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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., individually and as Administrative Agent for Various lenders party to the Term Loan Agreement described herein, *et al.*,	
Defendants.	

DEFENDANT JPMORGAN CHASE BANK, N.A.'S MEMORANDUM OF LAW IN OPPOSITION TO THE PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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MISCELLANEOUS

Defendant JPMorgan Chase Bank, N.A. ("**JPMCB**") respectfully submits this memorandum of law in opposition to the motion of the Official Committee of Unsecured Creditors of Motors Liquidation Company f/k/a General Motors Corporation (the "**Committee**" or "**Plaintiff**") for partial summary judgment and in further support of JPMCB's motion for summary judgment.

PRELIMINARY STATEMENT

The Committee and JPMCB agree that the central issue for decision is whether General Motors Corporation's ("**GM**") counsel, Mayer Brown LLP ("**Mayer Brown**"), was authorized in October 2008 during the repayment of a synthetic lease financing facility ("**Synthetic Lease Transaction**") to file a UCC-3 termination statement relating (the "**Unrelated Termination Statement**") to a completely separate $1.5 billion Term Loan facility ("**Term Loan**"). Yet, like a ship passing in the night, the Committee virtually ignores the relevant evidence that bears on this issue. Instead, the Committee cherry picks, as its purported factual support, the fact that a stack of draft documents passed among the parties and their counsel leading up to the repayment of the Synthetic Lease Transaction, which stack included a draft of the Unrelated Termination Statement. Although it is undisputable that not a single person recognized that the UCC-3 at issue related to the Term Loan, the Committee would have the security interest in the $1.5 billion Term Loan deemed lost solely based on the inclusion of the Unrelated Termination Statement in the stack of draft documents.

All of the documents and deposition testimony, however, demonstrate beyond cavil that Mayer Brown was not authorized, and did not believe it was authorized, to file any UCC-3 termination statement relating to the Term Loan. Specifically, the Committee's motion does not address the following undisputed facts:

- A written termination agreement signed by GM and JPMCB, governing the repayment of the Synthetic Lease Transaction, only gave GM permission to file termination statements that related to the specific real estate properties that were the subject of that financing, not the Term Loan. No other document provided GM or its counsel with authority to file anything in October 2008.

- Mayer Brown did not even know that the Unrelated Termination Statement was included in a stack of draft documents that it circulated prior to the repayment of the Synthetic Lease Transaction;

- Mayer Brown attorneys swore that they did not believe they were authorized to file the Unrelated Termination Statement;

- GM did not believe it had authority, and was not authorized to deputize its counsel to terminate the Term Loan financing statement;

- Richard Duker, a JPMCB managing director on the Synthetic Lease Transaction, did not know the Unrelated Termination Statement was included among draft documents that were sent to JPMCB's counsel by Mayer Brown prior to the repayment of the Synthetic Lease Transaction;

- The responsible attorney at Simpson Thacher & Bartlett LLP ("**Simpson**"), JPMCB's counsel for the Synthetic Lease Transaction, was not aware that the Unrelated Termination Statement was included among draft documents circulated by Mayer Brown prior to the repayment of the Synthetic Lease Transaction;

- Simpson, in any event, was only authorized to represent JPMCB in connection with the Synthetic Lease Transaction – not the Term Loan – and therefore had no ability to provide authority to anyone to act with respect to the Term Loan.

- To the extent the Simpson attorney advised Mayer Brown that the draft documents for the repayment of the Synthetic Lease Transaction were satisfactory, he did not know a UCC-3 relating to the Term Loan was among the drafts nor did he advise that the draft documents were approved to terminate the collateral for the Term Loan;

- Similarly, the Mayer Brown attorneys did not know that a UCC-3 termination statement relating to the Term Loan was among the drafts.

Relying on a line of cases that pre-date the 2001 revisions to Article 9 of the UCC, the Committee argues that JPMCB should be charged with the consequences of any type of mistake in connection with this filing. The Committee's cases, however, arose in the context

of errant filings at a time when UCC-3 termination statements had to be physically signed and, in each of those cases, the secured creditor itself affixed its signature to the UCC-3 termination statement. The significance of the filing of the Unrelated Termination Statement here must be measured against the revised Article 9 of the UCC regime which no longer requires signatures on financing statements, amendments and terminations, but does require such documents to be authorized in order to be effective. Thus, it is not enough, as the Committee argues, that JPMCB is chargeable with any "mistake." Rather, the dispositive issue is whether JPMCB *authorized* the filing. Here, the facts are clear: JPMCB gave no such authority; Simpson had no such authority to give; and Mayer Brown did not believe it had been given, or had, any such authority.

The Committee also half-heartedly argues that certain pre-printed language on the form of the Unrelated Termination Statement itself suffices to establish the requisite authority. The fact that a form contained pre-printed language, however, adds nothing to the resolution of whether the filing was authorized. Inasmuch as UCC-3 termination statements are no longer required to be signed, the logical result of the Committee's argument would be that a party's interest in property could be eliminated simply by the filing of a pre-printed termination statement by a debtor or anyone else – whether acting unscrupulously or not. That is not the law, is inconsistent with the policies inherent in the revised Article 9 of the UCC and would lead to complete chaos in commercial transactions.

In sum, the Committee's motion should be denied because it fails to meet the burden it bears in moving for summary judgment. Contrary to the Committee's claim, the undisputed facts show that the Committee is not entitled to judgment as a matter of law. Instead, JPMCB's motion for summary judgment should be granted.

STATEMENT OF THE FACTS

The facts relevant to this memorandum and the pending motions are set forth in: (i) 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 ("**JPMCB Rule 7056-1 Statement**") (Docket Entry 30); (ii) JPMorgan Chase Bank, N.A.'s Response Pursuant to Rule 7056-1(c) to Plaintiff's Statement of Undisputed Material Facts Pursuant to Rule 7056-1 filed herewith; and (iii) the Statement of the Facts set forth in the Memorandum of Law in support of JPMCB's Motion for Summary Judgment (Docket Entry 29), each one incorporated herein, to which the Court is respectfully referred.[1]

ARGUMENT

THE COMMITTEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT SHOULD BE DENIED AND JPMCB'S MOTION FOR SUMMARY JUDGMENT GRANTED

I. The Committee Cannot Show That JPMCB Authorized The Filing Of The Unrelated Termination Statement

The Committee argues that the mere filing, in and of itself, of a UCC-3 termination statement terminates the financing statement to which it relates. (Committee Mem. at 9.) This is not the law. A termination statement is effective only if *authorized* by the secured party of record. Section 9-510 of Title 6 of the Delaware Code, "Effectiveness of Filed Record," provides in subsection (a) entitled "Filed record effective if authorized" that "[a] filed record is

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[1] References to "**Committee Mem.**" are to Plaintiff's Memorandum of Law in Support of Motion for Partial Summary Judgment dated and filed with the Court on July 1, 2010. (Docket Entry 26.) References to: "**Callagy Decl.**" are to the declaration of John M. Callagy in support of Motion for Summary Judgment of JPMCB dated and filed with the Court on July 1, 2010 (Docket Entry 41); to "**Duker Aff.**" are to the affidavit of Richard W. Duker in Support of Defendant JPMCB's Motion for Summary Judgment dated June 29, 2010 and filed with the Court on July 1, 2010 (Docket Entry 31); and to the "**Hoge Aff.**" are to the affidavit of Debra Homic Hoge dated March 18, 2010 and filed with the Court July 1, 2010 (Docket Entry 42); and the exhibits identified therein and annexed thereto in such declaration and affidavits.

effective only to the extent that it was filed by a person that may file it under Section 9-509."

Section 9-509(d) of Title 6 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 termination statement is deemed an amendment. *See* Del. Code Title 6 § 9-102(a)(79).

Thus, contrary to the Committee's claim, Article 9 of the UCC requires that a UCC-3 termination statement be authorized to be *effective*. *See* Del. Code Title 6 §§ 9-509(d) and 9-510(a); *see also* Harry C. Sigman, *The Filing System Under Revised Article 9*, 73 AM. BANKR. L. J. 61, 78 n.110 (1999) (if an unauthorized person files a UCC-3 termination statement, the related UCC-1 financing statement to which it refers will remain effective); 9B William D. Hawkland et al., Uniform Commercial Code Series [Rev.] § 9-510:2 (2001) ("[t]he fate of a record filed by someone other than a person given the power to do so under revised Section 9-509 is quite clear. Such a filing is ineffective ... The same is true for a termination statement not authorized by the secured party of record."); National Conference of Commissioners on Uniform State Laws, DRAFT AMENDMENTS TO UNIFORM COMMERCIAL CODE ARTICLE 9, § 9-518 cmt. 2 (July 2010) ("*If the person that filed the record was not entitled to do so, the filed record is ineffective*, regardless of whether the secured party of record files an information statement." (emphasis added)). Indeed, courts have held that a UCC-3 termination statement filed without the requisite authority is ineffective. *See, e.g.*, *In re A.F. Evans*, No. 09-41727 (EDJ), 2009 WL 2821510 (Bankr. N.D. Cal. July 14, 2009). Here, the Committee does not – and cannot – show that JPMCB knew about, let alone authorized, the filing of the Unrelated Termination Statement.

A. The Committee Ignores Key Undisputed Evidence Regarding The Issue Of Authority

Highlighting the weakness of the Committee's motion is that it fails to address the key undisputed facts: (i) the Synthetic Lease Termination Agreement (as defined in the JPMCB Rule 7056-1 Statement at ¶ 28) which was the only source of GM's and Mayer Brown's authority to file any UCC-3 termination statements in October 2008; and (ii) the consistent testimony of every witness deposed by the Committee that no one gave, or believed they had, authority to file the Unrelated Termination Statement. This undisputed evidence demonstrates that JPMCB did not authorize the filing of the UCC-3 termination statement relating to the Term Loan.

1. The Only Source of Authority For Mayer Brown To File Termination Statements Was The Synthetic Lease Termination Agreement

The Synthetic Lease Termination Agreement was the operative document governing the repayment of the Synthetic Lease Transaction, and the only source of authority provided by JPMCB to file any UCC-3 termination statements in October of 2008. (Duker Aff. at ¶ 18; Ex. L; Callagy Decl. Ex. 4 (Gordon Tr.) at 53-54; Ex. 2 (Green Tr.) at 95-96; Ex 5 (Merjian Tr.) at 56; Ex. 11 at JPMCB-0000078-79; Hoge Aff. at ¶¶ 8-9 and 11.) The Synthetic Lease Termination Agreement expressly limited GM's authority to file UCC-3 termination statements with respect to the existing UCC-1 financing statements filed in connection with *"the Properties"* that were the subject of the Synthetic Lease Transaction. (Duker Aff. Ex. L; Callagy Decl. Ex. 4 (Gordon Tr.) at 22-23) (emphasis added.) The relevant Synthetic Lease Transaction documents defined "Properties" as twelve specified parcels of real estate. (Duker Aff. at ¶ 6; Exs. B, D and E at JPMCB-STB-00000918-920.) The Committee's complete failure to address the Synthetic Lease Termination Agreement underscores the weakness of its position.

2. The Uncontroverted Testimony Demonstrates That There Was No Authority To File The Unrelated Termination Statement

The Committee also fails to address the uncontroverted affidavits and deposition testimony of witnesses for GM, Mayer Brown, JPMCB and Simpson that: (i) GM and it counsel, Mayer Brown, did not have authority to file a termination statement in October of 2008 relating to the Term Loan; (ii) the filing of a termination statement related to the Term Loan remained unknown to all involved until after GM filed for bankruptcy protection on June 1, 2009; and (iii) the Mayer Brown attorneys and paralegals believed that everything they prepared and filed in October 2008 solely related to the Synthetic Lease Transaction.

(a) Mr. Gordon's June 2009 Affidavit Confirms There Was No Authority To File The Unrelated Termination Statement

In June 2009, promptly after the discovery of the filing of the Unrelated Termination Statement, counsel for the Committee, the Debtors and United States Department of the Treasury were provided with an affidavit executed by Robert 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.

(Callagy Decl. Ex. 11 at JPMCB-00000077-79.)

Ignoring the fact that Mr. Gordon also gave consistent deposition testimony, the Committee weakly suggests that his affidavit is suspect because it was prepared by JPMCB's counsel, and because Mr. Gordon stated in his affidavit that the Unrelated Termination Statement was filed "unbeknownst to him." (Committee Mem. at 8.) Both arguments are meritless. Mr. Gordon reviewed and made revisions to his draft affidavit before its execution. (Callagy Decl.,

Ex. 4 (Gordon Tr.) at 32.) Further, Mr. Gordon's statement that a termination statement relating to a Term Loan was filed in October 2008 remained "unbeknownst" to him until June 2009 is completely consistent with his deposition testimony. While Mr. Gordon may have received drafts of documents prepared in connection with the repayment of the Synthetic Lease Transaction, there are no facts whatsoever to show that Mr. Gordon – or any other witness involved for that matter – recognized that a termination statement relating to the Term Loan was going to be filed in connection with the Synthetic Lease Transaction, let alone believe they had authority to do so. (Callagy Decl. Ex. 4 (Gordon Tr.) at 11-12.) Rather, the testimony establishes that all parties believed that all such documents related to the Synthetic Lease Transaction. (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.) at 22; Duker Aff. at ¶¶ 16 and 29; Hoge Aff. at ¶ 12.)

(b) All Of The Deposition Testimony In This Case Confirms That No Authority Was Provided To File The Unrelated Termination Statement

Likewise, the testimony given by all of the deponents examined by the Committee uniformly confirmed that no one gave any authority to file, let alone even knew about, a termination statement related to the Term Loan. 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, the Mayer Brown associate who worked on the matter, also testified that he did not believe that Mayer Brown had any authority to release liens relating to the Term Loan. (*Id.* Ex. 2 (Green Tr.) at 99.) He further testified that he was never aware that Mayer Brown prepared and filed a UCC-3 relating to the Term Loan (*id.* at 88-89), and that prior to GM filing for bankruptcy in June 2009, he never 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.)

Similarly, Stewart Gonshorek, the paralegal who assisted Mr. Green, testified that he believed that all of the work that he performed in October of 2008 related to the repayment of the Synthetic Lease Transaction. (Callagy Decl. Ex. 3 (Gonshorek Tr.) at 47-48.)[2]

The Committee fails to address any of this undisputed testimony.

(c) Ms. Hoge's Affidavit Confirms That GM Had No Authority To File Unrelated Termination Statement

The Committee also ignores the affidavit of Debra Homic Hoge, GM's current Director of the Worldwide Real Estate Group for North America, which states 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.

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[2] Mr. Gonshorek's belief that his work pertained 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 pp. 81-82.)

(Hoge Aff. at ¶ 11.) Ms. Hoge executed the Synthetic Lease Termination Agreement on behalf of GM. (*Id.* at ¶ 7; Duker Aff. Ex. L.) Notably, her affidavit was produced to the Committee well before the Committee filed its motion. Yet, the Committee simply ignores this evidence.[3]

(d) JPMCB and Simpson Did Not Give Any Authority

Finally, JPMCB and Simpson did not give any authority to anyone to file a termination statement related to the Term Loan.[4] Mr. Duker of JPMCB states 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 he did not believe that the drafts of the Synthetic Lease Closing Checklist (as defined in the JPMCB Rule 7056-1 Statement at ¶ 36) that he received related to anything but the Synthetic Lease Transaction. (Duker Aff. at ¶¶ 16 and 29.) Similarly, the attorney from Simpson who worked on the Synthetic Lease Transaction

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[3] The Committee also ignores the fact that subsequent to October 30, 2008, GM continued to treat the Term Loan lenders as fully perfected secured parties under the Term Loan. For example: (i) GM spent nearly three months negotiating an amendment to the Term Loan; (ii) GM paid $6 million to JPMCB to arrange the First Amendment to the Term Loan executed on March 4, 2009 ("**First Amendment**"); (iii) GM continued to provide Collateral Value Certificates (as defined in JPMCB Rule 7056-1 Statement at ¶ 83) to JPMCB as required by the terms of the Term Loan and the First Amendment right up to GM's bankruptcy filing on June 1, 2009. (JPMCB Rule 7056-1 Statement at ¶¶ 81-89.) If GM believed that JPMCB had authorized it to file the Unrelated Termination Statement in October of 2008, it certainly would not have spent months negotiating the First Amendment, millions of dollars to arrange for the execution of the First Amendment or provide multiple Collateral Value Certificates.

[4] The Committee's reference to Section 6.04 of the Term Loan Collateral Agreement (as defined in the JPMCB Rule 7056-1 Statement at ¶ 11) (Committee Mem. at 3) is an incomplete and inaccurate representation of the provisions of the Term Loan Collateral Agreement and the Term Loan Agreement (as defined in the JPMCB Rule 7056-1 Statement at ¶ 10). Other relevant provisions of the Term Loan Collateral Agreement set forth that: (1) the Term Loan Collateral (as defined in the JPMCB Rule 7056-1 Statement at ¶ 12) could not be eliminated unless the Term Loan was fully paid off; (2) GM and Saturn Corporation covenanted that they would maintain the perfection of the security interests in the Term Loan Collateral; and (3) the terms and provisions of the Term Loan Collateral Agreement could only be waived, amended, supplemented or otherwise modified in writing signed by all parties thereto in accordance with Section 10.01 of the Term Loan Agreement, which states that the Term Loan lenders' perfected security interest in the Term Loan Collateral can not be released "without the written consent of each Lender." (JPMCB Rule 7056-1 Statement at ¶¶ 16-17; Duker Aff. Ex. G at § 10.01 at JPMCB-CSM-0000052-53 and Ex. H at §§ 4.03, 7.01 and 7.13 at JPMCB-CSM-0000120, 125 and 128.)

repayment also testified that Mayer Brown was not given any authority to file a termination statement related to the Term Loan. (Callagy Decl. Ex. 5 (Merjian Tr.) at 56.)

B. The Evidence Relied Upon By The Committee Does Not Establish Authority

The Committee relies only on the fact that various documents which reference a UCC-1 financing statement filing number – that no one knew pertained to the Term Loan – were exchanged prior to the repayment of the Synthetic Lease Transaction. These documents do not manifest any authority by JPMCB for GM or its counsel to terminate a UCC-1 financing statement related to the Term Loan. Indeed, these documents do not even refer to the Term Loan. Instead, the face of all such documents referenced the Synthetic Lease Transaction – confirming the witnesses' testimony that they believed that all such documents related solely to the Synthetic Lease Transaction.

1. JPMCB's And Simpson's Receipt Of A Closing Checklist Does Not Establish Authority For Anyone To File A Termination Statement Related To The Term Loan

The Committee argues JPMCB's and Simpson's receipt of a checklist of closing documents drafted by Mayer Brown in October 2008 relating to repayment of the Synthetic Lease Transaction establishes that JPMCB authorized GM or its counsel to file a termination statement related to the Term Loan. (Committee Mem. at 14-15.)

A review of the drafts of the Synthetic Lease Closing Checklist, however, plainly shows that such documents did not refer to the Term Loan. Instead, each draft and the cover e-mail attaching it stated on its face that it related to the repayment of the Synthetic Lease Transaction. For instance, the October 15, 2008 e-mails among Mayer Brown, GM, JPMCB and/or Simpson that attached a draft of the Synthetic Lease Closing Checklist contained a subject

line stating that the e-mail related to "GM/JPMorgan Chase - Synthetic Lease." (Fisher Decl. Exs. N, P and Q.)[5] Moreover, the draft Synthetic Lease Closing Checklist itself was entitled:

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

(Callagy Decl. Ex. 15.)

The draft Synthetic Lease Closing Checklist does list, among dozens of closing documents, multiple UCC-1 financing statements that needed to be terminated. (*Id.*) The checklists reference such financing statements by their filing number:

> 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.*) Although no one knew it at the time, the financing statement with the filing number "6416808 4" related to the Term Loan. (Duker Aff. at ¶¶ 16 and 29.) None of the parties who received a draft of the Synthetic Lease Closing Checklist recognized that such filing number related to the Term Loan. (*Id.*) Indeed, no one even discussed this or any of the other UCC-1 financing statements referenced on the checklists prior to the Petition Date. (Duker Aff. at ¶¶ 16 and 29; Callagy Decl. Ex. 5 (Merjian Tr.) at 18 and 22.) Instead, all of the relevant parties believed that all of the documents listed on the Synthetic Lease Closing Checklist, including the financing statement with the file number 6416808 4, related to the repayment of the Synthetic Lease Transaction. (Callagy Decl. Ex. 1 (Perlowski Tr.) at 32; Ex. 2 (Green Tr.) at 64; Ex. 3

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[5] "**Fisher Decl.**" refers to the Eric B. Fisher declaration dated and filed with the Court on July 1, 2010. (Docket Entry 27.)

(Gonshorek Tr.) at 35; Ex. 4 (Gordon Tr.) at 25; Ex. 6 (Duker Tr.) at 22; Duker Aff. at ¶¶ 16 and 29; Hoge Aff. at ¶ 12.) Mere receipt of a draft Synthetic Lease Closing Checklist cannot impart authority to Mayer Brown to file a termination statement relating to the Term Loan.

2. The Receipt Of A Draft Of The Unrelated Termination Statement Does Not Evidence Authority[6]

The Committee next argues that the receipt by JPMCB's counsel, Simpson, of a draft of the Unrelated Termination Statement itself gave Mayer Brown authority to file that document. (Committee Mem. at 14-15.) This too is erroneous for several reasons. First, contrary to the Committee's claim, the draft Unrelated Termination Statement did not on its "face" identify a financing statement that pertained to the Term Loan. (Callagy Decl. Ex. 16 at JPMCB-STB-00000206.) Instead, the draft of the Unrelated Termination Statement, attached along with nearly one hundred pages of draft documents to an e-mail, merely referenced a UCC-1 financing filing number "6416808 4." (*Id.*) That number was a reference to the Term Loan. Second, nothing in Mr. Green's October 15, 2008 e-mail attaching this document refers to the Term Loan. (Callagy Decl. Ex. 16.) To the contrary, the subject line of Mr. Green's e-mail attaching the draft documents once again was "GM/JPMorgan Chase – Synthetic Lease (Auto Facilities Real Estate Trust 2001-1)." (*Id.*) Moreover, there is no evidence that any party recognized that the draft of the termination statement which referenced the filing number 6416808 4 was a number that related to the Term Loan. (Duker Aff. at ¶¶ 16 and 29.) Rather, all parties believed that all of the draft closing documents related to the repayment of the

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[6] Contrary to the Committee's assertion (Committee Mem. at 14), Mr. Duker did not receive a draft of the Unrelated Termination Statement prior to GM filing for bankruptcy on June 1, 2009. Although Simpson forwarded Mr. Green's email that attached nearly one hundreds pages of drafts related to the Synthetic Lease Transaction repayment, including a draft of the Unrelated Termination Statement, the e-mail that Mr. Duker received was corrupted and the draft Unrelated Termination Statement along with a majority of the attachments were unreadable. (Exhibit A to the Supplemental Affidavit of Richard W. Duker In Further Support of Defendant JPMorgan Chase Bank, N.A.'s Motion for Summary Judgment and In Opposition to the Plaintiff's Motion for Partial Summary Judgment dated August 5, 2010 and filed herewith.)

Synthetic Lease Transactions. (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.) at 22; Duker Aff. at ¶ 29; Hoge Aff. at ¶ 12.)

The Committee also argues that authority is evidenced by a check mark and *pre-printed language* next to the termination box on the Unrelated Termination Statement itself:

> The second line of the draft, like the final, filed version, has a box checked next to "TERMINATION: Effectiveness of the Financing Statement identified above is terminated with respect to security interests(s) of the Secured Party authorizing this Termination Statement.

(Committee Mem. at 6 and 14.) This argument is completely misplaced.

Relying on pre-printed language on the form of the UCC-3 termination statement itself establishes nothing about whether the secured party authorized the filing of the document – particularly since secured parties are no longer required to sign UCC-3 termination statements. Indeed, taken to its logical conclusion, the Committee's position would render every filed UCC-3 termination statement effective regardless of whether it was authorized. Such a position would, in effect, eviscerate sections 9-509 and 9-510 of Article 9 of the UCC, which expressly require that a filing of a UCC-3 termination statement be authorized by the secured party in order to be effective. Further, the Committee's position, if sustained, could potentially reward a dishonest debtor who could surreptitiously effectuate the elimination of the creditor's complete security interest without authority. The adoption of the Committee's position could lead to a substantial increase of fraudulently filed statements. The Committee's argument should be rejected.

3. The Purported "Approval" By Simpson of the Draft Documents Does Not Establish Authority

The Committee's assertion that authority is established by Simpson's purported "approval" of the draft Synthetic Lease Closing Checklist and Unrelated Termination Statement is also wrong. (Committee Mem. at 14-15.) The Committee relies on an October 17, 2008 e-mail from Mr. Merjian of Simpson to Mr. Green of Mayer Brown wherein Mr. Merjian tells Mr. Green with respect to the nearly one-hundred pages of draft closing documents: "Ryan Nice job on the documents . . ." (Fisher Decl. Ex. T.) The Committee ignores Mr. Green's direct testimony that he did not understand Mr. Merjian's e-mail to approve or authorize anything. Rather, Mr. Green testified that:

> I [u]nderstood [Mr. Merjian's comment] to mean that [Mr. Merjian] didn't have additional comments to the documents. I didn't understand it to mean anything about filing documents because we weren't at closing.

(Callagy Decl., Ex. 2 (Green Tr.) at 91-92.)

Moreover, reliance by the Committee on Simpson's purported "approval" as evidence of authority is legally insufficient. Simpson was retained by JPMCB to solely work on the Synthetic Lease Transaction, not the Term Loan. (Duker Aff. at ¶¶ 8, 14 and 21; Callagy Decl. Ex. 5 (Merjian Tr.) at 9, 11 and 54-55; Ex. 6 (Duker Tr.) at 17.) 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 Corp.*, No. 95 Civ. 9006 (LAP), 2003 WL 1878237, at *3 (S.D.N.Y. Apr. 14, 2003); *In re Wells*, 129 Misc. 2d 56, 60, 492 N.Y.S.2d 349, 352-53 (N.Y. Surr. Ct. Queens County 1985) ("Just as in any other principal-agent relationship, a client may not be held responsible for the acts of the attorney-agent who proceeds to act beyond the scope of his authority..."). 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, 953 (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). Since Simpson was not retained by JPMCB to perform services with respect to the Term Loan, it directly follows that it was not authorized to bind JPMCB with respect to the Term Loan. *See Ellicott Machine Co. v. United States*, 44 Ct. Cl. 127 (Ct. Cl. 1908) ("even gross negligence on the part of an agent beyond the scope of his authority could not bind his principal"); *Bank of New York v. Alderazi*, 28 Misc. 3d 376, 900 N.Y.S.2d 821, 823 (N.Y. Sup. Ct. Kings County 2010). Nor could Simpson, as JPMCB's agent, confer to Mayer Brown or GM any authority greater than Simpson itself possessed. *See* RESTATEMENT (THIRD) OF AGENCY § 3.15(2) and cmt. b. (2006).

4. The Synthetic Lease Escrow Letter Did Not Authorize The Filing Of A Termination Statement Related To The Term Loan

The Committee also argues that Simpson "executed escrow instructions, identifying the Term Loan Termination Statement as a document to be filed upon the Lease Payoff." (Committee Mem. at 15.) Aside from not creating any such authority, the Committee is simply wrong about the import of the escrow instructions.

Like the other draft documents exchanged prior to the repayment of the Synthetic Lease Transaction, the Synthetic Lease Escrow Letter (as defined in the JPMCB Rule 7056-1 Statement at ¶ 66) did not "expressly identify" a financing statement that pertained to the Term Loan. (Committee Mem. at 6.) Rather, the Synthetic Lease Escrow Letter simply referenced the same UCC-1 financing statement filing number "6416808 4." (Callagy Decl. Ex. 19.) Indeed, the Synthetic Lease Escrow Letter does not refer to the Term Loan, and on its face related only to the Synthetic Lease Transaction. (*Id.* at MB000024.)

Furthermore, the Committee's assertion that the terms of the Synthetic Lease Escrow Letter "released" the Unrelated Termination Statement to Mayer Brown for filing (Committee Mem. at 7) is simply incorrect. The Synthetic Lease Escrow Letter merely instructed the escrow agent to forward the UCC-3 termination statements, among other "Escrow Documents," (as defined therein) 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 forwarded to the counsel for GM).

(Callagy Decl. Ex. 19 at MB000029.) The Synthetic Lease Escrow Letter did not provide any instructions or authorizations 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.)

C. The Legal Authority Relied Upon By The Committee Is Inapplicable

The Committee relies upon a series of inapplicable cases which do not address authority but instead only hold, on different facts, that a UCC-3 termination statement filed by mistake is effective. (Committee Mem. at 11-14.) Each one of these cases pre-dates the 2001 amendment to Article 9 of the UCC, which eliminated the requirement that the secured party sign a UCC-3 termination statement before it is filed and made clear the requirement that a UCC-3 needed to be filed with authority from the secured party to be effective. 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. Therefore, authority of the debtor was not at issue. *See, e.g.*, *In re Kitchin Equip. Co. of Va., Inc.*, 960 F.2d 1242, 1244-46 (4th Cir. 1992) (the secured party filed the termination statement with the clerk); *In re Pac. Trencher & Equip., Inc.*, 735 F.2d 362, 364-65 (9th Cir. 1984) (the secured party, Koehring, signed the termination statement and then filed it with the clerk's office); *In re Hampton*, No. 99-60376, 2001 WL 1860362, at *1 (Bankr. M.D. Ga. Jan. 2, 2001) (the secured party's employee signed the statement and filed the termination statement); *In re Silvernail Mirror & Glass Inc.*, 142 B.R. 987, 988-90 (Bankr. M.D. Fla. 1992) (the secured party filed the termination statement with the secretary of state); *In re York Chem. Indus.*, 30 B.R. 583, 584-85 (Bankr. D. S.C. 1983) (the secured party's employee requested that financing statement be terminated); *J.I. Case Credit Corp. v. Foos*, 717 P.2d 1064, 1065-67 (Kan. Ct. App. 1986) (the secured party filed a termination statement with the clerk's office).

In sharp contrast here, JPMCB did not sign the Unrelated Termination Statement, and did not file it. (JPMCB Rule 7056-1 Statement at ¶¶ 78-80.) Mayer Brown and GM caused it to be filed and they did not know they had filed a termination statement relating to the Term Loan. (*Id.*) They were not authorized to do it by the terms of the Synthetic Lease Termination Agreement, and never believed they were authorized to file such a document. Thus, all of the cases relied upon by the Committee are completely inapplicable.

Finally, the Committee's argument that the "purpose of the UCC system is to provide public notice of secured interests without requiring parties to look behind or beyond the four corners of the public filing" (Committee Mem. at 11) is based on an inaccurate statement of

the law.[7] In order to facilitate electronic filings, revised Article 9 of the UCC eliminated the requirement that UCC-3 termination statements be signed by the secured creditor. *See* UCC Art. 9, § 9-406; UCC Rev. Art. 9, § 9-502 cmt. 3 ("[t]he fact that [UCC-3 termination statement] does not require that an authenticating symbol be contained in the public record does not mean that all filings are authorized"). Therefore, under the current rules, a UCC-3 termination statement need only reflect the "applicable financing statement's filing number and a check mark next to the termination box." Stephen D. Brodie et al., *Ineffective UCC Termination Statements Pose a Danger to Lenders*, ASSET BASED LENDING ALERT (May 2009) http://www.herrick.com/sitecontent.cfm?pageID=29&itemID=12837.

Indeed, legal scholars and professionals agree that under the 2001 revisions to Article 9 of the UCC, lenders must perform their own due diligence in order to determine whether a filed UCC-3 termination statement was authorized. *See* First Corporate Solutions, *Tips for Tackling Fraudulently Filed Termination Statements*, UCC & Corporate Due Diligence (June 5, 2009) http://blog.ficoso.com/ 2009/06/05/tips-for-tackling-fraudulently-filed-termination-statements/; Brodie et al., *Ineffective UCC Termination Statements Pose a Danger to Lenders*, *supra*; Allison R. Lane, *UCC Terminations – Terminated But Not Ineffective* (September 2008) http://www.ftwlaw.com/page.php? page=articles&articles=95; First American Corp., UCC Division, *Is it Still Breathing? A Look at Best Practices When Determining Effectiveness of a UCC-3 Termination*, Vol. 3, Issue 2 at 11 (August 10, 2007) www.eagle9.com/newsletters/newsletter_3_2.pdf; Harry C. Sigman, *The Filing System Under Revised Article 9*, 73 AM. BANKR. L. J. 61, 78 n.110 (1999); Charles Cheatam, *Changes In Filing*

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[7] The cases the Committee cites in support of this position (Committee Mem. at 11-12) are inapplicable because they pre-date the revisions to Article 9 of the UCC. *See In re Silvernail Mirror & Glass, Inc.*, 142 B.R. 987 (Bankr. M.D. Fla. 1992); *Crestar Bank v. Neal (In re Kitchin Equip. Co. of Va., Inc.)*, 960 F.2d 1242 (4th Cir. 1992); *In re Pac. Trencher & Equip., Inc.*, 27 B.R. 167 (B.A.P. 9th Cir. 1983), *aff'd*, 735 F.2d 362 (9th Cir. 1984); *In re York Chem. Indus., Inc.*, 30 B.R. 583 (Bankr. D. S.C. 1983).

Procedures Under Revised Article 9, 25 OKLA. CITY U. L. REV. 235, 253 (2000); John J. Eikenburg, Jr., *Filing Provisions of Revised Article 9*, 52 SMU L. REV. 1627, 1643 (2000); *see also* National Conference of Commissioners on Uniform State Laws, DRAFT AMENDMENTS TO UNIFORM COMMERCIAL CODE ARTICLE 9, § 9-518 cmt. 2 (July 2010) ("Just as searchers bear the burden of determining whether the filing of initial financing statement was authorized, searchers *bear the burden of determining whether the filing of every subsequent record [referring to a termination statement] was authorized.*" (emphasis added)).[8]

Likewise, the acceptance by the filing clerk of a UCC-3 termination statement means nothing as to whether it was authorized or not under the revised code. *See United States v. Florida UCC, Inc. et al.*, No. 4:09-cv-15 (RH)(WCS), 2009 WL 1956269, at * 4-5 (N.D. Fla. July 3, 2009). Prior to the 2001 revisions to Article 9 of the UCC, filing clerks could review the UCC-3 termination statement to determine its validity. This procedure is no longer accepted. Today, under what is often referred to as the "open drawer" policy, filing officers have very limited discretion regarding the acceptance of records for filing and are obligated to accept them regardless of other indicators. *See Florida UCC, Inc*, 2009 WL 1956269, at * 4-5 (finding that 2001 revisions to the Florida UCC, which is identical to the Delaware UCC, created no obligation for the filing office to "make a substantive review of a filing to determine whether an alleged debtor did or did not authorize the filing to be made" (quotation marks and citation

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[8] For this reason, the Committee's argument that it is JPMCB's burden to prove that the filing of the Unrelated Termination Statement was not authorized is misplaced. (Committee Mem. at 11 n. 3.) As discussed herein and in JPMCB's motion for summary judgment, the Committee has failed to present sufficient evidence to demonstrate that JPMCB's lien became unperfected. Moreover, the Committee's reliance on *In re Hampton*, No. 99-60376, 2001 WL 1860362 (Bankr. M.D. Ga. Jan. 2, 2001) is misplaced. In that case, decided prior to the 2001 revisions to Article 9 of the UCC which eliminated the signature requirement for the filing of UCC-3 termination statements, the Court relied upon the fact that the filed UCC-3 termination statement was executed by the secured party. Even if the Court were to find that the burden of proof had shifted to JPMCB, it has presented sufficient evidence to demonstrate that the UCC-3 termination statement related to the Term Loan was filed without authority and was therefore ineffective.

omitted)); Wallis N. Boggus, *Revised UCC Article 9 Filing System: The Next Generation*, STATE BAR OF TEXAS LAU SEMINAR, Ch. 3, p.7 (Oct. 2, 2003); UCC § 9-502 cmt. 3; UCC § 9-520(a).

CONCLUSION

For the foregoing reasons, the Committee's motion for partial summary judgment should be denied and JPMCB's motion for summary judgment should be granted.

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Respectfully submitted,

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