.C. 1983) (creditor’s “lien was unperfected as to the debtor in possession” because creditor had terminated its “financing statement – albeit

unintentionally and inadvertently”). Thus, even if mistaken, the Termination Statement was legally effective and rendered the Lien unperfected.

We also expect JPMorgan to contend that the Termination Statement was not legally effective because, notwithstanding the language that appears on the face of the Termination Statement, its filing was not “authorized” by JPMorgan. As explained briefly below, however, the undisputed facts establish that JPMorgan authorized the filing of the Termination Statement.

The Termination Statement was filed in connection with the payoff of a lease transaction (the “Lease Payoff”), involving Old GM, as lessee, and JPMorgan, as administrative agent. The following undisputed facts demonstrate that JPMorgan authorized the filing of the Termination Statement. Before the closing on the Lease Payoff on October 30, 2008:

- Simpson Thacher & Bartlett LLP (“Simpson Thacher”), counsel for JPMorgan, received and approved several versions of the closing checklist, all of which identified the Termination Statement as a document to be filed in connection with the Lease Payoff.
- Simpson Thacher received and approved a draft of the Termination Statement to be filed in connection with the Lease Payoff.
- Simpson Thacher transmitted the closing checklist and the draft Termination Statement to the managing director at JPMorgan with responsibility for all of JPMorgan’s credit relationships with Old GM, including the Term Loan and the Lease Payoff.
- Old GM transmitted the closing checklist directly to that same JPMorgan managing director.
- Simpson Thacher executed escrow instructions, identifying the Termination Statement as a document to be filed upon the Lease Payoff.
- When the Lease Payoff closed, Mayer Brown LLP (“Mayer Brown”), as counsel to Old GM, caused the Termination Statement to be filed, with the knowledge of JPMorgan and in accordance with executed escrow instructions.

The above facts, along with others to be supported in the Committee’s anticipated motion with documents and deposition testimony, establish conclusively that – mistaken or not – JPMorgan authorized the filing of the Termination Statement.²

² Before engaging in discovery, all that was known to the Committee about the circumstances of the filing of the Termination Statement was contained in an affidavit (the “Affidavit”) executed by Robert Gordon of Mayer Brown, who served as counsel to Old GM with respect to the Lease Payoff. The Affidavit was provided to the Committee, in an effort to persuade its members that the filing of the

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Because the filing of the Termination Statement was authorized by JPMorgan, it is legally effective. As a consequence, the Lien was unperfected as of the chapter 11 petition date in these bankruptcy proceedings, and the Committee is entitled to the relief requested in the Complaint in this Action.

We thank the Court for its attention to this pre-motion letter.

Respectfully,

/s/ Eric B. Fisher

Barry N. Seidel

Eric B. Fisher

cc: John Callagy, Esq.

Termination Statement was not authorized by JPMorgan. In the Affidavit, the first draft of which was prepared by counsel for JPMorgan, Mr. Gordon claims that the Termination Statement was filed without his knowledge by an unnamed Mayer Brown paralegal. Discovery, however, has shown that Mr. Gordon, like JPMorgan and Simpson Thacher, received the draft Termination Statement and the closing checklist via email before the Termination Statement was filed, and that the closing checklist and draft Termination Statement were prepared by Mayer Brown personnel acting under Mr. Gordon's supervision. The Affidavit is notably silent about what JPMorgan and Simpson Thacher knew about the Termination Statement before it was filed. In light of what is now known as a result of discovery, it is clear that the Affidavit is – to be charitable – incomplete.

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