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Response Deadline: August 5, 2010
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Hearing Date: October 21, 2010

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11 Case
MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a General Motors Corp., *et al.*,	:	Case No. 09-50026 (REG)
Debtors.	:	(Jointly Administered)
OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF MOTORS LIQUIDATION COMPANY f/k/a GENERAL MOTORS CORPORATION,	:	Adversary Proceeding
Plaintiff,	:	Case No. 09-00504 (REG)
vs.	:	
JPMORGAN CHASE BANK, N.A., *et al.*,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT JPMORGAN CHASE BANK, N.A. MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

This action seeks to penalize a secured party for the consequences of the filing of a UCC-3 termination statement by another party which had no authority whatsoever to do so. Notwithstanding that the Uniform Commercial Code explicitly provides that unauthorized filings are a nullity, the complaint would have the Court avoid a security interest securing $1.5 billion in debt, thereby creating a windfall for the unsecured creditors of the estate – even though the party which filed the UCC-3 was not aware that it had done so, admits it had no authority from the secured creditor to do so, and there is no evidence that any creditor either knew about or relied in any way on the unauthorized filing before General Motors Corporation ("**GM**") filed for bankruptcy protection on June 1, 2009 (the "**Petition Date**").

In October 2008, in the context of a repayment in full by GM to JPMorgan Chase Bank, N.A. ("**JPMCB**") and other lenders, of a $150 million dollar outstanding loan relating to a synthetic lease financing transaction, GM's counsel in that matter – entirely without authority from JPMCB – filed a UCC-3 termination statement relating to an entirely separate $1.5 billion dollar GM Term Loan facility among JPMCB, for itself and as agent for a different syndicate of lenders. Pursuant to the limited standing granted by this Court's June 25, 2009 DIP Order, the Official Committee of Unsecured Creditors ("**Committee**") has brought this adversary proceeding claiming that the filing of the unrelated UCC-3 termination statement eliminated the Term Loan lenders' status as perfected secured creditors under that facility. The Committee seeks to obtain a windfall by clawing back repayment amounts paid to JPMCB and other lenders on this secured facility during the GM bankruptcy proceedings.[1]

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[1] Pursuant to the Court's order of January 20, 2010, the Committee is not required to serve all Term Loan lenders until thirty (30) days from the disposition of this motion, it being contemplated that JPMCB would address the issues raised in this motion to the Court in the interim.

The undisputed evidence and the law require dismissal of the Committee's adversary proceeding. A termination agreement signed by GM and JPMCB, which reflected and governed the repayment of the synthetic lease financing only gave permission to GM to file termination statements that related to the specific real estate properties that were the subject of that financing. Moreover, each of the witnesses who had knowledge of the events here has testified that they did not even know that an unrelated UCC-3 termination statement had been filed, and certainly did not believe they had ever been given any authority to do so. Specifically:

- The supervising partner at Mayer Brown LLP ("**Mayer Brown**"), counsel for GM in connection with the repayment of the synthetic lease transaction, testified that JPMCB did not authorize and he did not believe that Mayer Brown was authorized to file the unrelated Term Loan UCC-3 termination statement.

- The Mayer Brown associate who did the day-to-day work on the closing of the synthetic lease repayment testified that he did not believe that Mayer Brown received authority to release security related to the Term Loan, and he never believed that he was releasing any security or filing a UCC-3 termination statement related to the Term Loan.

- GM's current Director of the Worldwide Real Estate Group for North America who executed the termination agreement in connection with the synthetic lease repayment, stated in her affidavit that GM and its counsel, Mayer Brown, were not authorized, nor did GM believe it had authority to terminate a UCC-1 related to the Term Loan.

- The JPMCB banker on the synthetic lease transaction, also stated in his affidavit that JPMCB did not authorize GM nor its counsel, Mayer Brown, to file a UCC-3 termination statement relating to the Term Loan.

- The attorney at Simpson Thacher & Bartlett LLP ("**Simpson**"), who represented JPMCB on the synthetic lease transaction, also testified that the termination agreement was Mayer Brown's only source of authority and only authorized the release of collateral relating to the synthetic lease transaction.

Moreover, the evidence is undisputed that the filing of the unrelated UCC-3 termination statement remained unknown to all parties until after the Petition Date. The discovery in this adversary proceeding demonstrates that not a single party, including the Committee and any of its members, relied detrimentally or otherwise on the unauthorized filing. Furthermore, discovery has made it crystal clear that the filing of the unrelated termination statement was not authorized, and thus as a matter of law, its filing was ineffective to undermine the perfected security interest supporting the Term Loan facility.

Further, pursuant to the terms of this Court's June 25, 2009 DIP Order, JPMCB and the other Term Loan lenders have been released from any and all claims and causes of action, including avoidance actions, relating to the Term Loan except those relating to the perfection of their security interests. Here, the Term Loan lenders' security interests in the assets of GM and Saturn, respectively, also remained perfected by the Delaware UCC-1 financing statement covering Saturn as well as twenty-six fixture filings – which the Committee does not, and cannot, contest remained on file as of the Petition Date.

The Committee's adversary proceeding should also be dismissed on the alternative ground that JPMCB and the other Term Loan lenders are entitled to a constructive trust in the collateral for the Term Loan as of the Petition Date which would give them priority over any interest of the unsecured creditors. To permit recovery in light of the facts here would be inequitable, and would grossly and unjustly enrich the unsecured creditors of the estate to the detriment of the Term Loan lenders who bargained for the collateral in question.

STATEMENT OF FACTS[2]

A. The Synthetic Lease Transaction

On October 31, 2001, GM entered into a synthetic lease financing arrangement among multiple parties, including JPMCB (the "**Synthetic Lease Transaction**"). (Duker Aff. at ¶ 4.)[3] The Synthetic Lease Transaction, which was scheduled to mature on October 31, 2008, had provided GM with up to approximately $300 million of financing from a syndicate of financial institutions for the acquisition and construction of several real properties. (*Id.* at ¶¶ 4 and 15.) JPMCB served as one of several backup facility banks as well as the Administrative Agent in the transaction. (*Id.* at ¶ 4.)

JPMCB was represented by the law firm of Simpson in all matters relating to the Synthetic Lease Transaction. (Duker Aff. at ¶ 8; Callagy Decl. Ex. 5, Merjian Tr. at 9 and 11; Ex. 6, Duker Tr. at 17.) GM was represented by the law firm of Mayer Brown. (Callagy Decl. Ex. 11 at JPMCB-00000077, ¶ 2; Duker Aff. at ¶ 8.)

GM's obligation to repay the financing advanced by the banks in the Synthetic Lease Transaction was secured by liens on certain real properties defined in the Synthetic Lease Transaction Documents as the "Properties." (Duker Aff. at ¶ 6.)[4] Multiple state filings in

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2 The facts and evidence relevant to this motion are set forth in the accompanying declaration of John M. Callagy dated July 1, 2010 ("**Callagy Decl.**"), affidavit of Richard W. Duker dated June 29, 2010 ("**Duker Aff.**") and affidavit of Debra Homic Hoge dated March 18, 2010 ("**Hoge Aff.**") and the exhibits identified therein and annexed thereto.

3 The Synthetic Lease Transaction was set forth in a Participation Agreement dated October 31, 2001, among GM, as Lessee and Construction Agent, Auto Facilities Real Estate Trust 2001-1, a Delaware business trust, as Lessor, Wilmington Trust Company, as trustee of the Lessor, the Persons named therein as Investors, the Persons named therein as Backup Facility Banks, Relationship Funding Company, LLC, and The Chase Manhattan Bank (now known as JPMCB), as Administrative Agent, as amended, together with all related agreements and documents (collectively, the "**Synthetic Lease Transaction Documents**"). (Duker Aff. at ¶ 5; Exs. A-E.)

4 The Synthetic Lease Transaction Documents specifically identified twelve different properties: (1) SPO Warehouse – Bolingbrook, IL; (2) SPO Warehouse – Reno, NV; (3) SPO Warehouse – Denver, CO; (4) SPO Warehouse – Ontario, CA; (5) Transmission Parts Distribution Center – Indianapolis, IN; (6) Franklin Parking Deck – Detroit, MI; (7) River East Parking Deck – Detroit, MI; (8) Combined Parcels C & 6 –

relevant counties were made where such Properties were located, and Delaware UCC-1 financing statements were filed with the Delaware Secretary of State. (Duker Aff. at ¶ 7; Ex. F.)

B. The Term Loan

On November 29, 2006, five years after the closing of the Synthetic Lease Transaction, GM and Saturn Corporation ("**Saturn**") entered into an entirely different loan arrangement. (Duker Aff. at ¶ 9.) This loan involved a seven year senior secured term loan facility (the "**Term Loan**")[5] with a different syndicate of financial institutions and JPMCB, acting as Administrative Agent. (*Id.*) The Term Loan provided GM with approximately $1.5 billion in financing and was a completely separate transaction from the Synthetic Lease Transaction. (*Id.*)

In connection with the Term Loan, GM, Saturn and JPMCB entered into a Collateral Agreement, dated as of November 29, 2006, which provided the lenders with security interests in certain assets of GM and Saturn (the "**Term Loan Collateral Agreement**"). (Duker Aff. at ¶ 11; Ex. H.) Specifically, the obligation to repay the Term Loan was secured by:

> [A] security interest in, all of the following assets and property now owned or at any time hereafter acquired by [GM or Saturn] or in which [GM or Saturn] now has or at any time in the future may acquire any right, title or interest . . . as collateral security for the prompt and complete payment and performance when due . . . of the [Term Loan]:
>
> (a) all Equipment and all Fixtures . . .

Detroit, MI; (9) SPO Headquarters Building – Grand Blanc, MI; (10) SPO Warehouse – Brandon, MS; (11) SPO Warehouse – Charlotte, NC; and (12) Powertrain L6 Engine Plant – Flint, MI (collectively, the "**Properties**"). (Duker Aff. Exs. B, D and E at JPMCB-STB-00000918-920.)

[5] The Term Loan was set forth in a Term Loan Agreement (the "**Term Loan Agreement**"), dated as of November 29, 2006, among GM, as the Borrower, Saturn, as a Guarantor, the Several Lenders, Credit Suisse Securities (USA) LLC, as Syndication Agent, Barclays Bank PLC, Citigroup Global Markets Inc., Deutsche Bank Securities Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, and Morgan Stanley Senior Funding, Inc., as Co-Documentation Agents, and JPMCB, as Administrative Agent, as amended together with all related agreements and documents. (Duker Aff. at ¶ 10, Ex. G.)

(b) all Documents and General Intangibles attributable solely to Equipment or Fixtures . . .
(c) all books and records pertaining solely to Equipment or Fixtures (or Proceeds or products of Equipment or Fixtures), in each case . . .
(d) to the extent not otherwise included in foregoing clauses, all Proceeds and products of any and all of the foregoing. . .

(collectively, the "**Term Loan Collateral**"). (Duker Aff. at ¶ 12; Ex. H Article II at JPMCB-CSM-000117-118.) The Term Loan Collateral was located at forty-two GM and Saturn plants and facilities identified in the Term Loan Collateral Agreement, as well as at any U.S. manufacturing plant or facility that GM or Saturn acquired or leased after November 29, 2006. (*Id.*, Ex. H.) The Term Loan Agreement provided that the security interest in the Term Loan Collateral would be perfected by the filing of two UCC-1 financing statements with the Delaware Secretary of State against GM and Saturn as well as fixture filings as to each of those plants that housed Term Loan Collateral which value was at at least $100,000,000 as reflected on GM's books. (*Id.*, Ex. G at JPMCB-CSM-0000017, § 3.12 at JPMCB-CSM-0000035, Schedule 3.12 at JPMCB-CSM-0000073-74.)

Accordingly, after the closing of the Term Loan, JPMCB caused the filing of two UCC-1 financing statements with the Delaware Secretary of State listing GM and Saturn, respectively, as the debtors, and JPMCB, as Administrative Agent, as the secured party. (Duker Aff. at ¶ 13; Ex. I.) JPMCB also caused the filing of twenty-six state fixture filings in the counties where the fixtures were located. (*Id.*, Ex. J.)[6]

The Term Loan Agreement provided that the lenders' security interests in the Term Loan Collateral could not be eliminated unless the loan was fully paid off or unless all of the lenders gave express written consent. (Duker Aff. Exhibit G at § 10.01 at JPMCB-CSM-

[6] The twenty-six state fixture filings were filed in counties located in Delaware, Indiana, Kansas, Louisiana, Michigan, New York, Ohio, Texas and Wisconsin. (Duker Aff. Ex. J.)

0000052-53 and Ex. H at § 7.13 at JPMCB-CSM-0000128.) GM and Saturn also covenanted under Section 4.03 of the Term Loan Collateral Agreement that GM and Saturn would maintain the perfection of the security interests in the Term Loan Collateral. (Duker Aff. Ex. H at § 4.03 at JPMCB-CSM-0000120.) Moreover, this covenant could "be waived, amended, supplemented or otherwise modified [only] in a writing signed by all parties [to the Term Loan Collateral Agreement] . . ." (*Id.*, at § 7.01 at JPMCB-CSM-0000125.)

At all pertinent times, JPMCB was represented by Cravath, Swaine & Moore LLP ("**Cravath**") or Morgan Lewis & Bockius LLP ("**Morgan Lewis**") in connection with the Term Loan. (Duker Aff. at ¶ 14; Callagy Decl. Ex. 6 (Duker Tr.) at 11, 28-29.) Simpson, never represented JPMCB in connection with the Term Loan, and had no involvement in, or responsibilities with respect to the Term Loan. (Duker Aff. at ¶¶ 14 and 21; Callagy Decl. Ex. 5 (Merjian Tr.) at 54-55.)

C. The Termination Of The Synthetic Lease Transaction In October 2008

On or about September 30, 2008, GM informed its counsel for the Synthetic Lease Transaction, Robert Gordon, a partner at Mayer Brown, that it planned to repay the outstanding amount due under the Synthetic Lease Transaction, which would be accomplished by GM's re-purchase of the remaining Properties. (Callagy Decl. Ex. 12 at MB002426.) As of October 1, 2008, the balance of the amount to be repaid on the Synthetic Lease Transaction was approximately $150 million. (Duker Aff. at ¶ 15.)

GM requested that Mayer Brown "prepare the documents necessary for [JPMCB and the other lenders] to be paid off for the obligations on that synthetic lease and to release their interest in those properties." (Callagy Decl. Ex. 4 (Gordon Tr.) at 6.) Mr. Gordon assigned this work to Ryan Green, a Mayer Brown real estate associate. (*Id.* at 12.) Mr. Green was asked to

draft the documents necessary for "the termination and payoff of the synthetic lease." (*Id.*) Mr. Gordon, thereafter, did not stay involved in the day-to-day drafting of the closing documents. (*Id.* at 58.)

The documents prepared by Mr. Green most pertinent here included: (i) a termination agreement; (ii) a closing checklist; (iii) UCC-3 termination statements; and (iv) an escrow letter. Mr. Green understood that all of his drafting of these documents related solely to the repayment of the Synthetic Lease Transaction (*Id.* at Ex. 2 (Green Tr.) at 99), each of which is described below.

1. The Synthetic Lease Termination Agreement

The operative document for the repayment of the Synthetic Lease Transaction, as drafted by Mayer Brown, was entitled "Termination Agreement and Release of Operative Agreements" (the "**Synthetic Lease Termination Agreement**"). (Callagy Decl. Ex. 16.) The Synthetic Lease Termination Agreement was initially circulated in draft form by Mr. Green to the parties on October 15, 2008, and was eventually executed by GM, JPMCB and the other parties to the transaction on or about October 30, 2008, the effective date of the closing of the transaction. (*Id.*; Duker Aff. at ¶ 17; Ex. L; Hoge Aff. at ¶ 7.)

The Synthetic Lease Termination Agreement specifically limited GM's authority to file UCC-3 termination statements as to existing UCC-1 financing statements *filed in connection with the Properties* that were the subject of the Synthetic Lease Transaction. (Callagy Decl. Ex. 4 (Gordon Tr.) at 22-23.) Thus, the Synthetic Lease Termination Agreement stated that:

> In consideration of ONE Dollar ($1.00) and other good and valuable consideration, the receipt and sufficiency of which is hereby confessed and acknowledged, the undersigned, each of which is a party to one or more of the agreements identified as the

> Operative Agreements, hereby agree that (i) each of such Operative Agreements and any Commitment thereunder is hereby terminated and is discharged and of no further force or effect as of the date hereof, and (ii) *the Administrative Agent and Lessor do hereby* (x) release all of their Liens and Lessor Liens against the Properties created by the Operative Agreements, (y) acknowledge that such Liens and Lessor Liens are forever released, satisfied and discharged and *(x) authorize Lessee [i.e. , GM] to file a termination of any existing Financing Statements relating to the Properties.*

(Duker Aff. Ex. L at JPMCB-0002801) (emphasis added.) The Synthetic Lease Termination Agreement further stated that "[a]ll capitalized terms not otherwise defined herein shall have the meanings set forth in Annex A to that certain Participation Agreement dated as of October 31, 2001." (*Id.*) As referenced above, the relevant Synthetic Lease Transaction Documents defined "Properties" to be twelve specified parcels of real estate. *See supra* p.4 at note 4.

The Synthetic Lease Termination Agreement, therefore, as it related to the filing of UCC statements, only authorized the filing of UCC-3 termination statements relating to the Properties that served as collateral for the Synthetic Lease Transaction – nothing more. (Duker Aff. at ¶ 18; Hoge Aff. at ¶¶ 8-9 and 11; Callagy Decl. Ex. 2 (Green Tr.) at 95-96; Ex 5 (Merjian Tr.) at 56.) As Mr. Gordon of Mayer Brown testified, the Synthetic Lease Termination Agreement was "[t]he only source" of GM's and Mayer Brown's authority to file UCC-3 termination statements. (Callagy Decl. Ex. 4 (Gordon Tr.) at 53-54.)

2. <u>The Synthetic Lease Closing Checklist</u>

Mr. Green, along with a Mayer Brown real estate paralegal, Stewart Gonshorek, also drafted and circulated a closing checklist (the "**Synthetic Lease Closing Checklist**") referencing the documents Mr. Green believed to be necessary to effectuate the repayment of the Synthetic Lease Transaction. (Callagy Decl. Ex. 2 (Green Tr.) at 7-8, 10-12 and 85-87.) Indeed,

Mr. Green entitled the draft closing checklist:

CLOSING CHECKLIST
General Motors: Release of Properties from JPMorgan Chase Synthetic Lease
CLOSING DATE: October 31, 2008.

(Callagy Decl. Ex. 15.) Mr. Green determined what types of documents should be included on the Synthetic Lease Closing Checklist by "look[ing] through a copy of the [P]articipation [A]greement . . . the main document for the [Synthetic Lease Transaction] . . . [which] contained a description of how to unwind and the relevant documents." (*Id.*, Ex. 2 (Green Tr.) at 8.) Mr. Green's intent in preparing the checklist was "to list the documents which would release security relating to the synthetic lease facility." (*Id.* at 85-87.) Accordingly, the Synthetic Lease Closing Checklist listed several dozen closing documents relating to the Properties, such as the various UCC-1 financing statements that needed to be terminated for each property, including multiple Delaware UCC-1 financing statements filed in the Delaware Secretary of State's office that needed to be terminated. (*Id.*, Ex. 15.)

Under section 5 of the Synthetic Lease Closing Checklist, entitled "General Documentation," Mr. Green and Mr. Gonshorek listed filing numbers for three Delaware UCC-1 financing statements that they believed needed to be terminated. (*Id.*) Specifically, subcategory A of the "General Documentation" section set forth:

> Termination of UCCs (central, DE filings) Blanket-type financing statements as to real Property and related collateral located in Marion County, Indiana (file number 2092532 5, file date 4/12/02 and file number 2092526 7, file date 4/12/02)) financing statement as to equipment, fixtures and related collateral located at certain U.S. manufacturing facilities (file number 6416808 4, file date 11/30/06).

(*Id.*)

These three UCC-1 file numbers listed on the Synthetic Lease Closing Checklist

were derived from a UCC search Mr. Green had requested that another Mayer Brown paralegal, Michael Perlowski, perform in order to identify UCC-1 financing statements filed against GM and in favor of JPMCB in Delaware. (Callagy Decl. Ex. 1 (Perlowski Tr.) at 10-12; Ex. 2 (Green Tr.) at 9, 21-22; Ex. 7.) Working from the results of a prior Mayer Brown search for UCC-1 financing statements recorded against GM, Mr. Perlowski identified several UCC-1 financing statements in response to Mr. Green's request. (*Id.*, Exs. 8-10; Ex. 1 (Perlowski Tr.) at 12.) Although Mr. Perlowski was assigned this specific task, he was never privy to the specific transaction on which Mr. Green was working. (*Id.*, Ex. 1 (Perlowski Tr.) at 40.) As it turned out, Mr. Perlowski included a UCC-1 financing statement filed against GM in favor of JPMCB with the filing number 6416808 4, which did not relate to the Synthetic Lease Transaction. (Duker Aff. Ex. I at JPMCB-CSM-0000277-281.) That UCC-1 financing statement had been filed in Delaware in connection with the Term Loan. (*Id.*) But Mr. Green, along with Mr. Gonshorek, believed that all of the Delaware UCC-1 financing statements identified by Mr. Perlowski pertained only to the Synthetic Lease Transaction, and that UCC-3 termination statements should therefore be prepared for each in connection with the Synthetic Lease Transaction repayment. (Callagy Decl. Ex. 2 (Green Tr. 99); Ex. 3 (Gonshorek Tr.) 47-48.)

Mr. Green circulated the Synthetic Lease Closing Checklist to GM as well as to counsel for JPMCB on October 15, 2008. (Callagy Decl. Exs. 13 and 15.) Mr. Green also circulated updated, but largely similar, drafts of the checklist later on October 15, and again on October 21, 2008. (*Id.*, Exs. 16 and 17.) The subject lines of all of Mr. Green's e-mails attaching the drafts of the Synthetic Lease Closing Checklist stated that the attached related to the "GM/JPMorgan Chase - Synthetic Lease." (*Id.*).[7] None of the drafts ever referenced a Term

[7] Mr. Duker, JPMCB's banker for the transaction, also received a copy of the draft Synthetic Lease Closing Checklist from GM, Mr. Sundaram, and JPMCB's outside counsel, Simpson, on October 15, 2009.

Loan. (*Id.*) None of the parties who received a draft of the Synthetic Lease Closing Checklist recognized that the filing number 6416808 4 listed therein was unrelated to the Synthetic Lease Transaction. (Duker Aff. at ¶ 29.) Indeed, throughout the thirty days that it took to close the Synthetic Lease Transaction, there were no discussions whatsoever among JPMCB, Simpson, GM, Mayer Brown or any person involved in this transaction regarding any of the UCC-1 financing statements listed on the Synthetic Lease Closing Checklist, including the UCC-1 financing statement numbered 6416808 4. (Duker Aff. at ¶ 16; Callagy Decl. Ex. 5 (Merjian Tr.) at 18 and 22.)

3. The Unrelated Termination Statement

On October 15, 2008, Mr. Green also circulated drafts of the documents referenced on the Synthetic Lease Closing Checklist. (Callagy Decl. Ex. 16.) Mr. Green attached nearly one hundred pages of draft documents to an e-mail, including ten different draft UCC-3 termination statements – seven county filings to be filed in each of the counties where the Properties were located, and three to release the Delaware UCC-1 financing statements also referenced in the Synthetic Lease Closing Checklist. (*Id.* at JPMCB-STB-00000204-206, 221-222, 226-227 and 242-244.) Mr. Green did not include copies of any of the UCC-1 financing statements that corresponded to the filing numbers referenced on the ten draft UCC-3 termination statements that were circulated. (*Id.*) Nothing in Mr. Green's e-mail or enclosures referenced the Term Loan. (*Id.*) And again, the subject line of Mr. Green's e-mail enclosing the draft documents - "GM/JPMorgan Chase – Synthetic Lease (Auto Facilities Real Estate Trust 2001-1)" – reflected his contemporaneous belief that all of his enclosures related to the repayment of the Synthetic Lease Transaction. (*Id.*)

(Callagy Decl. Exs. 14, 22 and 23.) In each case, the cover email attaching the draft indicated that the checklist concerned the Synthetic Lease Transaction. (*Id.*)

One of the draft UCC-3 termination statements circulated by Mr. Green corresponded to UCC-1 financing statement numbered 6416808 4, which, as discussed above, actually related to the Term Loan (the "**Unrelated Termination Statement**"). (*Id.* at JPMCB-STB-00000206.) Mr. Gonshorek, the paralegal tasked with drafting the UCC-3 termination statements, testified that he prepared the Unrelated Termination Statement intending "to terminate the UCC in connection with the synthetic lease becoming unwound." (Callagy Decl. Ex. 3, Gonshorek Tr. at 20.) Mr. Gonshorek's contemporaneous belief that UCC-1 financing statement numbered 646808 4 and the Unrelated Termination Statement related to the Synthetic Lease Transaction is reflected on his draft of the Unrelated Termination Statement itself. Under section 10 of that document, Mr. Gonshorek typed in "Matter No. 00652500." (Callagy Decl. Ex. 16 at JPMCB-STB-00000206.) "Matter No. 00652500" is an internal Mayer Brown client-matter number and relates exclusively to Mayer Brown's representation of GM in connection with the Synthetic Lease Transaction, not the Term Loan. (*Id.*, Ex. 2 (Green Tr.) at 81-82.)

Moreover, the draft Unrelated Termination Statement merely referenced GM as the debtor, JPMCB, as Administrative Agent. (Callagy Decl. Ex. 16 at JPMCB-STB-00000206.) It made no reference to the Term Loan. (*Id.*)

4. <u>The Synthetic Lease Escrow Letter</u>

As part of the repayment of the Synthetic Lease Transaction, the parties agreed to use an escrow agent, LandAmerica, which was to hold the executed closing documents in escrow pending receipt of payment from GM. (Callagy Decl. Ex. 18; Ex. 4 (Gordon Tr.) at 20; Ex. 5 (Merjian Tr.) at 33-34.) Thus, Mayer Brown also drafted an escrow letter setting forth certain instructions to the escrow agent (the "**Synthetic Lease Escrow Letter**"). (*Id.*, Ex. 18.) Mr. Green circulated a draft of the Synthetic Lease Escrow Letter to JPMCB's counsel and others on October 24, 2008. (*Id.*) The subject line of Mr. Green's cover e-mail once again indicated that it

pertained to the Synthetic Lease Transaction. (*Id.*) The purpose of the escrow letter was "[t]o arrange for the payoff of the GM synthetic lease" (*id.* Ex. 4 (Gordon Tr.) 20) and to "have the documents in connection with the synthetic lease financing placed with one party so that they could be released at the appropriate time to the appropriate parties." (*Id.*, Ex. 5 (Merjian Tr.) 33-34.) Indeed, the fact that the Synthetic Lease Escrow Letter related only to the Synthetic Lease Transaction was reflected on the first page of the document, in its subject line, which stated:

> Termination of that certain Participation Agreement dates as of October 31, 2001, among General Motors Corporation ("**GM**"), as Lessee and Construction Agent, Auto Facilities Real Estate Trust 2001-1 ("**Trust**"), as Lessor, Wilmington Trust Company ("**Trustee**"), as Trustee, the Persons named therein as Investors, the Persons named therein as Backup Facility Banks, Relationship Funding Company, LLC, and JPMorgan Chase Bank ("**Agent**"), as Administrative Agent, as amended (the "**Participation Agreement**") and release of all liens related thereto including liens relating to the following properties: (i) the SPO Headquarters Building located in Grand Blanc, Michigan (the "**Grand Blanc Property**"); (ii) the GM Powertrain L6 Engine Plant in Flint, Michigan (the "**Flint Property**"); (iii) the Franklin Deck in Detroit, Michigan (the "**Franklin Deck**"); (iv) the River East Parking Deck in Detroit, Michigan (the "**River East Deck**"); and (v) Parcel 6/C in Detroit, Michigan ("**Parcel 6/C**") (the Grand Blanc Property, the Flint Property, the Franklin Deck, the River East Deck and Parcel 6/C herein are each a "Property" and, collectively, the "**Properties**"). Capitalized terms used but not defined herein have the respective meanings specified in Annex A to the Participation Agreement.

(Callagy Decl., Ex. 19 at MB000024.)

The Synthetic Lease Escrow Letter did not provide any authority to the escrow agent, or anyone else, to file any UCC-3 termination statements, including the Unrelated Termination Statement. The letter merely stated that upon the closing the parties would each receive sets of the documents listed therein. (*Id.*) Those documents were defined "collectively,

[as] the Escrow Documents." (*Id.* at MB000024.)[8] Among the Escrow Documents, entry number 2 referenced "Termination of UCC Financing Statements (File Numbers 2092532 5, 2092526 7, and 6416808 4) (the "**General UCC Terminations**")." (*Id.*) There was no reference to the Term Loan. (*Id.*)

The Synthetic Lease Escrow Letter instructed the escrow agent to forward the General UCC Terminations, among other Escrow Documents, to GM's counsel:

> Immediately following closing, any extra original documents and copies of all Escrow Documents shall be forwarded to the counsel for GM, except for those documents which have been forwarded to the recorder's office (in which case certified copies of the foregoing shall be found to the counsel for GM).

(*Id.* at MB000029.) The Synthetic Lease Escrow Letter did not provide any instructions to GM's counsel as to what to do with those documents upon their delivery. (*Id.*) The letter certainly does not constitute authority for anyone to file any of the UCC-3 termination statements. Indeed, GM's counsel, who prepared the Synthetic Lease Escrow Letter, testified that:

> The [termination] statements that related to the GM/Chase synthetic lease were permitted to be filed by [virtue of] the [Synthetic Lease Termination Agreement], not [the Synthetic Lease Escrow Letter].

(Callagy Decl. Ex. 4 (Gordon Tr.) at 21.)

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[8] The Synthetic Lease Escrow Letter instructed LandAmerica to record a subset of certain of the Escrow Documents (defined therein as "**Recording Documents**") with the appropriate recording offices in the applicable states following the repayment. (Callagy Decl. Ex. 19 at MB000028-29.) The Recording Documents set forth in the Synthetic Lease Escrow Letter consisted of documents such as releases of Mortgages, releases of Assignments of Leases and Rents, terminations of Short Form Memorandum of Leases and quitclaim Deeds, but did not include any of the Delaware UCC-3 termination statements. (*Id.*)

D. GM And Mayer Brown Admit That There Was No Authority To File A Termination Statement Related To The Term Loan

GM repaid the amount due on the Synthetic Lease Transaction on October 30, 2008. (Duker Aff. at ¶ 19; Callagy Decl. Ex. 24.) Thereafter, Mayer Brown caused the filing of UCC-3 termination statements with the Delaware Secretary of State, on October 30, 2008, including the Unrelated Termination Statement. (Callagy Decl. Ex. 21.) These UCC-3 termination statements were not signed, nor required to be signed, by JPMCB, pursuant to applicable law. (Duker Aff. at ¶ 19.)

The Mayer Brown attorneys and paralegals believed that everything they filed related to the Synthetic Lease Transaction, and admit that at no point did they have any authority to file a UCC-3 termination statement related to the Term Loan. (Callagy Decl. Ex. 11 at JPMCB-00000077-79). Indeed, in June 2009, after the discovery of the filing of the Unrelated Termination Statement (*see infra* pp. 20-21), counsel for the Committee and the Debtors were provided with an affidavit executed by Mr. Gordon of Mayer Brown which stated, in part:

> Mayer Brown has never represented GM with respect to the Term Loan Agreement among GM and others and [JPMCB], as Administrative Agent.
>
> GM was not authorized by the [Synthetic Lease] Termination Agreement to terminate any financing statement related to the Term Loan Agreement.

(*Id.*) Similarly, deposition testimony taken by the parties herein uniformly confirms that no authority was given to file the Unrelated Termination Statement. Mr. Gordon testified:

> Q. During the period of time that you were working on this transaction -- this synthetic lease transaction up to the present, has anybody ever told you that JPMorgan authorized the filing of the unrelated termination statement?
>
> A. No.

Q. During the period of time you worked on this matter up to today, did you ever form the belief that Mayer Brown was authorized in filing the unrelated termination statement?

A. No.

(Callagy Decl. Ex. 4 (Gordon Tr.) at 66.)

Likewise, Mr. Green testified that he was never aware that in the context of his work on the Synthetic Lease Transaction, he filed a UCC-3 relating to the Term Loan. (*Id.*, Ex. 2 (Green Tr.) at 88-89.) Indeed, prior to GM filing for bankruptcy in June 2009, Mr. Green had never even heard of the Term Loan. (*Id.* at 84 and 89.) Mr. Green understood that only the "security relating to the [S]ynthetic [L]ease [Transaction] was going to be released." (*Id.* at 83.) Mr. Green further testified:

Q. Did you, Mr. Green, on behalf --in the course of your representation of General Motors in the unwinding of the synthetic lease transaction and up to the point of the closing, did you believe that Mayer Brown had been given any authority by JPMorgan or its counsel to release liens on security relating to the term loan financing arrangement between General Motors and JPMorgan?

* * *

A. No

(*Id.* at 99.)

Furthermore, Mr. Gonshorek testified that he believed that all of the paralegal work that he did for Mr. Green in October of 2008 related to the repayment of the Synthetic Lease Transaction. (Callagy Decl. Ex. 3 (Gonshorek Tr.) at 47.) He further testified that he believed that all of the documents that he prepared in the context of repaying the Synthetic Lease Transaction related only to that transaction. (*Id.* at 47-48.) Mr. Perlowski, the other Mayer Brown paralegal who worked on the matter, did not have any knowledge of the nature of the

transaction for which he was asked to search for Delaware state filings. (*Id.*, Ex. 1 (Perlowski Tr.) 40-41.)

Similarly, Debra Homic Hoge, GM's current Director of the Worldwide Real Estate Group for North America, who executed the Synthetic Lease Termination Agreement, has provided an affidavit in which she affirms that:

> Old GM was not authorized by the Synthetic Lease Termination Agreement, nor did old GM believe it had any authority to terminate any UCC-1 financing statement related to the Term Loan. Nor did old GM provide Mayer Brown with any authority to file a termination statement with respect to the UCC-1 financing statement related to the Term Loan.

(Hoge Aff. at ¶ 11.)

Likewise, deponents from JPMCB and its counsel testified that they gave no authority to GM or its counsel Mayer Brown to file the Unrelated Termination Statement. As Mr. Duker of JPMCB stated in his affidavit:

> JPMCB did not authorize GM nor its counsel, Mayer Brown, to file a UCC-3 termination statement relating to the Term Loan in October 2008 or at any time prior to GM's bankruptcy filing on June 1, 2009.

(Duker Aff. at ¶ 20.) Mr. Duker further stated that:

> [] Simpson represented JPMCB only with respect to the Synthetic Lease Transaction. Simpson did not have any authority with respect to the Term Loan.

(Duker Aff. at ¶ 21.)

JPMCB's counsel, Simpson, has also testified that they gave no such authority to file the Unrelated Termination Statement.

> Q. In October of 2008 when you were representing JPMorgan in connection with the payoff of the synthetic lease transaction, did you understand or have any understanding

that Mayer Brown had any authority to do anything with respect to the security underlying the term loan financing?

***

A. No. Mayer Brown's authority to do anything in the synthetic lease transaction derives from a very -- one document called the termination agreement which authorizes only the releases of collateral that relate to the synthetic lease.

(Callagy Decl. Ex. 5 (Merjian Tr.) at 56.)

E. GM Continues To Treat JPMCB and the Other Term Loan Lenders As Fully Perfected Secured Parties Under The Term Loan After October 30, 2008

All of the deponents testified that they first learned about this unauthorized filing in June 2009, after GM had filed for bankruptcy protection.[9] (Callagy Decl. Ex. 1 (Perlowski Tr.) at 32; Ex. 2 (Green Tr.) at 64; Ex. 3 (Gonshorek Tr.) at 35; Ex. 4 (Gordon Tr.) at 25; Ex. 6 (Duker Tr.) 22; Duker Aff. at ¶ 29; Hoge Aff. at ¶ 12.) Moreover, the actions of JPMCB and GM after October 30, 2008 evidence that both parties believed that JPMCB continued to hold a perfected security interest in the Term Loan Collateral.

For example, between January and March 2009, GM engaged in negotiations to amend the Term Loan with JPMCB and the others lenders. (Duker Aff. at ¶ 22.) In January 2009, GM expected that its auditors would include a "going concern" qualification in their opinion for 2008, which would have constituted a default under the Term Loan. (Duker Aff. at ¶ 23.) GM therefore sought, among other things, from JPMCB and the Term Loan lenders a waiver of the "going concern" requirement, as well as the ability for GM to provide a second lien on the Term Loan Collateral to the U.S. government – albeit junior to the lien of the Term Loan

[9] Only one witness could not recall the exact date learned about this issue, but circumstances and the testimony of all other witnesses make it clear it was after GM filed for bankruptcy protection. (Callagy Decl. Ex. 5 (Merjian Tr.) at 41 and 43.)

lenders. (*Id.* at ¶ 23; Ex. M.) The parties also negotiated a modification to a covenant regarding the required ratio of the net book value of the Term Loan Collateral to the outstanding amount of the loan. (*Id.*) Ultimately, the parties agreed to, among other things, an increase in fees to be paid to the Term Loan lenders, an increase in the Term Loan Collateral ratio and a requirement that GM provide a detailed Term Loan Collateral report on a quarterly basis. (*Id.* at ¶ 25.) The First Amendment to the Term Loan was executed on March 4, 2009 ("**First Amendment**"). (*Id.* at ¶ 25, Ex. N.) Under the First Amendment, GM repeated that the lien over the Term Loan Collateral remained perfected indicating its lack of belief that any authority had ever been granted to terminate the lien. (*Id.*, Ex. N.) Throughout the negotiations of the First Amendment, no one from GM or anywhere else suggested that the Term Loan lenders' security interests in the Term Loan Collateral were not fully perfected. (*Id.* at ¶ 25.)

Subsequent to October 30, 2008, GM continued to provide Collateral Value Certificates to JPMCB throughout this period as required by the Term Loan and the First Amendment certifying that the ratio of the net book value of the Term Loan Collateral to the outstanding obligation was at, or above, the contractual requirement. (Duker Aff. at ¶ 26; Exs. G and N.) Specifically, GM sent Collateral Value Statements on December 2, 2008, March 23, 2009, and even on the eve of its bankruptcy filing, May 28, 2009. (*Id.*, at ¶ 26; Ex. O.)[10]

F. JPMCB's Counsel Discovers The Unrelated Termination Statement

GM filed for bankruptcy on June 1, 2009. (Complaint at Adversary Proceeding Docket Entry 1 at ¶ 5.) On or about June 15, 2009, JPMCB's counsel in the GM bankruptcy, Morgan Lewis, discovered that Mayer Brown had caused the Unrelated Termination Statement

[10] In fact, pursuant to the Collateral Value Certificate delivered by GM on May 28, 2009, only three days before GM's bankruptcy filing, the Term Loan Collateral had a net book value of more than $5.6 billion dollars. (Duker Aff. at ¶ 27; Ex. O at JPMCB-0000059.)

to be filed. (Callagy Decl. Ex. 20.) Promptly after its discovery, Morgan Lewis advised counsel for the estate, the U.S. Treasury and the Committee of this fact, and delivered Mr. Gordon's affidavit to them. (*Id.*, Ex. 11.) This is also the first time the Committee or any of its members became aware of the filing of the Unrelated Termination Statement. (*Id.*, Ex. 25.)

On June 25, 2009, this Court entered its DIP Order in the GM bankruptcy pursuant to which Debtors repaid the Term Loan.[11] The DIP Order also released JPMCB, as Administrative Agent, and all the Term Loan lenders from any and all claims and causes of action, including avoidance actions, which Debtors might have against the Term Loan lenders, subject only to the Committee's ability to investigate and bring an action:

> with respect *only* to the perfection of first priority liens of the Prepetition Senior Facilities Secured Parties [as defined in the DIP Order].

(DIP Order at Chapter 11 Case Docket Entry 2529 at pg. 25) (emphasis added.)[12]

Pursuant to the terms of the DIP Order, the Term Loan was repaid on June 30, 2009 out of the proceeds of the $33 billion DIP Credit Facility financing advanced by the U.S. Treasury. (*Id.*; Duker Aff. at ¶ 31.) JPMCB then authorized and caused the filing of all UCC-3 termination statements relating to the Term Loan. (Duker Aff. at ¶ 31; Ex. P.)

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[11] The DIP Order was entitled: *Final Order Pursuant to Bankruptcy Code Sections 105(a), 361, 362, 363, 364 and 507 and Bankruptcy Rules 2002, 4001 and 6004(A) Approving a DIP Credit Facility and Authorizing the Debtors to Obtain Post-Petition Financing Pursuant Thereto, (B) Granting Related Liens and Super-Priority Status, (C) Authorizing the Use of Cash Collateral and (D) Granting Adequate Protection to Certain Pre-Petition Secured Parties* (the "**DIP Order**"). (DIP Order at Chapter 11 Case Docket Entry 2529.)

[12] The DIP Order further limited the Committee's potential causes of action against JPMCB by providing that "[JPMCB, as Administrative Agent] shall have no responsibility or liability for amounts paid to any [Term Loan lenders] and such agent[] shall be exculpated for any and all such liabilities, excluding only such funds as are retained by each such agent solely in its respective role as lender." (*Id.* at pg. 26.)

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

The principal issue before the Court is whether GM, and its counsel, were authorized to file the Unrelated Termination Statement as authority is delineated under the applicable case law. JPMCB contends the filing was not authorized, and that summary judgment should be entered in its favor.

Summary judgment pursuant to Federal Rules of Civil Procedure 56 is available in an adversary proceeding pursuant to Bankruptcy Rule 7056. *In re Borison*, 226 B.R. 779, 784 (Bankr. S.D.N.Y. 1998). A court should grant summary judgment, where, as is the case here, "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). Whether or not a fact is material is determined by the substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986), *remanded*, 1991 WL 186998 (D.D.C. 1991).

The movant on a summary judgment motion meets its burden by "showing...that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554 (1986), *remanded*, 826 F.2d 33 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1066, 108 S.Ct. 1028 (1988). After the non-moving party has been afforded a sufficient time for discovery, summary judgment must be entered against it where it fails to make a showing sufficient to establish the existence of an element essential to its case and on which it has the burden of proof at trial. *Id.* at 322, 106 S.Ct. at 2552. Additionally, where there is "a complete failure of proof concerning an essential element of the nonmoving party's case," there is no genuine issue concerning any material fact because, "all other facts [are] immaterial." *Id.* at 323, 106 S.Ct. at 2552.

II. THE REPAYMENT OF THE TERM LOAN CANNOT BE RECLAIMED BECAUSE THE LIEN AGAINST THE TERM LOAN COLLATERAL REMAINED PERFECTED AS OF THE PETITION DATE

The Committee claims that the Term Loan lenders were not secured creditors arguing that they did not have a perfected security interest in the Term Loan Collateral as of the Petition Date. (Complaint at Adversary proceeding Docket Entry 1 at ¶ 440.) Accordingly, the Committee seeks, in part, to avoid and recover approximately $1.5 billion in pre-petition and post-petition payments made to the Term Loan lenders. (*Id.*, ¶¶ 441, 450 and 461.) The Committee's argument fails. The Unrelated Termination Statement was filed by GM's counsel without authority. Indeed prior to the Petition Date, GM's counsel was unaware that they had even filed a UCC-3 termination statement that related to the Term Loan. Despite these un-controverted facts, the Committee argues that the case law does not relieve the secured party from the consequences of an unauthorized filing on an unrelated financing. It is wrong. As discussed below, the cases the Committee relies upon all involved situations where the secured party itself made the filing. A thorough review of the relevant case law reflects that an unauthorized party's filing is not a sufficient predicate to support the necessary position of authority. Moreover, the security interest remained perfected by virtue of another Delaware UCC-1 financing statement against Saturn and twenty-six state fixture filings.

A. A UCC-3 Termination Statement Filed Without The Secured Party's Authority Is Ineffective

The 2001 revisions to Article 9 of the Uniform Commercial Code no longer mandate the execution of a UCC-3 termination statement by the secured party. Instead a filing can be done without any signature provided the filing has been authorized by the secured party.

Revised Article 9 of Title 6 of the Delaware Code[13] and Sections 9-509 and 9-510, as enacted, specifically set forth that a UCC-3 termination statement filed without the secured party's authority is ineffective. Section 9-510 of the Delaware Code, entitled "Effectiveness of Filed Record" provides in subsection (a) entitled "Filed record effective if authorized" that "[a] filed record is effective only to the extent that it was filed by a person that may file it under Section 9-509." And Section 9-509(d) of the Delaware Code provides in pertinent part:

> A person may file an amendment other than an amendment that adds collateral covered by a financing statement or an amendment that adds a debtor to a financing statement only if:
>
> (1) the secured party of record authorizes the filing; . . . .

A UCC-3 is deemed an amendment. *See* Del. Code Ann. title 6 § 9-102(a)(79) (West 2010). The 2001 amendment to Article 9 of Title 6 of the Delaware Code also eliminated the requirement that the secured party must sign a UCC-3 termination statement prior to its filing. *Compare* Del. Code Ann. title 6 §§ 9-509 and 9-510 *with* Del. Code Ann. title 6 § 9-404 (West 2010).

Indeed, the comments to Section 9-502 of the Delaware Code provide the following caveat:

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13 All of the transaction documents for the Synthetic Lease Transaction and the Term Loan provide that the rights and obligations of the parties shall be governed by the laws of the State of New York. (Duker Aff. Exs. A and G.) Pursuant to the New York Uniform Commercial Code, whether a creditor has perfected its security interest is generally determined by the law of the state in which the debtor is located. N.Y. U.C.C. § 9-301 (McKinney's 2001). When the debtor is a corporation, the location of the corporation is the state in which the corporation is incorporated. N.Y. U.C.C. § 9-307(e). In this case, GM had been organized under the laws of the State of Delaware. Accordingly, whether or not JPMCB had a perfected interest in the collateral at issue must be interpreted under Delaware law. *Id.* at § 9-301; *see also*, Del. Code Ann. title 6 §§ 9-301 and 9-307(e) (West 2010). However, in determining whether a party who filed a UCC financing statement had authority or not, "law other than the Commercial Code may determine the issue." *See In re A.F. Evans*, No. 09-41727 (EDJ), 2009 WL 2821510 at *3 (Bankr. N.D. Cal. 2009); Del. Code Ann. title 6 § 9-509, cmt 3. Therefore, JPMCB also cites New York common law in support of the present motion because of the choice of law provisions in the transaction documents. In any event, applying the law of Delaware regarding the issue of authority would require the same result as JPMCB argues herein. *Gen. Info. Asso. P'ship v. C.I.R.*, 1992 WL 238777, at *5 n. 4 (T.C.M. (RIA) 1992) (noting Delaware law was in accord with New York law concerning authority).

> The fact that this Article does not require that an authenticating symbol be contained in the public record does not mean that all filings are authorized...a filing has legal effect only to the extent that it is authorized.

See Del. Code Ann. title, 6 § 9-502 cmt 3 (West 2010) (citing Del. Code Ann. title 6 § 9-510). Thus, where a UCC-3 termination statement is filed without the requisite authority, it is not effective.

In re A.F. Evans, No. 09-41727 (EDJ), 2009 WL 2821510 (Bankr. N.D. Cal. July 14, 2009) is instructive. In that case, a creditor filed a UCC-1 financing statement with the California Secretary of State to perfect its security interest in all of the debtor's assets. *Id.* at *1. Thereafter, the debtor wished to sell some, but not all of its assets – two partnership interests. *Id.* To facilitate the sale, the creditor agreed to release its perfected security interest only as to those two partnership interests. Although the creditor authorized an escrow agent to file a limited release of its security interest, the escrow agent filed UCC-3 termination statements which inadvertently released the creditor's security interests in all of the assets. *Id.* at *2. Thereafter, relying on its security interest, the creditor sought proceeds from the court approved sale of the debtor's assets. The unsecured creditors' committee, however, opposed the creditor's motion arguing that, under the California version of the UCC, the filing of the UCC-3 termination statements terminated the creditor's secured status entirely. *Id.*

The bankruptcy court disagreed, analyzing the facts as presenting a case of an escrow agent acting without authority. Relying on an un-controverted declaration from the creditor stating that the escrow agent was not acting within its scope of authority when it filed the UCC-3 termination statement that released the creditor's security interest in all of the debtor's assets, the court held that "[the creditor] did not, in fact, authorize [the escrow agent] to terminate its security interest as to assets other than [the two specific partnership interests]." *Id.*

at *3. Accordingly, the court held that the escrow agent had limited authority, and thus the escrow agent, not the creditor, had made the mistake:

> [the escrow agent was the creditor's agent] for the limited purpose of handling the closing of the escrow for the debtor's sale to the buyer of [the two specific] interests [and] [i]t follows that [the creditor] was not bound by [the escrow agent's] unauthorized modification to the UCC-3[.]

Id. at *4. As a result, the bankruptcy court held that the unauthorized UCC-3 termination statement was ineffective, that the creditor held a perfected security interest in the remaining assets of the debtor at the time of the bankruptcy, and that the creditor was entitled to its share of the proceeds from the sale of debtor's assets. *Id.* at *1.

There are no applicable cases which support the Committee's position. The cases cited by the Committee in its March 8, 2010 and April 7, 2010 pre-motion letters to the Court and other cases like them are inapplicable. These cases pre-date the 2001 amendment to the UCC, which eliminated the requirement that the secured party sign a UCC-3 before it is filed. Accordingly, each one of these cases involved factual situations, unlike here, where the secured party itself signed and filed, albeit by mistake, a UCC-3 termination statement. *See, e.g.*, *In re Kitchin Equipment Co. of Va., Inc.*, 960 F.2d 1242, 1246-47 (4th Cir. 1992); *In re Pacific Trencher & Equip., Inc.*, 735 F.2d 362, 365 (9th Cir. 1984); *In re Hampton*, No. 99-60376, 2001 WL 1860362, at *3 (Bankr. M.D. Ga. Jan. 2, 2001); *In re Silvernail Mirror and Glass Inc.*, 142 B.R. 987, 989-90 (Bankr. M.D. Fla. 1992); *In re York Chemical Industries*, 30 B.R. 583, 586 (Bankr. D. S.C. 1983); *J.I. Case Credit Corp. v. Foos*, 717 P.2d 1064, 1067 (Kan. Ct. App. 1986). These cases are factually inapposite and do not address the situation in the case at bar, discussed at point II.B *infra* where an agent did not know it made a filing in connection with the Term Loan, was not authorized to do it, and never believed it was authorized. *In re A.F. Evans*, 2009 WL 2821510 at *4-5, *supra*, addresses the difference between these "mistake" cases and

the case at bar. In *A.F. Evans*, the court rejected the unsecured creditors committee's reliance on *Pacific Trencher*, because "the error in *Pacific Trencher* was the secured party's error, and did not involve an unauthorized act . . ." *Id.* at *5.

Furthermore, even cases that pre-dated the 2001 amendment to the UCC, held that UCC-3 termination statements filed without authority of the secured party were ineffective. For example, in *In re Feifer Industries, Inc.*, 155 B.R. 256 (Bankr. N.D. Ga. 1993), two banks jointly filed a financing statement perfecting their security interest in a debtor's equipment and inventory in connection with a loan. *Id.* at 258. Thereafter, a UCC-3 termination statement, signed only by an officer for one of the banks, was filed, purporting to terminate the jointly filed financing statement. *Id.* Later, the debtor granted security interests in its equipment and inventory to third parties. *Id.* The debtor filed its bankruptcy petition a year later and its equipment and inventory were liquidated. *Id.* The trustee, to whom the second bank which had not signed the UCC-3 had assigned its secured interest, sought determination that the second bank's security interest had priority over the subsequent lien holders because the termination statement filed by only one of the banks was unauthorized and ineffective against the other non-filing bank. *Id.* at 258-59. The bankruptcy court held that since the first bank which signed its UCC-3 did not have actual authority to file the termination statement on behalf of the second bank, the second bank's security interest was not avoided, and it had priority over the subsequent lien holders. *Id.* at 261-62.

B. No Authority Express or Implied Was Granted For The Filing Of The Unrelated Termination Statement

Article 9 of the Delaware Code does not define what constitutes "authority." Courts rely on state law agency cases to determine whether a person had authority to file a termination statement. *See* Del. Code Ann. title 6 § 9-509 cmt. 3 (West 2010) ("[l]aw other than

this Article...generally determines whether a person has the requisite authority to file a record under this section."); *Halpert v. Manhattan Apartments*, 580 F.3d 86, 88 (2d Cir. 2009) ("General principles of agency law determine whether the independent contractor or other third party has been given actual authority to hire on behalf of the company"); *Towers World Airways Inc. v. PHH Aviation Systems Inc.*, 933 F.2d 174, 176-77 (2d Cir. 1991), *cert. denied*, 502 U.S. 823, 112 S.Ct. 87 (1991) (relying on "background principles of agency law" to determine whether a credit card user had authority from the cardholder to make certain purchases); *McLeod v. Local 27 Paper Products*, 212 F. Supp. 57, 63 (E.D.N.Y. 1962) (whether authority to contract is lacking presents a question involving "well established agency principles"). In fact, the Delaware Code specifically provides that, "[u]nless displaced by the particular provisions of this subtitle, the principles of law and equity, including the...law relative to...principal and agent...shall supplement [the UCC provisions]." Del. Code Ann. title 6, § 1-103.

The Committee may argue three theories to establish such authority: (1) actual authority; (2) apparent authority; or (3) ratification. As discussed below, no such authority existed here under any one of these theories.

1. No Actual Authority Existed

Actual authority "is created by direct manifestations from the principal to the agent, and the extent of the agent's actual authority is interpreted in the light of all circumstances attending these manifestations, including the customs of business, the subject matter, any formal agreement between the parties, and the facts of which both parties are aware." *Old Republic Insurance Co. v. Hansa World Cargo Service, Inc.*, 51 F. Supp. 2d 457, 472 (S.D.N.Y. 1999) (applying New York law). *See also Hidden Brook Air, Inc. v. Thabet Aviation Int'l Inc.*, 241 F. Supp. 2d 246, 261 (S.D.N.Y. 2002) (applying New York law). Actual authority may be express or implied. *Id.* at 260.

a. JPMCB Did Not Give Express Authority to File the Unrelated Termination Statement

"Express authority is authority distinctly, plainly expressed, orally or in writing." *Hidden Brook*, 241 F. Supp. 2d at 261; *see also Benderson Development Co., Inc. v. Schwab Bros. Trucking, Inc.*, 64 A.D.2d 447, 455, 409 N.Y.S.2d 890, 896 (4th Dep't 1978) (example of express authority is when a principal grants an agent power of attorney through a written instrument that distinctly and plainly sets forth the scope of the agent's authority); Restatement (Third) of Agency § 2.01 cmt. b (2006) ("express authority" often means actual authority that a principal has stated in very specific or detailed language).

There is absolutely no evidence that in connection with the repayment of the Synthetic Lease Transaction, JPMCB gave any express authority to anyone to file a UCC-3 termination statement relating to the Term Loan. In fact, the only "express" authority given by JPMCB – indeed, the only authority given at all by JPMCB regarding UCC filings – in this case was set forth in the Synthetic Lease Termination Agreement, which authorized GM "to file a termination of any existing Financing Statement relating to the Properties." (Duker Aff. Ex. L.) "Properties" was specifically defined in the Synthetic Lease Transaction Documents and was limited to twelve real properties that secured the loan made under the Synthetic Lease Transaction. (Duker Aff., Exs. B, D and E at JPMCB-STB-00000918-920.)

b. No Implied Authority Was Given to File the Unrelated Termination Statement

"Implied authority" is often used to mean "actual authority either: (1) to do what is necessary, usual, and proper to accomplish or perform an agent's express responsibilities; or (2) to act in a manner in which an agent believes the principal wishes the agent to act based on the agent's reasonable interpretation of the principal's manifestation in light of the principal's objectives and other facts known to the agent." Restatement (Third) of Agency § 2.01 cmt. B

(2006); *see also Vig v. Deka Realty Corp.*, 143 A.D.2d 185, 186, 531 N.Y.S.2d 633, 634 (2d Dep't 1988), *appeal denied*, 73 N.Y.2d 708, 540 N.Y.S.2d 1003 (1989) (agents generally have implied authority to perform the necessary acts within the scope of their usual and ordinary duties). Here, the Committee cannot demonstrate that JPMCB gave implied authority to file the Unrelated Termination Statement for several reasons.

First, the filing of the Unrelated Termination Statement was clearly not "necessary" or "proper" to accomplish GM's express (and very limited) responsibility as set forth in the Synthetic Lease Termination Agreement – to file terminations of financing statements relating to the Properties. (Duker Aff. Ex. L.) The filing of a termination statement completely unrelated to the Synthetic Lease Transaction was plainly outside the scope of GM's limited authority under that agreement. (*Id.*)

Second, it is undisputed that GM and its counsel, Mayer Brown, did not believe that they had authority to file the Unrelated Termination Statement. (Callagy Decl. Ex. 11 at JPMCB-00000077-79; Ex. 2 (Green Tr.) at 99; Ex. 4 (Gordon Tr.) at 66; Hoge Aff. at ¶ 11.) Indeed, Mayer Brown did not even realize that they had filed a UCC-3 relating to the Term Loan, so the attorneys and paralegals certainly could not have believed they had such authority. (*Id.*, Ex. 1 (Perlowski Tr.) at 40-41; Ex. 2 (Green Tr.) at 88-89; Ex. 3 (Gonshorek Tr.) at 47-48.) This is critical in the analysis here because:

> An agent does not have actual authority to do an act if the agent does not reasonably believe that the principal has consented to its commission. . . . Lack of actual authority is established by showing either that the agent did not believe, or could not reasonably have believed, that the principal's grant of actual authority encompassed the act in question.

Restatement (Third) of Agency § 2.02 cmt. h.; *see also* AmJur Agency § 72 (2009) ("The doctrine of implied actual authority focuses on whether the agent reasonably believes, because of

the principal's conduct, that the principal desired the agent so to act. Thus, an agent who does not believe that he or she had such authority has no implied authority."). Indeed, "[t]he *focal point* for determining whether an agent acted with actual authority is the agent's reasonable understanding at the time the agent takes action." Restatement (Third) of Agency cmt. c (emphasis added); *see also Dinaco, Inc. v. Time Warner, Inc.*, 346 F.3d 64, 68 (2d Cir. 2003).

Testimony of the alleged agent is admissible to prove or disprove the existence and scope of authority. For example, in *Merex A.G. v. Fairchild Weston Systems, Inc.*, 810 F. Supp. 1356, 1369-70 (S.D. N.Y. 1993), *aff'd*, 29 F.3d 821 (2d Cir. 1994), *cert. denied*, 513 U.S. 1084, 115 S.Ct. 737 (1995), a German company brought an action seeking to collect a fee under an alleged oral agreement with an American company to introduce the plaintiff to the People's Republic of China to facilitate a business opportunity. *Id.* at 1358. The alleged oral agreement was entered into by the American company's European market manager. *Id.* at 1359. The court held that, under New York law, the market manager did not have actual authority. *Id.* at 1369-70. Notably, the court relied on the market manager's testimony that he informed the German company that he had no authority to bind the American company as well as the testimony of the president and vice president of the American company that the market manager had no authority to make a contract for commissions. *Id.*

Similarly, in *Playboy Enterprises, Inc. v. Dumas*, 960 F. Supp. 710 (S.D.N.Y. 1997), *aff'd*, 159 F.3d 1347 (2d Cir. 1998), the plaintiff, Playboy Enterprises ("Playboy"), the magazine publisher, sought a declaration that it owned copyrights of an artist's (Nagel) works which had been published in its magazine under the theory that they were works for hire. Playboy included language on its payment checks to Nagel which stated that endorsement of the check constituted the signing party's consent to a work-for-hire agreement. *Id.* at 719-20. The

court concluded that Nagel's own endorsement of some checks constituted his assent to the work-for-hire agreement (*id.* at 720), but that other checks endorsed by Nagel's accountants did not create any binding agreement at all, because the accountants did not have actual authority to enter into any such agreements on behalf of Nagel. *Id.* at 721. The court based its decision on the deposition testimony of the accountant, who stated that, although he had authority to endorse the checks, he did not have authority to enter into a work-for-hire agreement on Nagel's behalf. *Id.*; *see also Yolton v. El Paso Tennessee Pipeline Co.*, 668 F. Supp. 2d 1023, 1041-42 (E.D. Mich. 2009) (a union which had authority to negotiate on behalf of individual member employees, did not have implied authority to negotiate reductions or releases of the employees' vested benefits where the union representative testified that he knew the union did not have the right to negotiate with respect to any reduction of the employees' benefits); *Lone Star Heat Treating Co., Ltd. v. Liberty Mutual Fire Insurance Co.*, 233 S.W.3d 524, 531 (Tex. Ct. App. 2007) (based on the un-controverted affidavit of an employee stating that he did not have actual authority, the court held that no actual authority existed); *Cho Mark Oriental Food, Ltd. v. K&K International*, 836 P.2d 1057, 1062, 73 Haw. 509, 517 (Haw. 1992) (a real estate broker did not have implied authority to bind the building owner to obligations relating to a lease agreement where the broker testified that he was not acting in accordance with any communication of authority from the owner).

Here, Mayer Brown, GM's counsel for the purpose of winding up the Synthetic Lease Transaction, has provided un-controverted testimony that they did not know they had filed a UCC-3 unrelated to the Synthetic Lease Transaction, and did not believe they were authorized to file a termination statement relating to the Term Loan. *See supra* pp. 16-17. Indeed, the Mayer Brown attorney who actively worked on the Synthetic Lease Transaction had never even

heard of the Term Loan at the time of the repayment, much less worked on it on behalf of GM. (Callagy Decl., Ex. 2 (Green Tr.) at 84 and 89.)

This is not a situation in which Mayer Brown recognized it was filing a UCC-3 connected to the Term Loan but for whatever reason believed it was appropriate. Indeed, promptly after discovering that the Unrelated Termination Statement had been filed, Mr. Gordon of Mayer Brown provided an affidavit stating that Mayer Brown was not authorized to file that document. (Callagy Decl. Ex. 11 at JPMCB-00000077-79.) Similarly, every Mayer Brown deponent questioned by the Committee confirmed that they did not know they were filing a UCC-3 in connection with the Term Loan, and certainly were not authorized by any document or otherwise to file a termination statement related to the Term Loan. *See supra* pp. 16-17. They also confirmed that the Synthetic Lease Termination Agreement did not authorize the filing of the Unrelated Termination Statement, and that the only termination statements they believed they had authority to file related to the Synthetic Lease Transaction. *See supra* pp. 16-17. Likewise, GM has also confirmed that the Synthetic Lease Termination Agreement did not provide authority to file the Unrelated Termination Statement, that it did not believe it had authority make such a filing and that it gave no permission to its counsel to file the Unrelated Termination Statement. (Hoge Aff. at ¶ 11.)

Finally, JPMCB's failure to notice the inclusion of the Unrelated Termination Statement in the pre-closing documents in October 2008 does not convey implied authority. Silence constitutes manifestation of the principal's assent to an act only when the agent could draw an inference from that silence that it had actual authority to act on behalf of the principal. Restatement (Third) of Agency § 1.03 cmt. b, e. Based on the evidence herein, neither GM nor Mayer Brown drew any such inference or formed any such belief based on the fact that JPMCB

did not comment on the inclusion of the Unrelated Termination Agreement in the pre-closing documents. Indeed, each of the aforesaid parties was wholly unaware of the fact that the Unrelated Termination Statement did not relate to the Synthetic Lease Transaction. *See supra* pp. 16-19.[14] Indeed, the Committee's position, if sustained, would allow elimination of a security interest, even if a dishonest debtor sought to include unrelated UCC-3 termination statements in drafts of closing documentation, hoping that the lender or its counsel would not notice the inclusion of such unrelated statements.

Further, each of the documents which the Committee could conceivably rely upon actually demonstrates that *no* implied authority was given to file a termination statement relating to the Term Loan. All the e-mails attaching the relevant documents herein reference "GM/JPMorgan Chase - Synthetic Lease." (Callagy Decl. Exs. 13, 15, 16 and 17.) None of them reference the Term Loan. (*Id.*) There was not a single communication which referenced the Term Loan in connection with the repayment of the Synthetic Lease Transaction. As for the Synthetic Lease Closing Checklist prepared by Mr. Green, it does not contain any reference whatsoever to the Term Loan. (*Id.*) Indeed, it is entitled the "CLOSING CHECKLIST General Motors: Release of Properties from JPMorgan Chase Synthetic Lease CLOSING DATE: October 31, 2008." (*Id.*) It only contains reference to a financing statement filing number, 641808 4, which on its face only pertains to a financing statement filed on a certain date – nothing more. (*Id.*)

The same is true with respect to the Unrelated Termination Statement drafted and filed by Mayer Brown. (Callagy Decl. Ex. 16 at JPMCB_STB-00000206.) It does not reference

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[14] Nor could there have been any such inferences drawn because the explicit terms of the Term Loan Agreement required the express written consent of each of the Term Loan lenders before their security interests in the Term Loan Collateral could be released. (Callagy Aff. Ex. G at § 10.01 at JPMCB-CSM-0000052-53.)

the Term Loan. (*Id.*) In fact, reflecting Mayer Brown's belief that it pertained to the Synthetic Lease Transaction, at the bottom of the Unrelated Termination Statement Mayer Brown inserted a client matter number, which pertained exclusively to the Synthetic Lease Transaction. (*Id.*; Ex. 2 (Green Tr.) at 81-82.)

Similarly, the Synthetic Lease Escrow Letter executed by Simpson on behalf of JPMCB does not convey authority to file the Unrelated Termination Statement either. (Callagy Decl. Ex. 19.) The letter merely lists as one of the Escrow Documents (as defined therein) a UCC-1 financing statement file number (6416808 4). (*Id.*) The Synthetic Lease Escrow Letter does not reference the Term Loan anywhere, and was drafted to instruct the escrow agent to hold certain documents pending the repayment of the Synthetic Lease Transaction. (*Id.*) Nor does the Synthetic Lease Escrow Letter provide any authority whatsoever to actually file any UCC-3 termination statements at all. (*Id.*) It provides only that the UCC-3 termination statements, including the Unrelated Termination Statement, along with the other documents, be "forwarded to counsel for GM" once the conditions precedent and the disbursement of funds set forth therein have been completed. (*Id.* at MB000029.)[15]

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[15] Any reliance by the Committee on the failure of JPMCB's counsel, Simpson, to object to the filing of the Unrelated Termination Statement fails for the additional reason that Simpson did not have any authority to bind JPMCB with respect to the Term Loan. Indeed, Mayer Brown understood that Simpson represented JPMCB with respect to the Synthetic Lease Transaction. It is axiomatic that an attorney's authority is limited by the terms of employment, and, where employed for a specific purpose, the attorney may not act beyond the scope of authority. *See, e.g., Guidi v. Inter-Continental Hotels Corporation*, No. 95 Civ. 9006 (LAP), 2003 WL 1878237, at *3 (S.D.N.Y. April 14, 2003); *In re Wells*, 129 Misc.2d 56, 60, 492 N.Y.S.2d 349, 352-53 (Sur. Ct. Queens County 1985); *County of Sullivan v. Town of Thompson*, 99 A.D.2d 574, 574, 471 N.Y.S.2d 399, 400 (3d Dep't 1984); *In re Rosenberg's Will*, 164 Misc. 837, 838, 299 N.Y.S. 462, 463 (Sur. Ct. Kings County 1937). Thus, an attorney does not have the authority to bind his or her client to what amounts to a surrender or waiver of any substantial right where the act complained of is beyond the scope of the attorney's representation. *See Bryan v. State-Wide Ins. Co.*, 144 A.D.2d 325, 327, 533 N.Y.S.2d 951, 952 (2d Dep't 1988); *Gordon v. Town of Esopus*, 107 A.D.2d 114, 116, 486 N.Y.S.2d 420, 421 (3d Dep't 1985), *appeal denied*, 65 N.Y.2d 609, 494 N.Y.S.2d 1028 (1985). Here, Simpson was retained by JPMCB to work on the Synthetic Lease Transaction and not the Term Loan. (Duker Aff. at ¶¶ 8, 14 and 21; Callagy Decl. Ex. 5 (Marjian Tr.) at 9, 11 and 54-55; Ex. 6 (Duker Tr.) at 17.) Rather, it is undisputed that Cravath and Morgan Lewis were counsel for JPMCB in connection with the Term Loan. (Duker Aff. at ¶ 14; Callagy Decl. Ex. 6 (Duker Tr.) at 11, 28-29.)

2. Apparent Authority Did Not Exist To File The Unrelated Termination Statement

The Committee also cannot prevail on a theory of apparent authority. Apparent authority arises from a manifestation by the principal – either through written or spoken words or some other conduct – which, reasonably interpreted, causes *a third party* to believe that the principal consents to have an act done on his behalf by the person purporting to act for him. *Hidden Brook,* 241 F. Supp. at 262 (emphasis added). "Apparent authority consists of two elements: (1) a manifestation (by words or conduct) by the principal that the agent has authority and (2) reasonable reliance on that manifestation by the person dealing with the agent." *In re Kollel Mateh Efraim, LLC*, 334 B.R. 554, 560 (Bankr. S.D.N.Y. 2005); *FDIC v. Providence College*, 115 F.3d 136, 140 (2d Cir. 1997); *Herbert Construction Co. v. Continental Insurance Co.*, 931 F.2d 989, 993-94 (2d Cir. 1991); Restatement (Second) of Agency § 27 (1958). Ultimately, the party asserting the existence of apparent authority bears the burden of proving that the facts that give rise to the apparent authority were known to him when he dealt with the agent. *See 36 Convent Ave. HDFC v. Fishman*, No. 03 Civ 3998 (JGK), 2004 WL 1048213, at *3-4 (S.D.N.Y. May 7, 2004).

Fundamentally, apparent authority turns on whether the representations made by the principal to a third party created the appearance of authority. *Hidden Brook*, 241 F. Supp. 2d at 262; *Fennell v. TLB Kent Co.*, 865 F.2d 498, 502 (2d Cir. 1989) ("in order to create apparent authority, the *principal must manifest to a third party* that he 'consents to have the act done on his behalf by the person purporting to act for him'") (quoting, Restatement (Second) of Agency § 27 (1958) (emphasis added)). Courts in the Second Circuit routinely hold that "apparent authority is created only by the representations of the principal to the third party . . ." *Fennel,* 865 F.2d at 502; *Hallock v. State*, 64 N.Y.2d 224, 485 N.Y.S.2d 510, 513 (1984) ("[e]ssential to

the creation of apparent authority are *words or conduct of the principal, communicated to a third party,* that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The agent cannot by his own acts imbue himself with apparent authority") (emphasis added); s*ee Trustees of UIU Health & Welfare Fund v. New York Flame Proofing Co.*, 828 F.2d 79, 84 (2d Cir. 1987); *Karavos Compania Naviera S.A. v. Atlantica Export Corp.*, 588 F.2d 1, 10 (2d Cir. 1978); *see also Edwards v. Born Inc.*, 792 F.2d 387, 390-91 (3d Cir. 1986) (apparent authority is not found where there is no record of communication between the principal and the third party).

The Committee can show no apparent authority because there were no representations by JPMCB to any third party that it consented to have any act done on its behalf by Mayer Brown in connection with the Term Loan. Moreover neither the Debtor, the Debtor's estate nor any other party in interest relied on any apparent authority or was detrimentally affected by the filing of the Unrelated Termination Statement prior to the Petition Date. Indeed, the Committee admits that it first learned of the Unrelated Termination Statement in June 2009 (Callagy Decl. Ex.25), and cannot show that they, or any party in interest, knew of, or relied on any manifestation of JPMCB, or that such reliance resulted in a detrimental change in position. *Hidden Brook*, 241 F. Supp. 2d at 262.

3. The Unauthorized Unrelated Termination Statement Was Not Ratified by JPMCB

Nor can the Committee argue that JPMCB "ratified" the filing of the Unrelated Termination Statement. There is no evidence that anyone at JPMCB knew, prior to the Petition Date, that a termination statement relating to the Term Loan had been filed.

"Under the law of agency, ratification occurs when a principal, having knowledge of the material facts in a transaction, evidences an intention to affirm or adopt the transaction of

his agent through his acts or words." *Orix Credit Alliance v. Phillips-Mahnen, Inc.*, No. 89 Civ 8376 (THK), 1993 WL 183766, at *4 (S.D.N.Y. May 26, 1993). Ratification, therefore, can only occur "*where the principal has full knowledge of all material facts and takes some action to affirm the agent's actions.*" *Prisco v. State of New York*, 804 F. Supp. 518 (S.D.N.Y. 1992) (emphasis added); *see, In re Bennett Funding Group, Inc.*, 336 F.3d 94, 100-101 (2d Cir. 2003) (applying New York law). "Without knowing ratification, the agent's act is unauthorized and the principal is not obligated to perform." *Banque Arabe*, 850 F. Supp. 1199, 1213 (S.D.N.Y. 1994). Moreover:

> The act of ratification, [in whatever form], must be performed with full knowledge of the material facts relating to the transaction, and the [intention to authorize another's act] must be clearly established and may not be inferred from equivocal acts or language.

Holm, 455 N.Y.S.2d at 432. In addition, courts in New York consistently require the acceptance of benefits of a transaction as an additional element, in addition to the principal's knowledge and evidence of an intention to affirm or adopt the transaction, to establish ratification. *See, e.g., Monarch Insurance Co. of Ohio v. Insurance Corp. of Ireland Ltd.*, 835 F.2d 32, 36 (2d Cir. 1987); *Credit Alliance*, 1986 WL 10726 at *2 (S.D.N.Y. 1986).

Here, the undisputed evidence is that no one whatsoever became aware prior to GM's bankruptcy filing on June 1, 2009 that a termination statement related to the Term Loan had been filed on October 30, 2008. (Callagy Decl. Ex. 1 (Perlowski Tr.) at 32; Ex. 2 (Green Tr.) at 64; Ex. 3 (Gonshorek Tr.) at 35; Ex. 4 (Gordon Tr.) at 25; Ex. 6 (Duker Tr.) 22; Duker Aff. at ¶ 29; Hoge Aff. at ¶ 12.) Moreover, as previously described, JPMCB and GM took affirmative actions even after October 30, 2008 that evidence that both parties believed that JPMCB, as Administrative Agent, continued to hold a perfected security interest in the Term Loan Collateral. *See supra* pp. 19-20.

4. No Third Party Could Waive JPMCB's Rights Under The Term Loan

The Committee, in effect, asks this Court to find that JPMCB waived its rights to the Term Loan Collateral. Under New York law, however, waiver is an intentional abandonment or relinquishment of a known right and should not be lightly presumed. *Gilbert Frank Corp. v. Fed. Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793, 795 (1988); *Santamaria v. 1125 Park Avenue Corp.*, 238 A.D.2d 259, 657 N.Y.S.2d 20, 22 (1st Dep't 1997); *Horne v. Radiological Health Services, P.C.*, 83 Misc. 2d 446, 371 N.Y.S.2d 948, 961 (Sup. Ct. Suffolk County 1975), *aff'd*, 51 A.D.2d 544, 379 N.Y.S.2d 374 (2d Dep't 1976). Intent to waive a right must be "unmistakably manifested" and cannot "be inferred from a doubtful or equivocal act." *Navillus Tile, Inc. v. Turner Const. Co.*, 2 A.D.2d 209, 770 N.Y.S.2d 3, 5 (1st Dep't 2003). Accordingly, neither negligence, oversight, thoughtlessness or silence constitute a clear manifestation of intent to relinquish a known right and cannot create a waiver. *Peck v. Peck*, 232 A.D.2d 549, 649 N.Y.S.2d 22, 23 (2d Dep't 1996); *Golfo v. Kycia Assocs., Inc.*,, 45 A.D.3d 531, 845 N.Y.S.2d, 124 (2d Dep't 2007), *appeal denied*, 10 N.Y.3d 704, 857 N.Y.S.2d 36 (2008); *Courtney-Clarke v. Rizzoli International Publications, Inc.*, 251 A.D.2d 13, 676 N.Y.S.2d 529, 529 (1st Dep't 1998). Instead, there must be proof that there was a voluntary and intentional relinquishment of a known and otherwise enforceable right. *Peck*, 649 N.Y.S.2d at 23; *Golfo*, 845 N.Y.S.2d at 124.

For example, in *In re Angiulli*, 148 Misc. 2d 796, 561 N.Y.S.2d 626, 629 (Sur. Ct, Oneida County 1990), *aff'd*, 178 A.D.2d 948, 580 N.Y.S.2d 889 (4th Dep't 1991) the court held that a secured creditor must "clearly, unequivocally, and decisively act [ ] so as to demonstrate an intent to waive and relinquish" its secured interest. In the absence of such clear, unequivocal and decisive action, there was no proof that the secured creditor "surrendered" its rights. 561 N.Y.S.2d at 629. Likewise, in *Courtney-Clarke,* 676 N.Y.S.2d at 529, the court held that an

author's mere oversight in failing to object to the royalty rate paid by her publisher, which was lower than the rate set forth in the contract, did not constitute a clear manifestation of intent to relinquish the author's known right to the rate set forth in the contract. *See also Southern Federal Savings and Loan Association of Georgia v. 21-26 East 105th Street Associates*, 145 B.R. 375, 384 (S.D.N.Y.), *rearg. denied*, No. 90 Civ 6959 (LLS), 1991 WL 274485 (S.D.N.Y. 1991), *aff'd*, 978 F.2d 706 (2d Cir. 1992) (bank's forbearance in failing to exercise its right to interest payments did not result in a waiver of the bank's right to insist on interest from debtors).

Moreover, in principal-agency relationships, the agent needs to receive explicit instruction to waive a principal's right. *See Business Integration Services, Inc. v. AT&T Corp.*, 251 F.R.D. 121, 126-27 (S.D.N.Y.), *aff'd*, No. 06 Civ 1863 (JGK), 2008 WL 5159781 (S.D.N.Y. 2008) (the defendant's manager who shared privileged material with plaintiff, did not have authority to waive the privilege where manager was not instructed to disclose the documents); *Fasa Corp. v. Playmates Toys, Inc.*, 892 F. Supp. 1061, 1065 (N.D. Ill. 1995) (agent of toy designer did not have actual authority to waive designer's intellectual property rights under California law, where designer did not explicitly authorize agent to waive its rights, and agent did not believe that he had authority to waive such rights). There are simply no facts which show that JPMCB "intended" to abandon its security rights in the Term Loan Collateral or granted authority to waive such rights. Further, the Term Loan Collateral Agreement expressly provides that the terms and provisions, including those related to the Term Loan Collateral, could only be waived in a writing signed by all of the Term Loan lenders. (Duker Aff. Ex. H at § 7.01 at JPMCB-CSM-0000125 and G at § 10.01 at JPMCB-CSM-0000052-53.)

Thus as a legal matter, this provision alone requires dismissal of the Committee's claims because there is no evidence that all of the Term Loan lenders executed a written waiver

as is required by the terms of the Term Loan Collateral Agreement. *See, e.g., Conoco Phillips v. 261 East Merrick Road Corp.*, 428 F. Supp. 2d 111, 122 (E.D.N.Y. 2006) (finding no waiver absent a writing because agreement expressly provided that modifications be made in writing "signed by all the parties"); *Rochester Community Individual Practice Assoc., Inc. v. Finger Lakes Health Insurance Co., Inc.*, 281 A.D.2d 977, 977-78, 722 N.Y.S.2d 663 (4th Dept. 2001), *leave to appeal denied*, 726 N.Y.S.2d 43, 2001 Slip Op. 05261 (4th Dept. 2001) (same); *Cohen Fashion Optical, Inc. v. V&M Optical, Inc.*, 51 A.D.3d 619, 619, 858 N.Y.S.2d 260 (2d Dep't. 2008) (same).

C. JPMCB and the Term Loan Lenders Were Secured Creditors as of the Petition Date Pursuant to Other UCC-1 Financing Statements

The Committee does not and cannot contest the fact that JPMCB and the Term Loan lenders were also secured as of the Petition Date by (i) twenty-six fixture filings (the "**Fixture Filings**") filed by JPMCB in counties where Term Loan Collateral was located; and (ii) a Delaware UCC-1 financing statement filed with the Delaware Secretary of State against Saturn as debtor. (Duker Aff. Exs. I and J.) Pursuant to this Court's DIP Order, JPMCB and the other Term Loan lenders have been released from any and all claims and causes of action, including avoidance actions, related to the Term Loan except those relating to the perfection of their security interests in the Term Loan Collateral. (DIP Order at Chapter 11 Case Docket Entry 2529 at pg. 25.) Because perfection is not at issue relating to these filings, the Committee is precluded from raising any other issues relating to these filings, including the value of the fixture filings and Saturn's assets.[16]

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[16] The Collateral Value Certificate delivered by GM on May 28, 2009, only three days before GM's bankruptcy filing, set forth the Term Loan Collateral net book value at more than $5.6 billion dollars or well above the $1.4 billion outstanding under the Term Loan. (Duker Aff. at ¶ 27; Ex. O at JPMCB-0000059.)

As noted, all of the Term Loan transaction documents provide that the rights and obligations of the parties shall be governed by the laws of the State of New York. *See* supra p. 24 *at* n. 13. Pursuant to New York UCC § 301(c)(1), the perfection of a security interest in goods by filing a fixture filing is governed by the local law of the jurisdiction in which such goods are located. *See* N.Y. U.C.C. Law § 9-301 comment 5(b) (McKinney's 2001). In each one of the jurisdictions where the Fixture Filings were filed:

> There are two ways in which a secured party may file a financing statement to perfect a security interest in goods that are or are to become fixtures. It may file in the Article 9 records, as with most other goods. *See* subsection (a)(2). *Or* it may file the financing statement as a "fixture filing," defined in Section 9-102 in the office in which a record of a mortgage on the related real property would be filed. *See* subsection (a)(1)(B).

See, e.g., U.C.C. § 9-501 cmt. 4 (2002); *see also* Mich. Comp. Laws Ann. § 440.9501 cmt. 4 (West 2005); Kan. Stat. Ann. § 84-9-501 cmt. 4 (West 2000); Ohio Rev. Code Ann. § 1309.501 cmt. 4 (2000); La. Rev. Stat. Ann. § 10:9-501 cmt. 4 (2004); Ind. Code § 26-1-9.1-501 cmt. 4 (West 2002); Wis. Stat. Ann. § 409.501 cmt. 4 (West 2003); N.Y. U.C.C. Law § 9-501 cmt. 4 (McKinney's 2001); Del. Code Ann. title 6 § 9-501 cmt. 4 (West 2010); Tex. Bus. & Com. § 9.501 cmt. 4 (West 2002). *See also Yeadon Fabric Domes, Inc. v. Maine Sports Complex, LLC*, 901 A.2d 200, 203-05 (Me. 2006) (court found that the plaintiff could perfect its security interests in the fixtures by either filing a fixture filing in the county registry of deeds, or through a financing statement filed with the Secretary of State). [17]

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[17] Leading authorities uniformly agree with this interpretation of the UCC. *See* Ray G. Warner, *New Filing Rules Follow the Debtor*, 19-2 Am. Bankr. Inst. J. 16 (2000) at 16, *available at* WL 19-MAR AMBKRIJ 16 ("Although most financing statements must be filed in the jurisdiction where the debtor is located, this rule does not apply to real estate-related collateral. Fixture filings...must be filed in the state where the related real estate is located. *See* [UCC] §§ 9-301(3)(A & B) and 9-301(4)"); Ray G. Warner, *Real Estate Transactions Under Revised Article 9*, 19-5 Am. Bankr. Inst. J. 14 (2000) at 14, *available at* WL 19-JUNE AMBKRIJ 14 ("A 'fixture filing' must be filed in the office where a mortgage on the related real property would be filed, whereas the regular filing would be in the statewide filing office of the state where the debtor is located. *See* [UCC] § 9-301(1) & (3)(A)...Thus, either type of filing will protect a security

A fixture filing is defined in the relevant jurisdictions as a "filing of a financing statement covering goods that are or are to become fixtures and satisfying [Section 9-502(a) and (b)] . . ." *See* Mich. Comp. Laws Ann. § 440.9102(nn); Kan. Stat. Ann. § 84-9-102(40); Ohio Rev. Code Ann. § 1309.102(40); La. Rev. Stat. Ann. § 10:9-102(40); Ind. Code § 26-1-9.1-102(40); Wis. Stat. Ann. § 409.102(js); N.Y. U.C.C. Law § 9-102(40); Del. Code Ann. title, 6 § 9-102(40); Tex. Bus. & Com. § 9.102(40). Each one of the Fixture Filings filed by JPMCB fully satisfied the formal requisites of a fixture filing in the applicable jurisdiction in which the fixtures were located.[18] *Compare* Duker Aff., Ex. J *with* U.C.C. §§ 9-502(a) and (b).

As such, the Committee cannot contest that, as of the Petition Date, these twenty-six Fixture Filings perfected the security interest in the fixtures located at each one of those twenty-six GM and Saturn plants and facilities. Moreover, it is uncontested that the Term Loan lenders held a perfected security interest as of the Petition Date in Saturn's assets pursuant to the UCC-1 financing statement filed with the Delaware Secretary of State. Accordingly, JPMCB's summary judgment should be granted because the Committee is precluded from raising any

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interest in fixtures from avoidance by a bankruptcy trustee under § 544(a) of the Bankruptcy Code. *See* § 9-334, cmt. 9"); Kuhn Hans, *Multi-State and International Secured Transactions Under Revised Article 9 of the Uniform Commercial Code*, 40 VA. J. INT'L. L. 1009, 1020-21 (Summer 2000) (noting that fixture filings were an exception to the debtor-location rule and that fixture filings must be filed in the "office designated for the filing or the recording of a mortgage on the related real property."(citations omitted)); Philip H. Ebling and Steven O. Weise, *What a Dirt Lawyer Needs to Know About New Article 9 of the UCC*, 37 REAL PROP. PROB. & TR. J. 191 (Summer 2002).

[18] U.C.C. § 9-502(a) requires that to be deemed a fixture filing, the filing should provide, in relevant part: (1) the name of the debtor; (2) the name of the secured party or representative of the secured party; and (3) the collateral covered by the financing statement. U.C.C. § 9-502(b) requires that the filing: (1) indicate that it covers fixtures; (2) indicate that it is to be filed [for record] in the real property records; (3) provide a description of the real property to which the collateral is related; and (4) if the debtor does not have an interest of record in the real property, provide the name of a record owner. Each one of the relevant jurisdictions have adopted identical requisites for a filing to be deemed a fixture filing. *See e.g.* Tex. Bus. & Com. § 9.502(a) and (b); Ohio Rev. Code Ann. § 1309.502(a) and (b); Mich. Comp. Laws Ann. § 440.9502(1) and (2); Wis. Stat. Ann. § 409.502(1) and (2); Kan. Stat. Ann. § 84-9-502(a) and (b); Ind. Code § 26-1-9.1-502(a) and (b); Del. Code Ann. title 6 § 9-502(a) and (b); N.Y. U.C.C. § 9-502(a) and (b); and La. Rev. Stat. Ann. 10:9-502(a) and (b).

issues relating to these perfected security filings by virtue of the release provided in the DIP Order.[19]

III. IN THE ALTERNATIVE, THE COURT SHOULD IMPOSE A CONSTRUCTIVE TRUST ON THE TERM LOAN COLLATERAL IN THE TERM LOAN LENDERS' FAVOR

In the alternative, the Court should impose a constructive trust on the Term Loan Collateral in favor of the Term Loan lenders. While Section 541 of the Bankruptcy Code provides that property of the estate is expansive and comprised of the debtor's legal and equitable interests in property as of the commencement of the case, courts have, however, imposed limits in order to do equity. *In re Howard's Appliance Corp.*, 874 F.2d 88, 93 (2d Cir. 1989). In that case, the Second Circuit held:

> Property in which the debtor holds only legal title and not an equitable interest . . . becomes property of the estate 'only to the extent of a debtor's legal title to such property, but not to the extent of any equitable interest in the property that the debtor does not hold.

Id. (citing 11 U.S.C. § 541(d)). A constructive trust thus "confers on the true owner of the property an equitable interest in the property superior to the trustee's." *Id.* "When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a [constructive] trustee." *In re Koreag, Controle Et Revision S.A.*, 961 F.2d 341, 352 (2d Cir. 1992), *aff'd*, No. 89 Civ 3071 (WK), 1992 WL 200748 (S.D.N.Y. 1992), *cert. denied*, 506 U.S. 865, 113 S.Ct. 188 (1992). A constructive trust thus places its beneficiary ahead of other creditors with respect to the trust property. *In re Howard's Appliance Corp.*, 874 F.2d at 93.

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[19] To the extent the Court does not adopt JPMCB's position in this or any other regard in this motion, summary judgment cannot be awarded to the Committee because multiple issues of fact would remain unresolved regarding the value of the fixture filings and Saturn's assets.

In *Howard's Appliance* the debtor moved its inventory to another state without advising the secured creditor as it was required to do under its agreement. 874 F.2d at 90. As a result, the secured creditor would have become unperfected after a four-month period of time. *Id.* at 90-91. Notwithstanding the passage of the statutory period, the Second Circuit held that if a constructive trust were not imposed in favor of the secured creditor, the estate would have been unjustly enriched as a result of the debtor's wrongful conduct. *Id.* at 95.

Here, the estate should not be unjustly enriched as a result of the unauthorized action of GM's counsel. Such a result would be equally as unjust as the result which the Court refused to allow in *Howard's Appliance*.

New York evaluates four elements for establishment of a constructive trust: (1) a confidential or fiduciary relationship; (2) a promise, express or implied; (3) a transfer of subject res in reliance on that promise; and (4) unjust enrichment.[20] *In re McLean Industries*, 132 B.R. 271, 286 (Bankr. S.D.N.Y. 1991) (citing *Sharp v. Kosmalski*, 40 N.Y.2d 119, 121, 386 N.Y.S.2d

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[20] State law determines whether to impose a constructive trust on property within the debtor's possession. *In re Howard's Appliance Corp.*, 874 F.2d at 93. The law of the situs of the property governs this determination. *Id.* at 93-94. The Term Loan Collateral, consisting of GM's and Saturn's equipment and fixtures located in their United States manufacturing facilities, is not located within one specific state. However, in the absence of an actual conflict of laws among the states of the situs of the property, this Court should "dispense with a choice of law analysis" and apply New York law. *See Amusement Industry, Inc. v. Stern*, No. 07 Civ. 11586, 2010 WL 445906, at *5 (S.D.N.Y. Feb. 9, 2010). Here, no such conflict exists among the various states which contain Term Loan Collateral. All such jurisdictions apply largely similar tests for the imposition of a constructive trust. *See, e.g. Wilmington Savings Fund Soc., FSB v. Kaczmarczyk*, No. Civ.A. 1769-N, 2007 WL 704937 (Del. Ch. March 1, 2007), *judg't entered*, No. 1769-VCP, 2007 WL 1576790 (Del. Ch. Mar. 23, 2007) (Delaware law); *Hicks v. State*, 635 N.E.2d 1151 (Ind. Ct. App. 1994) (Indiana law); *Logan v. Logan*, 937 P.2d 967 (Kan. Ct. App. 1997) (Kansas law); *Kaplon v. Chase*, 690 S.W.2d 761 (Kent. Ct. App. 1985) (Kentucky law); *In re Beard*, No. 89-4-0719, 1990 WL 279503 (Bankr. D. Md. Nov. 29, 1990) (Maryland law); *Dargis v. Boss*, No. 273473, 2008 WL 4228350 (Mich. Ct. App. Sept. 16, 2008) (Michigan law); *In re Material Engineering Assocs. Ltd.*, 168 B.R. 204 (Bankr. W.D. Mo. 1994) (Missouri law); *In re Morris*, 260 F.3d 654 (6th Cir. 2001) (Ohio law); *Estate of Wallis*, No. 12-07-00022-CV, 2010 WL 702267 (Tex. Civ. App. – Tyler Feb. 26, 2010), *opinion withdrawn and superseded by rehearing by* 2010 WL 1987514 (Tex. Civ. App. – Tyler May 19, 2010) (Texas law); *Leontios v. PWS Lake Geneva Dev. Co., Inc.*, 316 Wis. 2d 411, 763 N.W.2d 559 (Wis. Ct. App. 2009), *rev. denied* 775 N.W.2d 100 (Wis. 2009) (Wisconsin law). Only Louisiana does not recognize the remedy of a constructive trust. *See Schwegmann v. Schwegmann*, 441 So.2d 316 (La. Ct. App. 1984), *writ denied*, 443 So.2d 1122 (La. 1984), *cert. denied*, 467 U.S. 1206, 104 S.Ct. 2389 (1984).

72 (1976)). It is not necessary that all four elements be met. *Id.* Indeed, New York courts have consistently stressed the need to apply the doctrine of constructive trusts with sufficient flexibility to prevent unjust enrichment in a wide range of circumstances. *In re Koreag*, 961 F.2d at 353 The crucial element for establishing a constructive trust is the need to prevent unjust enrichment. *In re McLean Industries*, 132 B.R. at 286. "Willfully wrongful conduct" is not required. *In re Koreag*, 961 F.2d at 354.

A constructive trust may even arise where title to property is "acquired through a mistake." *In re McLean*, 132 B.R. at 285 (quoting 5 *Scott on Trusts* § 462). In *McLean*, the secured creditor was listed on an insurance policy as a loss payee. When the debtor changed insurers, the new policy mistakenly did not include the secured creditor as a loss payee. *Id.* at 275-76. The bankruptcy court stated that the circumstances in the case made it clear that all the parties intended to secure the creditor's equitable interest in the insurance proceeds, and, in order to protect those intentions, the court imposed a constructive trust on the proceeds. *Id.* at 286-87. The court held that the fact that the new policy did not include the creditor as a loss payee due to "inadvertent error" would not prevent the imposition of a constructive trust. *Id.* at 286. Furthermore, since the creditor was an intended beneficiary of the insurance proceeds, and "the imposition of a constructive trust on the insurance proceeds [would] prevent unjust enrichment by the [d]ebtor, its estate, and the unsecured creditors, who were never the intended beneficiaries of the insurance." The court thus held that "[e]quity dictates that a constructive trust be imposed on the insurance proceeds, in order to effectuate the intent of the parties." *Id.* at 287.

Here, JPMCB and the Term Loan lenders are entitled to a constructive trust on the Term Loan Collateral as of the Petition Date for similar reasons. It is undisputed that Mayer Brown prepared and filed the Unrelated Termination Statement in connection with the repayment

of the Synthetic Lease Transaction without authority of the secured party. It is also beyond dispute that no party intended for a UCC-3 termination statement relating to the Term Loan be prepared and filed in connection with the repayment of the Synthetic Lease Transaction. Mayer Brown, GM's counsel, has given consistent, un-controverted testimony that the only intent was to prepare and file documents relating to the repayment of the Synthetic Lease Transaction – and that no authority was given to terminate the security interest in the Term Loan. GM has also confirmed that no such authority was given or intended. *See supra* pp. 16-17.

In addition, the critical elements for imposing a constructive trust have been met. Absent GM's pledge of the Term Loan Collateral, the Term Loan lenders would not have lent GM approximately $1.5 billion under the Term Loan. Also, giving effect to the Unrelated Termination Statement would contravene the express agreement of the parties memorialized by the terms of the Term Loan Agreement that, as described above, provided that the Term Loan lenders' security interest could not be eliminated unless the Term Loan was repaid or all of the Term Loan lenders gave their express written consent -- which did not occur here. (Duker Aff. Ex. G at § 10.01 at JPMCB-CSM-0000052-53 and Ex. H at § 7.13 at JPMCB-CSM-0000128.) In addition, GM covenanted that it would maintain the security interests in the Term Loan Collateral and agreed that such interests could only be "waived" in writing by all parties to the Term Loan Agreement. (*Id.*, Ex. H at §§ 4.03 and 7.01 at JPMCB-CSM-0000120 and 125.) Furthermore, GM continued to treat the Term Loan lenders, at all relevant times, as fully secured – even during negotiations to amend the Term Loan in 2009. *See supra* pp. 19-20. Finally, it is notable that the Term Loan was repaid from the DIP Credit Facility provided by the U.S. Treasury, and American taxpayers. (DIP Order at Chapter 11 Docket Entry 2529.) To the extent

the Committee seeks to recover amounts provided from the U.S. Treasury to repay the Term Loan lenders, the unsecured creditors would be grossly and unjustly enriched.

IV. BECAUSE JPMCB AND THE OTHER TERM LOAN LENDERS WERE SECURED CREDITORS, THE PRE-PETITION AND POST-PETITION TRANSFERS AT ISSUE HERE ARE EXEMPT FROM AVOIDANCE

In Count III of its Complaint, the Committee also seeks to avoid and recover certain pre-petition transfers made to JPMCB and the other Term Loan lenders, including a payment made to JPMCB in the amount of $28.2 million on May 27, 2009. (Complaint Adversary Proceeding Docket Entry 1 at ¶¶ 453-61.) This claim fails because, as demonstrated above, JPMCB was a fully secured creditor to GM. *In re 360 Networks (USA) Inc.*, 327 B.R. 187, 190 (Bankr. S.D.N.Y. 2005). To the extent the Court holds that JPMCB was not a secured creditor, JPMCB reserves all of its previously asserted rights and any additional affirmative defenses. Likewise, because JPMCB and the Term Loan lenders were at all times fully secured, the post-petition transfers cannot be avoided either as the Committee seeks to do in Counts I, II and IV of its Complaint. *See* 11 U.S.C. 549(a)(2)(B). Accordingly, the entire Complaint must be dismissed.

CONCLUSION

For the foregoing reasons, JPMorgan Chase Bank, N.A. respectfully requests that it be awarded summary judgment dismissing the Complaint in its entirety.

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Respectfully submitted,

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