Hearing Date and Time: October 21, 2010 at 9:45 a.m. (Prevailing Eastern Time)
Reply Deadline: August 26, 2010 at 4:00 p.m. (Prevailing Eastern Time)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11 Case
MOTORS LIQUIDATION COMPANY, *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.	

PLAINTIFF'S MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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The Official Committee of Unsecured Creditors (the **"Committee"** or **"Plaintiff"**) of Motors Liquidation Company f/k/a General Motors Corporation (**"Old GM"**) respectfully submits this memorandum of law in opposition to the motion for summary judgment filed by defendant JPMorgan Chase Bank, N.A. (**"JPMorgan"**).

PRELIMINARY STATEMENT

This case concerns JPMorgan's mistake in approving the filing of the Term Loan Termination Statement.[1] Because JPMorgan approved the filing, JPMorgan's summary judgment motion should be denied, and the Committee's motion should be granted.

The parties do not dispute that a UCC filing that mistakenly terminates a creditor's security interest is legally effective, provided that the filing was authorized by the secured creditor. Thus, the only dispute between the parties concerns whether JPMorgan authorized the filing of the Term Loan Termination Statement. The Committee contends that JPMorgan authorized Old GM's counsel to file the Term Loan Termination Statement; and JPMorgan contends that it did not.

In support of its summary judgment motion, JPMorgan asserts that Old GM's counsel had "no authority whatsoever" to file the Term Loan Termination Statement and that the filing was "entirely without authority" from JPMorgan. These assertions are inadmissible legal conclusions – not undisputed facts – even when they are parroted by affiants seeking to support the result urged by JPMorgan.[2] The actual facts in the record point to the opposite conclusion: JPMorgan authorized the filing of the Term Loan Termination Statement.

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[1] Terms not otherwise defined herein shall have the meanings set forth in Plaintiff's Memorandum of Law in Support of Motion for Partial Summary Judgment dated July 1, 2010 (**"Plaintiff's Summary Judgment Brief"**).

[2] Testimony about whether individual witnesses thought the filing was "authorized" or not is inadmissible, and thus cannot be advanced in support of JPMorgan's summary judgment motion because

Fact 1: The Term Loan Termination Statement was filed with the Secretary of State for the State of Delaware before the Petition Date. JPMorgan 7056-1 Statement ¶ 79 and Plaintiff 7056-1 Counter-Statement ¶ 79.[3]

Fact 2: JPMorgan was identified as "THE SECURED PARTY OF RECORD AUTHORIZING" the Term Loan Termination Statement. JPMorgan 7056-1 Statement ¶ 63 and Plaintiff 7056-1 Counter-Statement ¶ 63.

Fact 3: Richard Duker, the Managing Director at JPMorgan responsible for the Term Loan, received a written checklist indicating, in advance of its filing, that Old GM's counsel planned to file the Term Loan Termination Statement. JPMorgan 7056-1 Statement ¶ 50 and Plaintiff 7056-1 Counter-Statement ¶ 50.

Fact 4: Also in advance of filing, Mr. Duker received a draft of the Term Loan Termination Statement itself. *Id*.

Fact 5: Simpson Thacher, counsel for JPMorgan, received the checklist identifying the Term Loan Termination Statement as a document that Old GM's counsel planned to file and a draft of the Term Loan Termination Statement itself. JPMorgan 7056-1 Statement ¶ 54.

Fact 6: Commenting upon the documents received from Old GM's counsel, including, among other documents, the Term Loan Termination Statement, Simpson Thacher sent an email

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such testimony constitutes inadmissible legal conclusions. *See, e.g., Bellsouth Telecomms., Inc. v. W.R. Grace & Co.*, 77 F.3d 603, 615 (2d Cir. 1996) ("recitations of the affiant's 'mental state' were inadmissible and not considered in opposition to summary judgment motion because "ultimate or conclusory facts and conclusions of law…cannot be utilized on a summary judgment motion").

[3] "**JPMorgan 7056-1 Statement**" refers to the Rule 7056-1(b) Statement of Undisputed Material Facts of Defendant JPMorgan Chase Bank, N.A. in Support of its Motion for Summary Judgment submitted by JPMorgan in connection with its motion for summary judgment. "**Plaintiff 7056-1 Counter-Statement**" refers to the Counter-Statement of Material Facts Pursuant to Local Bankruptcy Rule 7056-1 submitted by Plaintiff in connection with this opposition to JPMorgan's motion for summary judgment.

to Old GM's counsel, in advance of the filing, stating: "Nice job on the documents." Plaintiff 7056-1 Counter-Statement ¶ 18.

Fact 7: Simpson Thacher executed written escrow instructions authorizing the release of the Term Loan Termination Statement to Old GM's counsel upon the closing of the Lease Payoff. *Id.*

JPMorgan urges this Court to rule, as a matter of law, that it did not authorize the filing of the Term Loan Termination Statement. As even just the above seven basic facts demonstrate, however, there is no basis for such a ruling. To the contrary, the facts identified above, along with a number of additional facts all corroborative of the above, demonstrate that JPMorgan authorized the filing of the Term Loan Termination Statement, even though the filing terminated a security interest that JPMorgan did not intend to terminate.

Because JPMorgan approved the filing of the Term Loan Termination Statement, it is legally effective, and, consequently, the Lien was not perfected as of the Petition Date. Accordingly, JPMorgan's summary judgment motion should be denied, and the Committee's should be granted.

STATEMENT OF FACTS

To avoid unnecessary duplication, the Factual Background set forth at pages 3 to 8 of Plaintiff's Summary Judgment Brief is incorporated herein by reference.

ARGUMENT

I. The Term Loan Termination Statement Unambiguously Indicates That It Was Authorized By JPMorgan

The Term Loan Termination Statement unambiguously terminates the financing statement that previously had perfected the Lien and states that the filing was authorized by JPMorgan. Since UCC filings are presumptively valid, any analysis of this case should start with

the Term Loan Termination Statement itself. It is JPMorgan's burden to show that this public filing is a nullity. *In re Hampton*, No. 99-60376, 2001 WL 1860362 at *2 (Bankr. M.D. Ga. Jan. 2, 2001) (burden of persuasion shifts to creditor once its entitlement to secured status has been placed in issue). For all of the reasons set forth below, JPMorgan cannot meet this burden; to the contrary, the undisputed facts of this case establish that the Term Loan Termination Statement is legally effective.

II. The Term Loan Termination Statement Is Effective, Even Though JPMorgan Did Not Intend To Terminate The Security Interest With Respect To The Term Loan

JPMorgan acknowledges, as it must, the consistent authority holding that UCC filings that mistakenly terminate a security interest are legally effective. *See generally In re Silvernail Mirror and Glass, Inc.*, 142 B.R. 987, 989 (Bankr. M.D. Fla. 1992) (mistaken termination statement held to be legally effective); *Crestar Bank v. Neal (In re Kitchin Equip. Co. of Va.)*, 960 F.2d 1242, 1245-46 (4th Cir. 1992) (same); *Koehring Co. v. Nolden* (*In re Pac. Trencher & Equip., Inc.)*, 27 B.R. 167, 168 (B.A.P. 9th Cir. 1983), *aff'd*, 735 F.2d 362 (1984) (same); *Rock Hill Nat'l Bank v. York Chem. Indus., Inc.* (*In re York Chem. Indus., Inc.)*, 30 B.R. 583, 586 (Bankr. D. S.C. 1983) (same).

In its brief, JPMorgan relies on only two cases involving UCC termination statements containing mistakes. Those cases are easily distinguished. Moreover, they support the basic principle that UCC termination statements are effective when, as here, they are filed in the form in which they are approved by the secured lender authorized to cause the filing.

First, JPMorgan relies upon *In re A.F. Evans Co.*, No. 09-41727 (EDJ), 2009 WL 2821510 (Bankr. N.D. Cal. July 14, 2009). In *A.F. Evans*, the borrower prepared draft UCC

termination statements for review by the secured lender.[4] The draft termination statements properly indicated that the secured lender's security interest in only two specified properties would be terminated, leaving the secured lender with a perfected security interest in a third property. Notably, the draft UCC forms did not contain an "X" in box number 2[5] of the UCC form, which would have indicated that the secured lender's entire security interest in all three properties was being terminated. After the secured lender transmitted these approved UCC forms to the escrow agent for filing, the escrow agent mistakenly checked the termination box before filing the UCC termination statement.

In ruling that the secured lender's perfected security interest in the third property was not terminated by the UCC filing, the Court relied upon the fact that the UCC form transmitted to the escrow agent did not have the termination box checked, and that the filed form thus differed from the form approved by the secured lender. *Id.* at *3. In *A.F. Evans*, in other words, the mistake was that of the escrow agent – not the secured lender. In this case, however, the Term Loan Termination Statement was filed in exactly the same form in which it had been transmitted to JPMorgan before it was filed. Thus, unlike *A.F. Evans*, this is not an "unauthorized modification" case, *id.* at *4, as the filed version of the Term Loan Termination Statement corresponds exactly to the draft version received by JPMorgan and its counsel before the filing. There were no surprise or unreviewed alterations or modifications to the Term Loan Termination Statement between the time that JPMorgan and its counsel received it for review and the time it was filed. The onus was on JPMorgan to make any necessary corrections to the UCC forms

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[4] In this case, too, it was the borrower (Old GM) that prepared the UCC filings for approval by the secured lender (JPMorgan). This division of labor is typical with regard to the termination of security interests.

[5] *See* standard form of UCC termination statement attached as Ex. D to the Declaration of Katie L. Cooperman, dated August 5, 2010, filed in support of Plaintiff's opposition to JPMorgan's summary judgment motion.

prepared to be filed on its behalf in connection with the closing of the Lease Payoff. Having failed to correct the mistake, JPMorgan is legally required to bear the consequences. Unlike *A.F. Evans*, there is no basis for JPMorgan to shift the blame to Old GM's counsel and argue that JPMorgan did not authorize the filing of the Term Loan Termination Statement.

Indeed, in distinguishing the facts of *A.F. Evans* from the facts of *In re Pac. Trencher & Equip., Inc.*, 735 F.2d 362 (9th Cir. 1984), the *A.F. Evans* court noted that the "error in Pacific Trencher was the secured party's error, and did not involve an unauthorized act by an escrow agent." 2009 WL 2821510 at *5. Accordingly, in *Pacific Trencher*, the secured lender's mistaken termination statement was held to be legally effective as a matter of law. So too in this case, the filing of the Term Loan Termination Statement resulted from JPMorgan's error. JPMorgan and its counsel received the Term Loan Termination Statement in its final form and authorized its filing through, among other things, email communications and written escrow instructions[6] that released the Term Loan Termination Statement upon the closing of the Lease Payoff.

The *A.F. Evans* court also distinguished *Pacific Trencher* on the basis that the UCC filing in the *A.F. Evans* case, unlike *Pacific Trencher*, was ambiguous on its face because two different boxes were checked: the "termination box," which purported to terminate all of the secured lender's security interest, and the "release of collateral" box, which purported to terminate only a specified portion of the secured lender's collateral. The court explained that the

[6] JPMorgan argues that the escrow instructions do not provide "any authority whatsoever to actually file any UCC-3 termination statements at all." This is not a credible position. According to the escrow instructions, once the closing conditions with respect to the Lease Payoff are satisfied, the identified UCC-3 termination statements, including the Term Loan Termination Statement, are to be "forwarded to counsel for GM." The obvious purpose behind releasing and forwarding the UCC-3 termination statements to Old GM's counsel was to allow Old GM's counsel to cause them to be filed. Indeed, JPMorgan has never objected to the filing of the other three Delaware UCC termination statements, all of which were released to Old GM's counsel for filing pursuant to the same escrow instructions.

ambiguity on the face of the UCC filing raised a "red flag," alerting third parties of the "possibility that a full termination may not have been intended." *Id.* at *5. Because the UCC filing itself raised a "red flag," the *A.F. Evans* court found that it was unlikely to be "seriously misleading" to an interested third party. In *Pacific Trencher*, however, like this case, the termination statement was unambiguous in its termination of the secured lender's entire security interest, and thus the secured lender was bound by the mistake.

Supposing hypothetically that the facts of *A.F. Evans* were more like this case – and that the agent in *A.F. Evans* had filed an unaltered UCC statement with only the termination box checked – it is clear from the language and reasoning of the court that such a UCC statement would have been effective, even though it contained a fundamental mistake. The same result is compelled here and comports with all of the UCC cases addressing the issue of mistaken filings.

Goger v. Merchants Bank of Atlanta (In re Feifer Industries, Inc.), 155 B.R. 256 (Bankr. N.D. Ga. 1993), the only other case involving a mistaken UCC filing that is cited by JPMorgan in support of its motion, is also not on point. In *Feifer*, a case decided under Georgia law, one secured lender filed a termination statement that, in addition to terminating its own security interest, also purported to terminate the security interest of a second secured lender. The court ruled that the termination statement was ineffective as to the second lender because there was "no written or parol evidence regarding the actual authority" of the first lender to terminate the security interest of the second lender. This case, in contrast, concerns JPMorgan's approval of a UCC filing that terminated a security interest as to which JPMorgan was indisputably authorized to act in its capacity as administrative agent on the Term Loan. JPMorgan itself approved the filing of the Term Loan Termination Statement by, among other things: receiving, and not correcting, the draft Term Loan Termination Statement; affirmatively expressing approval of the draft Term Loan Termination Statement ("Nice job on the documents"); and executing escrow

instructions providing for the release of the Term Loan Termination Statement to Old GM's counsel.

Because the facts in the record establish that JPMorgan received and approved the mistaken Term Loan Termination Statement, there are no grounds to nullify the filing.[7] Accordingly, JPMorgan's summary judgment motion should be denied, and the Committee's should be granted.

III. JPMorgan Expressly Authorized The Filing Of The Term Loan Termination Statement

Ignoring basic facts, JPMorgan argues incorrectly that Old GM's counsel was not provided with express authority to file the Term Loan Termination Statement. "Express authority is authority distinctly, plainly expressed, orally or in writing." *Hidden Brook Air, Inc. v. Thabet Aviation Int'l Inc.*, 241 F. Supp.2d 246, 261 (S.D.N.Y. 2002). Here, JPMorgan distinctly and plainly, albeit mistakenly, instructed Old GM's counsel to file the Term Loan Termination Statement.

In *Hidden Brook*, a non-UCC case relied upon by JPMorgan, plaintiff argued that defendants were bound by a contract entered into by their agent because, among other things, the

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[7] JPMorgan argues that it should not be subject to the consequences of the filing of the Term Loan Termination Statement because it did not unmistakably manifest an intent to waive its rights in the collateral securing the Term Loan. Memorandum of Law in Support of JPMorgan Chase Bank N.A.'s Motion for Summary Judgment (**"JPMorgan Brief"**) at 39. This waiver argument misses the mark entirely. In support of the argument, JPMorgan cites inapposite cases involving the doctrine of waiver generally. None of those cases involves mistaken UCC filings. *See, e.g., In re Angiuilli*, 148 Misc. 2d 796, 561 N.Y.S.2d 626 (Sur. Ct. Oneida County 1990), *aff'd*, 178 A.D.2d 948, 580 N.Y.S.2d 889 (4th Dep't 1991) (whether right to Medicaid payments had been waived); *Peck v. Peck*, 232 A.D.2d 540, 649 N.Y.S.2d 22 (2d Dep't 1996) (whether wife had waived rights under separation agreement). As already explained above, there is a clear line of cases dealing specifically with the issue of mistaken UCC termination statements. Those cases do not frame the legal issue as one of waiver. JPMorgan's far-fetched effort to recast the issue as one of waiver is a tacit acknowledgement that the UCC cases do not support JPMorgan's position.

agent showed the defendants a copy of the agreement before he signed it, and the defendants told him to sign it. Judge McMahon found a disputed material fact with respect to the issue of actual authority because defendants denied having told the agent that he could sign the contract, and thus there was conflicting testimony before the court. *Id.* at 262.[8]

In this case, unlike *Hidden Brook*, JPMorgan does not dispute that it received the closing checklist and the draft Term Loan Termination Statement in advance of its filing, and that JPMorgan's counsel expressed approval of the filing of the Term Loan Termination Statement in an email and written escrow instructions. Thus, JPMorgan expressly authorized the filing of the Term Loan Termination Statement.

It should be noted that the Term Loan Termination Statement was one of four Delaware UCC termination statements that were to be filed by Old GM's counsel as listed in the Lease Payoff closing checklist and escrow instructions. JPMorgan does not claim that the other three UCC termination statements were filed by Old GM's counsel without authority. It is, therefore, clear that Old GM's counsel was authorized to cause such UCC filings to be made on behalf of JPMorgan. It is equally clear that, had JPMorgan corrected the closing checklist and escrow instructions, or otherwise indicated to Old GM's counsel that it should not file the Term Loan Termination Statement, Old GM's counsel would not have proceeded with the filing.[9]

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[8] It should be noted that the court went on to find that the agent had apparent authority to enter into the contract, even though the contract contained a payment to the agent that was undisclosed to the principal.

[9] JPMorgan attempts to distinguish the nature of Old GM's permission to file the other three UCC termination statements from its permission to file the Term Loan Termination Statement based on the language of the Termination Agreement and Release of Operative Agreements dated October 30, 2008 (the **"Termination Agreement"**), which expressly authorizes Old GM to terminate financing statements "relating to the Properties." *See* Richard W. Duker affidavit, dated June 29, 2010, filed in support of JPMorgan's summary judgment motion ("**Duker Affidavit**"), at Ex. L. "Properties" is defined elsewhere to mean those properties that are the subject of the Synthetic Lease Agreement. JPMorgan's reliance on the Termination Agreement is misplaced. The Termination Agreement does not contain a merger or integration clause, and there is no document indicating that it is the sole source of Old GM's authority to file UCC termination statements on behalf of Old GM. As already explained in detail above, in addition

Old GM's duty to follow the instructions of JPMorgan with regard to the Term Loan Agreement is spelled out in writing in the Collateral Agreement dated November 29, 2006 that pertains to the Term Loan. Duker Affidavit at Ex. H. According to section 6.04 of the Collateral Agreement titled "Authority of Agent," "the Agent [JPMorgan] shall be conclusively presumed to be acting as agent for the Secured Parties with full and valid authority so to act or refrain from acting, and no Grantor [Old GM and Saturn Corporation] shall be under any obligation, or entitlement, to make any inquiry respecting such authority." Here, JPMorgan, through Richard Duker and its counsel, directed Old GM's counsel to act by filing the Term Loan Termination Statement. Although JPMorgan and Old GM both may wish that one or the other had caught this mistake before the Petition Date, Old GM's counsel cannot ultimately be faulted for following instructions that were signed off on by JPMorgan.

Accordingly, JPMorgan's summary judgment motion, which is premised on the factually unsupported – and directly contradicted – contention that JPMorgan did not authorize the filing of the Term Loan Termination Statement, should be denied. Further, because the facts conclusively establish that JPMorgan expressly authorized Old GM's counsel to file the Term

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to the authority granted in the Termination Agreement with respect to certain UCC filings, Old GM's counsel was also authorized to file the Term Loan Termination Statement based upon JPMorgan's review of the document, express email approval and signed, written escrow instructions. For the same reason, the inadmissible legal conclusions set forth in the affidavit of Debra Homic Hoge, of Old GM, executed on March 18, 2010, are irrelevant to JPMorgan's motion. Ms. Hoge states that Old GM was not authorized to file the Term Loan Termination Statement by the Synthetic Lease Termination Agreement. Ms. Hoge fails to address any of the key facts on the issue of authorization, including JPMorgan's pre-filing receipt of the Term Loan Termination Statement; Simpson Thacher's express approval of the closing documents, including the Term Loan Termination Statement; and the executed escrow instructions. Finally, in *Old Republic Ins. Co. v. Hansa World Cargo Service, Inc.*, 51 F. Supp.2d 457, 473 (S.D.N.Y. 1999), a case relied upon by JPMorgan, defendant argued that it was not bound by the acts of its agent due to contract language that "negate[d] any claim of actual authority" because it insulated the principal from liability for certain acts of its agent. The court there found that the contract did not bar a "valid agency claim." *Id.*

Loan Termination Statement, the Committee's motion for summary judgment should be granted.[10]

IV. JPMorgan Implicitly Authorized The Filing Of The Term Loan Termination Statement

JPMorgan contends that Old GM's counsel did not possess implied authority to file the Term Loan Termination Statement. Because Old GM's counsel was vested with express authority, there is no need for the Court to even reach this question. Nonetheless, it is clear that, on this theory too, the filing of the Term Loan Termination Statement was authorized.

As JPMorgan explains, "agents generally have implied authority to perform the necessary acts within the scope of their usual and ordinary duties." JPMorgan Brief at 30 (citing *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)). Here, JPMorgan concedes that Old GM's counsel was authorized to file UCC termination statements on its behalf and does not contest that the other three UCC termination statements were authorized by JPMorgan. Thus, filing UCC termination statements on behalf of JPMorgan with respect to loans to Old GM was clearly "within the scope" of Old GM's authority, and the particular UCC filing at issue in this case was implicitly – as well as expressly – authorized by JPMorgan. JPMorgan simply made a mistake.

Quoting comment e to section 2.02 of the Restatement (Third) of Agency, JPMorgan explains that an "agent does not have actual authority to do an act if the agent does not

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[10] JPMorgan argues that, even if the Court rules that the Term Loan Termination Statement was effective, it still has a perfected security interest in certain assets of Saturn Corporation and certain other property based upon UCC financing statements filed in various counties where collateral was located. That issue is not currently before the Court, as the parties have agreed that the sole issue to be decided in this early-stage summary judgment motion is the legal effectiveness of the Term Loan Termination Statement. The issue of whether any collateral remained perfected as of the Petition Date on account of those other filings and the value of any such surviving collateral are issues that will require discovery after the court determines the legal effectiveness of the Term Loan Termination Statement.

reasonably believe that the principal has consented to its commission." There is no doubt here, though, that Old GM's counsel reasonably believed that JPMorgan had consented to its filing of the Term Loan Termination Statement. The Term Loan Termination Statement appeared on each version of the closing checklist that was shared with JPMorgan and its counsel. A draft of the Term Loan Termination Statement was provided to JPMorgan and its counsel before filing. JPMorgan executed written escrow instructions permitting the release of the Term Loan Termination Statement upon the closing of the Lease Payoff.

Of course, if JPMorgan had analyzed and appreciated the consequences of the UCC filing, it never would have permitted Old GM's counsel to cause the Term Loan Termination Statement to be filed. That fact is what makes this a case about mistake and not a case, as JPMorgan would have it, about lack of agency. Although Old GM's counsel prepared drafts of the relevant documents, it was acting at all times under the direction of JPMorgan.

The testimony of Ryan Green, the Mayer Brown associate involved in the Lease Payoff, is telling. After the Petition Date, when Robert Gordon, the Mayer Brown partner in charge of the Lease Payoff, first brought to Ryan Green's attention that JPMorgan was inquiring about why the Term Loan Termination Statement had been filed, Mr. Green told Mr. Gordon that "the UCC causing the concern was referenced on the checklist and in the escrow instructions" and "was within the universe of documents involved in the unwind." Plaintiff 7056-1 Counter-Statement ¶ 101. Thus, according to Mr. Green, the JPMorgan-approved checklist and escrow instructions defined the scope of what Mayer Brown, as Old GM's counsel, was permitted to file. This is the correct view of the relationship between the two parties.

JPMorgan also argues without basis that JPMorgan's silence in response to receipt of the closing checklist and the draft Term Loan Termination Statement should not be interpreted as conveying implied authority to Old GM's counsel. As an initial matter, as already described

above, JPMorgan was not silent. Rather, through its counsel, JPMorgan affirmatively expressed approval of the Term Loan Termination Statement. In any event, as set forth in section 1.03 of the Restatement (Third) of Agency and as summarized in JPMorgan's Brief, "[s]ilence 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." JPMorgan Brief at 33. Here, as already explained above, by providing the draft Term Loan Termination Statement to JPMorgan and identifying that document for filing in the closing checklist and escrow instructions, Old GM's counsel could, and did, reasonably infer from JPMorgan's silence – and, of course, also from its affirmative indications of consent to the filing – that the Term Loan Termination Statement was approved for filing by JPMorgan.

JPMorgan's papers are artfully worded to obscure a key issue. According to JPMorgan, there is "uncontroverted testimony" that Old GM's counsel "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." JPMorgan Brief at 32. While it may be true that Old GM's counsel – like JPMorgan and Simpson Thacher – failed to recognize at the time of filing that the Term Loan Termination Statement related to the Term Loan, it remains the case that all of those parties had express written notification that the Term Loan Termination Statement would be filed. Their collective failure to recognize the import of that filing is what makes this a case about mistake, but that failure does not mean that the filing was unauthorized.[11]

[11] To prevail, the Committee is not required to show that JPMorgan could have, or should have, discovered and corrected the mistake before the Petition Date. Nonetheless, it is clear that is the case. First, the draft Term Loan Termination Statement (and each listing of it on the closing checklist) referenced the November 30, 2006 closing date on the Term Loan Agreement. Plaintiff 7056-1 Counter-Statement ¶ 50. In this way, it stood out from the other UCC termination statements identified in the Lease Payoff closing documents. Second, in March 2009, the Term Loan Agreement was amended. JPMorgan 7056-1 Statement ¶ 84. If routine UCC searches had been conducted at that time, the mistake would have been discovered. Third, in May 2009, Morgan Lewis, on behalf of JPMorgan, conducted lien searches, presumably in connection with the Term Loan Agreement, but inexplicably failed to conduct

In a similar vein, JPMorgan correctly asserts that 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." That is exactly the point. Mayer Brown did not exercise independent judgment here and engage in an act that was not authorized by JPMorgan. To the contrary, Mayer Brown prepared a draft UCC filing, presumably without appreciating that the termination statement terminated collateral securing the Term Loan, and then followed JPMorgan's instructions to the letter. JPMorgan's instructions to go ahead and file the Term Loan Termination Statement were set forth in express emails; were properly inferred by Mayer Brown from JPMorgan's failure to object to the draft Term Loan Termination Statement that was sent to it for pre-filing review; and were reflected in express written escrow instructions. As a result, the mistaken decision to file the Term Loan Termination Statement is attributable to JPMorgan, the secured lender authorized to direct the filing of the Term Loan Termination Statement.

Finally, JPMorgan makes much of the affidavit executed after the Petition Date by Robert Gordon of Mayer Brown. The obvious purpose of that affidavit was to offer reassurance to all parties in interest, in order to induce Old GM to pay the Term Loan Lenders in full notwithstanding the filing of the Term Loan Termination Statement.

According to JPMorgan's characterization of the affidavit, Mr. Gordon swore that Mayer Brown was not authorized to file the Term Loan Termination Statement. JPMorgan Brief at 33.

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such a search in Delaware until after the Petition Date. Plaintiff 7056-1 Counter-Statement ¶ 91. Finally, on May 6, 2009, Mr. Duker asked JPMorgan's lien perfection group, which is located in Bangalore, to send him a report of all UCC filings in connection with the Term Loan Agreement. *Id*. The group in Bangalore responded with irrelevant information, and Mr. Duker did not follow up. *Id*. If Mr. Duker had received the results of the routine collateral search he had requested, he likely would have become aware of the mistaken filing with time to direct a corrective filing before the Petition Date. While such a corrective filing would not necessarily have rendered the Term Loan Termination Statement ineffective, it may have strengthened JPMorgan's position somewhat.

In fact, that is not what Mr. Gordon's affidavit says. The affidavit is substantially more narrow and circumspect, stating only that Old "GM was not authorized by the Termination Agreement to terminate any financing statement related to the Term Loan Agreement." The qualifying language "by the Termination Agreement" leaves a gaping hole. It is telling that an earlier draft version of Mr. Gordon's affidavit, prepared by JPMorgan's counsel, stated categorically, and without qualification, that "Mayer Brown was not authorized to terminate any financing statement related to the Term Loan Agreement." Mr. Gordon changed this language before signing his affidavit. The clear implication of this change to the affidavit is that it was Mr. Gordon's view that, even though the four corners of the Termination Agreement did not authorize the filing of the Term Loan Termination Statement, the filing by Mayer Brown was, in fact, authorized by JPMorgan through other means; presumably, JPMorgan's pre-filing receipt of the draft UCC termination statement, express email approval of the draft UCC termination statement, and escrow instructions authorizing the release of the UCC termination statement.[12]

V. Old GM's Counsel Had Apparent Authority To File The Term Loan Termination Statement

Attempting to cover the waterfront with respect to the law of agency, JPMorgan also argues that Old GM's counsel had no apparent authority to file the Term Loan Termination Statement. As already set forth above, because Old GM's counsel was vested with express and implied actual authority to file the Term Loan Termination Statement, this Court need not reach

[12] The cases cited by JPMorgan with respect to implied authority are inapposite. *See, e.g., Playboy Enterprises, Inc. v. Dumas*, 960 F. Supp. 710 (S.D.N.Y. 1997), *aff'd*, 159 F.3d 1347 (2d Cir. 1998) (agents were authorized only to endorse checks for the principal, but not to enter into work-for-hire agreements on behalf of the principal); *Merex A.G. v. Fairchild Weston Systems, Inc.*, 810 F. Supp. 1356 (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) (no evidence of agency relationship in case involving German company's allegations of an oral agreement to be paid a commission for introducing an American company to a Chinese company). In contrast, this case concerns an uncontested agency relationship between JPMorgan and Old GM, pursuant to which Old GM was authorized to make UCC filings on behalf of JPMorgan.

the issue of apparent authority. Nonetheless, if the Court were to reach the issue, it is clear that Old GM's counsel was vested with apparent authority to file the Term Loan Termination Statement.

"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." JPMorgan Brief at 36 (citing *Hidden Brook*, 241 F. Supp. at 262). JPMorgan claims that 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." JPMorgan Brief at 36.

This claim is directly contradicted by the factual record. Through the escrow instructions signed by Simpson Thacher on behalf of JPMorgan, JPMorgan manifested to the escrow agent that the Term Loan Termination Statement was among the documents to be released to Mayer Brown once the closing conditions to the Lease Payoff were met.[13] The escrow agent reasonably relied on these instructions in releasing the Term Loan Termination Statement to Mayer Brown.

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[13] In a footnote, JPMorgan argues that Simpson Thacher was authorized to act for JPMorgan only with respect to the Lease Payoff and thus exceeded its authority by directing the filing of the Term Loan Termination Statement. JPMorgan's attempt to distance itself from its counsel's actions lacks merit, particularly in view of the fact that JPMorgan itself received all of the pertinent information before the Term Loan Termination Statement was filed. First, the scope of Simpson Thacher's representation of JPMorgan was broad. Mardi Merjian of Simpson Thacher has represented JPMorgan and its predecessors in a significant number of transactions since 1987, and representation of JPMorgan in different secured lending transactions has accounted for approximately forty percent of Mr. Merjian's overall practice. *See* Declaration of John M. Callagy, dated July 1, 2010, filed in support of JPMorgan's summary judgment motion, at Ex. 5 (Merjian Tr.) at 7:1-8:8. Simpson Thacher continues to represent JPMorgan on an ongoing basis. *Id.* Second, with respect to the Lease Payoff in particular, Simpson Thacher was acting in the absence of any engagement letter limiting the scope of the representation. *Id*. Third, in any event, as already explained above, when it directed the filing of the Term Loan Termination Statement through email approval and escrow instructions, Simpson Thacher was acting with the knowledge of Mr. Duker of JPMorgan. Finally, the cases cited by JPMorgan in an effort to blame Simpson Thacher for JPMorgan's own mistake are easily distinguished. *Guidi v. Inter-Continental Hotels Corp.*, No. 95 Civ. 9006 (LAP), 2003 WL 1878237 (S.D.N.Y. Apr. 14, 2003) (filings made by Egyptian attorney in Egyptian proceeding did not bind the client because the Egyptian attorney was under explicit instructions that no filings could

Moreover, Mayer Brown reasonably relied on these instructions in filing the Term Loan Termination Statement upon its release. In addition to the escrow instructions, Mayer Brown also relied on other manifestations of assent, including the fact that JPMorgan and its counsel were provided with a draft of the Term Loan Termination Statement for review before it was filed and the fact that Simpson Thacher affirmatively indicated its assent in an email to Mayer Brown. Certainly, if JPMorgan had corrected the closing checklist and escrow instructions to delete reference to the Term Loan Termination Statement, Mayer Brown would not have proceeded with the filing. Thus, it is clear that Mayer Brown was relying on the fact that JPMorgan had approved those documents.

JPMorgan also argues that the Committee cannot show that it or any party in interest, "knew of, or relied on any manifestation of JPMCB." JPMorgan Brief at 37. That argument is without merit. To begin with, none of the cases dealing with mistaken UCC filings impose any reliance requirement upon the debtor or its representatives. *See, e.g., In re Pac. Trencher*, 27 B.R. at 169 ("The fact that there is no evidence that any creditor was actually misled is not determinative. The controlling fact is that an ideal hypothetical creditor would not have discovered" the lien by examining the public records). Accordingly, there is no basis to impose any such requirement here. Further, under section 544(a) of the Bankruptcy Code, the debtor stands in the shoes of a creditor that extends credit, and acquires a lien, on the bankruptcy petition date "without regard to any knowledge of the trustee or of any creditor." Thus, even if this Court were to impose a reliance requirement, which it should not, reliance on the integrity of

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be made without prior approval of U.S. counsel); *Bryan v. State-Wide Ins. Co.*, 144 A.D.2d 325, 533 N.Y.S.2d 951 (2d Dep't 1988) (plaintiff not bound by actions of attorney waiving its rights because plaintiff had never been made aware of actions taken by attorney). Here, unlike those cases, Simpson Thacher acted with the knowledge of JPMorgan at all times.

the UCC filings should be presumed in the case of the Debtors and the Committee.

VI. The Filing Of The Term Loan Termination Statement Was Ratified By JPMorgan

JPMorgan also argues that its failure to object to, or correct, the Term Loan Termination Statement should not be deemed ratification of the filing. Because Old GM's counsel was vested with express, implied and apparent authority to file the Term Loan Termination Statement, there is no need for the Court to even reach this question. Nonetheless, it is clear that, on this theory too, the filing of the Term Loan Termination Statement was authorized.

As the Court noted in *Orix Credit Alliance v. Phillips-Mahnen, Inc.*, a case relied upon by JPMorgan, ratification requires "intent, express or implied, to affirm or adopt the acts of another. Affirmance can be established by *any* conduct manifesting an individual's consent to be a party to a transaction…such as knowledge of the unauthorized act and the failure to timely repudiate." No. 89 Civ. 8376 (THK), 1993 WL 183766, at *5 (S.D.N.Y. May 26, 1993) (internal citations omitted). In *Orix*, for example, the Court held that a principal had ratified his forged signature because he failed to object, even after the inauthentic letters were mailed to his attention.[14]

Here, there is no doubt that JPMorgan knew, before filing, that the Term Loan Termination Statement was going to be filed and knew, after filing, that the Term Loan

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[14] JPMorgan misstates the criteria for ratification. For example, JPMorgan stresses that the principal must have "full knowledge" of the relevant facts, overlooking that the court in *Banque Arabe et Internationale D'Investissement v. Maryland Nat'l Bank*, 850 F. Supp. 1199, 1213 (S.D.N.Y. 1994), held that "notice of facts that would invite reasonable inquiry" is sufficient, and that "full knowledge is not necessary before there can be ratification." Here, in any event, JPMorgan had full knowledge of the filing. While it may not have appreciated the legal import of the filing, it should have. Moreover, before the Petition Date, JPMorgan certainly had knowledge of facts that should have prompted "reasonable inquiry."

JPMorgan also argues that the principal's acceptance of the benefits of the action is required. It makes no sense to apply such a requirement here because the act in question was to JPMorgan's detriment. Similarly, in *Orix*, which involved an act that was to the detriment of the party alleged to have ratified the act, the court noted that "acceptance of the benefits" of a transaction is not a required element to establish ratification. The same approach makes sense here; and, accordingly, this Court should find that the elements for ratification have been satisfied.

Termination Statement had been filed. While JPMorgan may have failed to appreciate the ramifications of the filing, the fact of the filing was fully known to it at all times. Moreover, for the reasons already specified in footnote 11 above, JPMorgan had numerous opportunities to identify and correct the mistake before the Petition Date. *See generally Orix*, 1993 WL 183766, at *5 (ratification may occur through the principal's "silence when there is an opportunity to speak and, under the circumstances, a desire to repudiate would normally be expressed"); *In re Fontanez*, 113 B.R. 136, 139 (Bankr. W.D.N.Y. 1990) (scope of agent's authority is "determined not only by what the principal actually knows of the agent's acts, but also by what the principal should know if he had exercised ordinary care and prudence").[15]

VII. There Is No Basis To Impose A Constructive Trust

Finally, JPMorgan argues without basis that the Court should "impose a constructive trust on the Term Loan Collateral in favor of the Term Loan lenders." JPMorgan Brief at 44. This argument, like so many other arguments advanced by JPMorgan, has no grounding in any of the cases dealing with mistaken UCC filings. As those cases clearly establish, courts do not save secured lenders from the consequences of mistaken UCC filings by resorting to equitable doctrines such as constructive trust. To the contrary, courts consistently require lenders to bear the consequences that flow from mistaken UCC filings. *See, e.g., In re Kitchin*, 960 F.2d at 1246 (refusing to apply equitable principles to relieve a secured lender from consequences of mistaken termination statement).

[15] The other ratification cases cited by JPMorgan also do not support its position. *See, e.g., Monarch Ins. Co. v. Ins. Corp. of Ireland Ltd.*, 835 F.2d 32 (2d Cir. 1987) (affirming jury verdict because "the jury could properly have found that the contracts were ratified"); *Prisco v. State of New York*, 804 F. Supp. 518 (S.D.N.Y. 1992) (denying summary judgment because a "principal may ratify and thereby become liable for the acts of an agent even if those acts were initially unauthorized").

In any event, the cases cited by JPMorgan are not on point. For example, in *Sanyo Electric, Inc. v. Howard's Appliance Corp. (In re Howard's Appliance Corp.)*, 874 F.2d 88 (2d Cir. 1989), the court imposed a constructive trust in favor of a secured creditor because the debtor engaged in deceitful conduct intended to defeat the rights of the secured creditor. In this case, there is no claim that Old GM engaged in wrongful conduct or otherwise intended to defeat the rights of JPMorgan. In general, the Bankruptcy Code reflects "the conscious decision by Congress to favor the trustee over unperfected creditors, regardless of the particular equities of the case." 874 F.2d at 92. Here, where there is no claim of misconduct by Old GM, there is no basis to depart from the requirements of the Bankruptcy Code or the UCC.[16]

CONCLUSION

Throughout its summary judgment brief, JPMorgan asks, and thus answers, the wrong question. JPMorgan focuses on the question of whether JPMorgan or Old GM intended to terminate JPMorgan's interest in the collateral that secured the Term Loan Agreement. That is an easy, but irrelevant, question. The answer is: of course not. That is why the filing was a mistake.

If the issue is reframed, however, as whether JPMorgan intended to file a termination of UCC Financing Statement No. 6416808 4, also known as the Term Loan Termination Statement, the answer is equally obvious. JPMorgan – in emails, fully-executed escrow instructions, and through its pre-filing receipt of the draft Term Loan Termination Statement – directed the filing of the Term Loan Termination Statement. That is why the filing was authorized. In that respect,

[16] Similarly, in *Chemical Bank v. United States Lines S.A. Inc. (In re McLean Indus.)*, 132 B.R. 271, 286 (Bankr. S.D.N.Y. 1991), the court explained that the "essential ingredients to establish a constructive trust are that the person damaged must be induced to his detriment and that the other's unjust benefit must result from an abuse of trust relationship existing between the parties." Neither of these two factors is present here.

this case is no different from the numerous other cases in which a secured lender must bear the consequences of its own mistake.

Accordingly, the Committee respectfully requests that this Court enter an order: (i) denying JPMorgan's motion for summary judgment; (ii) granting the Committee's motion for summary judgment; and (iii) granting such other and further relief as the Court deems just and proper.

Dated: New York, New York
August 5, 2010

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