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

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11 Case
MOTORS LIQUIDATION COMPANY, *et al.*,	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
	Case No. 09-00504 (REG)
Plaintiff,	
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
REPLY MEMORANDUM OF LAW IN FURTHER
SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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Defendant JPMorgan Chase Bank, N.A. ("**JPMCB**"), by and through its counsel, respectfully submits this reply memorandum of law in further support of its motion for summary judgment.

PRELIMINARY STATEMENT

The primary issue before this Court is whether General Motors Corporation ("**GM**") and its counsel Mayer Brown LLP ("**Mayer Brown**") were authorized to file a termination statement (the "**Unrelated Termination Statement**") relating to a Term Loan facility ("**Term Loan**") in connection with the repayment of a synthetic lease financing facility ("**Synthetic Lease Transaction**"). As the Official Committee of Unsecured Creditors of Motors Liquidation Company f/k/a GM (the "**Committee**") acknowledges, even if a termination statement is filed by mistake, it is not effective if, as here, it was done without authority. (*See* Committee Opp. Mem.[1] at 1 ("a UCC filing that mistakenly terminates a creditor's security interest is legally effective, *provided that the filing was authorized by the secured creditor*") (emphasis added).)

Nonetheless, the Committee largely ignores the Synthetic Lease Termination Agreement – the sole and unambiguous source of authority executed by JPMCB and GM in this

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[1] References to: "**Committee Opp. Mem.**" are to Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment (D.E. 45); "**JPMCB Mem.**" are to the Memorandum of Law in Support of JPMCB's Motion for Summary Judgment (D.E. 29); "**JPMCB Opp. Mem.**" are to the Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment and in Further Support of its Motion for Summary Judgment (D.E. 48); "**JPMCB Rule 7056-1 Statement**" are to the Rule 7056-1(b) Statement of Undisputed Material Facts of Defendant JPMCB in Support of Its Motion for Summary Judgment (D.E. 30); "**Callagy Decl.**" are to the Declaration of John M. Callagy in Support of Motion for Summary Judgment of JPMCB (D.E. 41); "**Duker Aff.**" are to the Affidavit of Richard W. Duker in Support of Defendant JPMCB's Motion for Summary Judgment (D.E. 31); "**Duker Supp. Aff.**" are to the Supplemental Affidavit of Richard W. Duker in further Support of JPMCB's Motion for Summary Judgment and in Opposition to the Committee's Motion for Partial Summary Judgment (D.E. 51); "**Callagy Supp. Decl.**" are to the Supplemental Declaration of John M. Callagy in Support of Motion for Summary Judgment of JPMCB (D.E. 50); "**Fisher Decl.**" are to the Declaration of Eric B. Fisher in Support of the Committee's Motion for Partial Summary Judgment (D.E. 27); and the exhibits identified therein and annexed thereto. Capitalized terms not defined herein have their meaning set forth in JPMCB's Mem.

case to permit the filing of termination statements. The Committee also ignores the testimony of GM and Mayer Brown that they believed that the Synthetic Lease Termination Agreement was their sole source of authority regarding the filing of any termination statements, and that they did not believe that they were authorized by that agreement or otherwise to file a termination statement related to the Term Loan. Unable to challenge this testimony, the Committee argues that it is inadmissible. But the law, which the Committee also ignores, is contrary: the testimony of the agent as to issues of its authority is always admissible because authority often depends on the "reasonable belief" of the agent. And here, there is no dispute that the "reasonable belief" of the agent was that it had no such authority.

Instead, the Committee continues to rely almost solely on the fact that JPMCB and its counsel received a stack of draft documents from GM's counsel which contained a draft of the Unrelated Termination Statement. The Committee argues that JPMCB and its counsel did not notice the inclusion therein of the Unrelated Termination Statement, and that JPMCB for all purposes here lost its lien. It is undisputed however that:

- GM's counsel mistakenly prepared and filed the Unrelated Termination Statement, which was not signed by JPMCB and made no reference to the Term Loan;

- None of the other documents related to the repayment, including the Synthetic Lease Closing Checklist and the Synthetic Lease Escrow Letter referred to the Term Loan whatsoever;

- Neither JPMCB nor its counsel had any awareness that the draft documents related to the Synthetic Lease Transaction repayment included a termination statement related to the Term Loan;

- The parties' communications reflect that all parties believed that all of the documents related to repayment of the Synthetic Lease Transaction;

- No communications between the parties authorized the filing of a termination statement relating to the Term Loan; and

- As the Committee repeatedly concedes, no party was even aware that a termination statement relating to the Term Loan had been filed until after GM filed for bankruptcy.

The undisputed facts, therefore, demonstrate that there was no authority to file a termination statement relating to the Term Loan. The Committee fails to meet its burden on a motion for summary judgment to show that there is any genuine issue of material facts. Accordingly, JPMCB's motion for summary judgment should be granted.

ARGUMENT

THIS COURT SHOULD GRANT JPMCB'S MOTION FOR SUMMARY JUDGMENT

I. The Filing Of The Unrelated Termination Statement Did Not Terminate JPMCB's Security Interest In The Term Loan Collateral

The Committee argues, incorrectly, that the mere filing, in and of itself, of a UCC-3 termination statement "unambiguously terminates" the financing statement because it is "presumptively valid." (Committee Opp. Mem. at 3-4.) Therefore, the Committee argues that it is JPMCB's "burden" to show that the filing of the termination statement relating to the Term Loan was a nullity. (*Id.*) The Committee's argument completely misstates the law and the policy underpinning the current version of the UCC.

Article 9 of the UCC was revised in 2001. The 2001 revisions eliminated the requirement that a UCC-3 termination statement be signed by the secured party and eliminated the filing clerk's discretion to review UCC-3 termination statements for validity. (*See* JPMCB Mem. at 24; JPMCB Opp. Mem. at 19.) At the same time, the revisions made explicitly clear that a UCC-3 termination statement is effective only if *authorized* by the secured party of record. *See* Del. Code Title 6 §§ 9-509(d) and 9-510(a). Accordingly, under the current version of the UCC, the fact that a UCC-3 termination statement has been filed does not presumptively mean that the secured party authorized its filing. (JPMCB Opp. Mem. at 18-21.) Subsequent lenders

must perform their own due diligence in order to determine whether such filing was authorized. *See id.; see also* National Conference of Commissioners on Uniform State Laws, DRAFT AMENDMENTS TO UNIFORM COMMERCIAL CODE ARTICLE 9, § 9-518 cmt. 2 (July 2010); UCC Rev. Art. 9, § 9-519 cmt. 6 (after the 2001 revisions, the clerk is required to retain information related to a financing statement for an extended period of time, this "rule [] contemplates that searchers – not the filing office – will determine the significance and effectiveness of filed records.")

For this reason, the Committee, not JPMCB, bears the burden to show that JPMCB authorized Mayer Brown to file the UCC-3 termination statement related to the Term Loan in connection with the repayment of the Synthetic Lease Transaction. Indeed, the drafters of the current UCC made clear in the UCC itself that under Article 9 "searchers [now] bear the burden of determining whether the filing of [a UCC-3 termination statement] was authorized." National Conference of Commissioners on Uniform State Laws, DRAFT AMENDMENTS TO UNIFORM COMMERCIAL CODE ARTICLE 9, § 9-518 cmt. 2 (July 2010). The law is also clear that the burden of proof is on the person – here the Committee – asserting both the scope of the agency relationship, and that the agent had authority to perform the act at issue. *See Oldman-Magee Boiler Works, Inc. v. Ocean & Inland Transp. Co.*, 210 A.D. 183, 184-85 (4th Dep't 1924); 2A N.Y. Jur. 2d *Agency* § 26 (2010); *see also Zeeb v. Atlas Powder Co.*, 87 A.2d 123, 128 (Del. 1952).

II. Unauthorized UCC-3 Termination Statements Are Ineffective

Throughout its opposition, the Committee repeats that this is a "mistake" case, that JPMCB caused the mistake, and that the inquiry regarding authority is over. The Committee relies upon a line of "mistake" cases that pre-date the 2001 revisions to Article 9. (Committee Opp. Mem at 4.) Those cases, however, are not applicable both because of vintage and

underlying facts. None of these cases focused on the issue of authority. (*See* JPMCB Mem. at 26-27; JPMCB Opp. Mem. at 17-18.) Moreover, each one of these cases arose prior to the 2001 revisions to the UCC when the secured party was required to sign the UCC-3 termination statement prior to its filing. (*Id.*) Accordingly, authority was not at issue because the secured party's signature actually approved a termination statement. (*Id.*) Here, in the absence of a signature, the issue remains whether JPMCB authorized GM and its counsel to file the UCC-3 termination statement relating to the Term Loan. In sharp contrast, JPMCB relies on cases which address the dispositive authority issue at bar. *See In re A.F. Evans Co.*, No. 09-41727 (EDJ), 2009 WL 2821510 (Bankr. N.D. Cal. July 14, 2009); *In re Feifer Indus., Inc.*, 155 B.R. 256 (Bankr. N.D. Ga. 1993). Notwithstanding the Committee's misplaced efforts to distinguish them, both decisions firmly establish that a UCC-3 termination statement is ineffective if it is filed, as here, by an agent acting outside the scope of its authority. (*Id.*)

In *In re A.F. Evans Co.*, the secured creditor authorized an escrow agent, through a set of escrow instructions, to record UCC-3 termination statements related only to two specific partnerships. *See* 2009 WL 2621510 at *1. Instead, the escrow agent filed UCC-3 termination statements which released the secured creditor's security interest in all of the debtor's assets. *Id.* at *2. Like here, the unsecured creditors' committee argued that the UCC-3 termination statement was effective because it had been filed. *Id.* at *3. Relying only on an uncontroverted declaration from the secured creditor, however, the *A.F. Evans* court held that "[the creditor] did not, in fact, authorize [the escrow agent] to terminate its security interest as to assets other than [the two specific partnership interests]" (*id.* at *3):

> [the escrow agent was the secured creditor's agent] for the limited purpose of handling the closing of the escrow for the debtor's sale to the buyer of [the two specific] interests . . . [and] [i]t follows

> that [the creditor] was not bound by [the escrow agent's] unauthorized modification to the UCC-3[.]

Id. at *4.

The Committee attempts to distinguish *A.F. Evans* by arguing that the agent made the "mistake" in that case, but *A.F. Evans* mandates the same result here. In this case, despite express authority to file termination statements only in the Synthetic Lease Termination Agreement, GM's counsel erroneously prepared a UCC-3 termination statement with a filing number that pertained to the Term Loan. (JPMCB Rule 7056-1 Statement ¶¶ 41-43 and 54-64; JPMCB Mem. at 8-9 and 12-13.) All of the documents and Mayer Brown's communications about them indicated that they were all related to the repayment of the Synthetic Lease Transaction. (JPMCB Rule 7056-1 Statement ¶¶ 28-77; JPMCB Mem. at 8-15.) The Committee admits that Mayer Brown's mistake remained unknown to all. (Committee Opp. Mem. at 13.)[2] Indeed, this case is even stronger than *A.F. Evans*. Not only did Mayer Brown's acts contravene the limited authority in the Synthetic Lease Termination Agreement, but here both the secured party (JPMCB) and the agent and its representative (GM and Mayer Brown) have provided uncontroverted testimony that they did not believe that there was any authority to file a termination statement relating to the Term Loan.[3] (*See* JPMCB Rule 7056-1 Statement ¶¶ 101-114.)

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[2] Even assuming arguendo that the erroneous filing of the UCC-3 termination statement relating to the Term Loan was contributed to in part by JPMCB, any such alleged inadvertence certainly does not mean that Mayer Brown was authorized to file termination statements related to the Term Loan – which is the fundamental issue before this Court. Indeed, the evidence is undisputed that Mayer Brown did not believe it had any authority to file termination statements related to the Term Loan. Here, any purported JPMCB "mistake" was caused by GM, by virtue of its counsel circulating draft documents that its counsel labeled and represented to JPMCB and its counsel as being related to the repayment of the Synthetic Lease Transaction. Where a mistake is "caused" by the agent, the principal is not bound by the mistake. *See* Restatement (Second) of Contracts, § 153(b) (1981); Restatement (Third) of Agency, § 3.11, Reporter's Note a (2006) (on application of the contractual law of mistake to authority questions).

[3] The Committee also weakly argues that *In re Feifer Industries, Inc.*, 155 B.R. 256 (Bankr. N.D. Ga. 1993) is distinguishable because there was no written or parol evidence in that case regarding actual authority for

III. No Authority, Express Or Implied, Supported The Filing Of The Unrelated Termination Statement

A. Testimony Concerning The Existence and Scope of Authority Is Admissible

Unable to dispute the uncontroverted testimony of every witness that they did not believe that they had authority to file the UCC-3 termination statement related to the Term Loan, the Committee resorts to arguing that such testimony is inadmissible. (*See* Committee Opp. Mem. at 1, n.2.) But the law is clearly otherwise, which the Committee fails to address. (*See* JPMCB Mem. at 31-32 and cases cited therein.) Moreover, the Committee concedes that the "reasonable belief" of the agent is the central issue in establishing whether the agent had the requisite authority to perform an act. (*See* Committee Opp. Mem. at 11-12.)[4]

B. JPMCB Did Not Expressly Authorize the Filing of the Unrelated Termination Statement

While the Committee argues that JPMCB expressly authorized the filing of the Unrelated Termination Statement, it concedes that "[e]xpress authority is authority distinctly, plainly expressed, orally or in writing." (Committee Opp. Mem. at 8 citing *Hidden Brook Air Inc. v. Thabet Aviation Int'l Inc.*, 241 F. Supp. 2d 246, 261 (S.D.N.Y. 2002).) Express authority occurs, for instance, when a principal grants an agent power of attorney through a written instrument that distinctly and plainly sets forth the scope of the agent's authority. *See Benderson Dev. Co., Inc. v. Schwab Bros. Trucking, Inc.*, 64 A.D.2d 447, 455, 409 N.Y.S.2d 890 (4th Dep't

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one lender to terminate the security interest of another lender. (Committee Opp. Mem. at 7-8.) Here of course, there is a plain, unambiguous agreement which the Committee concedes only authorized the filing of UCC-3 termination statements relating to the Synthetic Lease Transaction. (*Id.* at 9, n.9.) Thus, parol evidence is not at issue. *See* Point III.B.2. *infra*. But even if it were, all of the parol evidence demonstrates that no such authority was given to file a termination statement relating to a Term Loan. (JPMCB Rule 7056-1 Statement ¶¶ 28-70; JPMCB Mem. at 8-15.)

[4] The one case relied upon by the Committee is inapposite. *Bellsouth Telecomms., Inc., v. W.R. Grace & Co.*, 77 F.3d 603 (2d Cir. 1996). *Bellsouth* concerned affidavits given by the plaintiff's executives disclaiming knowledge of elements of its claim in order to oppose a summary judgment motion on statute of limitations grounds – not any issues related to agency and/or authority.

1978); Restatement (Third) of Agency § 2.01 cmt. b (2006) ("express authority often means actual authority that a principal has stated in very specific or detailed language").

1. The Synthetic Lease Termination Agreement Was The Only Source of Authority to File UCC-3 Termination Statements

Here, the only express authority given by JPMCB in this case to file termination statements was set forth in the Synthetic Lease Termination Agreement – a written agreement signed by GM and JPMCB which distinctly, plainly and unambiguously stated that GM was authorized only to file a termination of existing financing statement relating to twelve real properties that secured the loan made under the Synthetic Lease Transaction. (JPMCB Rule 7056-1 Statement ¶¶ 28-35; JPMCB Mem. at 8-9.)

The Committee concedes that the scope of authority granted to GM and its counsel by the Synthetic Lease Termination Agreement was limited to "properties that are the subject of the Synthetic Lease Agreement." (Committee Opp. Mem. at 9, n.9.) But, nonetheless, it argues that JPMCB's reliance on the Synthetic Lease Termination Agreement is misplaced because that agreement is not conclusive on the question of authority inasmuch as it does not contain a "merger or integration clause." (*Id.*) This misses the point entirely. With or without a merger clause, the agreement states in clear, unambiguous language that GM and Mayer Brown were only authorized to file termination statements related to the Synthetic Lease Transaction. (JPMCB Rule 7056-1 Statement ¶¶ 28-35; JPMCB Mem. at 8-9.) Under New York law, an agreement that appears to be complete on its face is an integrated agreement as a matter of law. *Morgan Stanley High Yield Secs., Inc. v. Seven Circle Gaming Corp.*, 269 F. Supp. 2d 206, 214 (S.D.N.Y. 2003) (citations omitted). And a fully integrated agreement, unless ambiguous, will

preclude a court from considering parol evidence to construe the parties' intent. *Instinet, Inc. v. Ariel (UK) Ltd.*, No. 08-cv-7141 (JFK), 2010 WL 779324, at *4 (S.D.N.Y. March 5, 2010).[5]

2. The Evidence Relied Upon By the Committee Does Not Establish Actual Authority

The Committee argues that JPMCB expressly authorized the filing of the Unrelated Termination Statement in three ways: (i) JPMCB received drafts of the Synthetic Lease Closing Checklist and Unrelated Termination Statement; (ii) JPMCB's counsel purportedly approved the filing by not raising an issue about the inclusion of its Unrelated Termination Statement; and (iii) by virtue of section 6.04 of the Term Loan Collateral Agreement. (Committee Opp. Mem. at 9-11.) None of these grounds remotely establishes "express authority." Rather, the Committee's so-called proof is nothing more than an attempt to create impermissible inferences.

For instance, JPMCB's and/or its counsel's receipt of draft documents such as the Synthetic Lease Closing Checklist and Unrelated Termination Agreement that did not refer to the Term Loan does not impart "distinctly" and "plainly" any authority to GM or Mayer Brown to file anything, let alone a termination statement relating to the Term Loan.[6]

Likewise, the Committee's reliance on Simpson's purported "approval" of the Unrelated Termination Statement is also misplaced. (Committee Opp. Mem. at 9.) JPMCB's counsel did not "approve" the filing of anything. Instead, Mr. Merjian of Simpson, in an e-mail

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[5] The parol evidence rule bars the use of extrinsic evidence to contradict and perhaps even supplement a written agreement between the parties. *Myskina v. The Condé Nast Publ'n, Inc.*, 386 F. Supp.2d 409, 415 (S.D.N.Y. 2005).

[6] Contrary to the Committee's assertion, the draft Unrelated Termination Statement received by JPMCB from Simpson was corrupted. (JPMCB Opp. Mem. at 13, n.6.) Despite awareness of this issue, the Committee questioned Mr. Duker on the e-mail and attachments *sent* by Simpson, not the one *received* by JPMCB. (*Compare* Fisher Decl Ex. S and Duker Supp. Aff. Ex. A.) In any event, none of the draft closing documents, including the draft Unrelated Termination Statement, refer to the Term Loan. (*Id.*)

to Mr. Green of Mayer Brown, merely commented "[n]ice job" as to nearly one-hundred pages of draft closing documents. (JPMCB Opp. Mem. at 15.) While the Committee draws the inference that "nice job" authorized the filing of a termination statement related to the Term Loan, the Committee ignores Mr. Green's direct testimony that he did not understand Mr. Merjian's e-mail to be approving or authorizing the filing of anything. (*Id.*) Likewise, as the Committee admits, the Synthetic Lease Escrow Letter merely instructed the escrow agent to forward certain UCC-3 termination statements, including the Unrelated Termination Statement to Mayer Brown. (Committee Opp. Mem. at 6, n.6, 16.) It did not, on its face, provide any authorization to GM's counsel to file those statements. (JPMCB Rule 7056-1 Statement ¶¶ 65-77; JPMCB Mem. at 13-15; JPMCB Opp. Mem at 16-17; Callagy Decl., Ex. 19.) And again, GM's counsel, who prepared the Synthetic Lease Escrow Letter, testified that that letter did not provide any authority.[7] (*Id.*)

Finally, section 6.04 of the Term Loan Collateral Agreement cannot possibly have provided express authority to GM or Mayer Brown. Indeed, the Committee admits that no party was aware that anything related to the Term Loan was included among the closing documents prepared by Mayer Brown in connection with the repayment of the Synthetic Lease Transaction. (Committee Opp. Mem. at 13.) Nor did Mayer Brown represent GM on the Term Loan, and several of the Mayer Brown witnesses had not even heard of the Term Loan. (JPMCB Rule 7056-1 Statement ¶¶ 5, 105 and 110; JPMCB Mem. at 4, 17-18 and 32-33.) Accordingly, Mayer Brown could not have known it received any instructions about the Term Loan, or that it was

[7] Moreover, Simpson was not retained by JPMCB to perform services with respect to the Term Loan and could not have legally bound JPMCB with respect to the Term Loan. (*See* JPMCB Rule 7056-1 Statement ¶¶ 19 and 114; JPMCB Mem. at 7 and 18-19; JPMCB Opp. Mem. at 15-16.)

under a purported duty to follow them, pursuant to the terms of the Term Loan Collateral Agreement.[8]

C. JPMCB Did Not Implicitly Authorize the Filing of the Unrelated Termination Statement

The Committee's contention that JPMCB implicitly authorized GM to file a UCC-3 termination statement related to the Term Loan is also meritless. As an initial matter, the Committee admits that agents only have implied authority to perform the necessary acts within the scope of their usual and ordinary duties. (*See* Committee Opp. Mem. at 11.) The Committee also does not dispute that under the Restatement:

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

Restatement (Third) of Agency § 2.02 cmt. e (2006); (*see also* Committee Opp. Mem. at 11-12.)

The Committee first asserts that the filing of the Unrelated Termination Statement was impliedly authorized because Mayer Brown was authorized to file "UCC termination statements on [JPMCB's] behalf." (Committee Opp. Mem. at 11.) Not so. Mayer Brown's authority to file termination statements derived solely from the Synthetic Lease Termination Agreement – which the Committee concedes expressly limited such authority to UCC-3 termination statements relating to twelve specific properties that were the subject of the Synthetic Lease Transaction. (JPMCB Rule 7056-1 Statement ¶¶ 28-35; JPMCB Mem. at 8-9; Committee Opp. Mem. at 9, n.9.) For this reason, the Committee's observation that JPMCB did

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[8] The Committee's reliance only on section 6.04 is also misplaced because it is a misleading and incomplete statement of the Term Loan Collateral Agreement and the Term Loan Agreement. Those agreements make clear that their terms could only be waived in a writing signed by all parties and that the Term Loan lenders' perfected security interest in the Term Loan Collateral could not be released "without the written consent of each Lender." (JPMCB Rule 7056-1 Statement at ¶¶ 16-17; JPMCB Opp. Mem. at 10, n.4.)

not object to the filing of three other UCC-3 termination statements misses the point. (*See* Committee Opp. Mem. at 11.) The three other Delaware UCC-3 termination statements in question did relate to the Synthetic Lease Transaction "Properties." (Callagy Decl., Ex. 21.) Thus, GM and Mayer Brown were authorized by JPMCB by virtue of the Synthetic Lease Termination Agreement to file those documents.

The Committee next argues, incredibly, that "Old GM's counsel reasonably believed that JPMorgan consented to [the] filing of the Term Loan Termination Statement." (Committee Opp. Mem. at p. 12.) But aside from the conceptual disconnect inherent in such a contention, the Committee once again completely ignores the uncontroverted affidavits and deposition testimony of witnesses for GM and Mayer Brown who testified that they did not have any belief that they had authority to file a termination statement in October of 2008 relating to the Term Loan. (JPMCB Rule 7056-1 Statement ¶¶ 101-111; JPMCB Mem. at 16-18; JPMCB Opp. Mem. at 7-10.)[9] Unable to dispute this testimony, the Committee distorts it. Specifically, the Committee argues that in response to a request from Mr. Gordon, Mr. Green reviewed the draft Synthetic Lease Closing Checklists and the Synthetic Lease Escrow Letter and found that the Unrelated Termination Statement were listed on both. (Committee Opp. Mem. at 12.) The Committee concludes that:

> [A]ccording 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.

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[9] The Committee also argues that JPMCB's silence in response to receipt of the draft documents conferred implied authority (Committee Opp. Mem. at 12-13), but concedes, however, that "[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*." (*Id.*, at 13) (emphasis added). Here, the uncontroverted testimony of witnesses for GM and Mayer Brown set forth that they did not believe that they had authority to file a termination statement relating to the Term Loan. (JPMCB Rule 7056-1 Statement ¶¶ 101-111; JPMCB Mem. at 16-18; JPMCB Opp. Mem. at 7-10.)

(*Id.*) First of all, calling it a "JPMorgan-approved checklist" begs the question. Moreover, that is not what Mr. Green said, and the Committee does not cite to any testimony in support of its self-serving mis-characterization. It cannot because Mr. Green testified that he did not believe that Mayer Brown was authorized to file the Unrelated Termination Statement or that JPMCB approved or authorized anything in connection with the draft closing checklist, closing documents and escrow letter that he circulated. (JPMCB Rule 7056-1 Statement ¶¶ 103-107; JPMCB Mem. at 17; JPMCB Opp. Mem. at 9.)

Likewise, the Committee mischaracterizes Mr. Gordon's testimony as well. According to the Committee's gloss on the sworn statement, Mr. Gordon believed that Mayer Brown's authority may have derived from sources other than the Synthetic Lease Termination Agreement because Mr. Gordon's affidavit only states that "GM was not authorized by the Termination Agreement to terminate any financing statement related to the Term Loan Agreement" (Committee Opp. Mem. at 15.) There is no support for this characterization, which is belied by Mr. Gordon's (and every other witness') deposition testimony that GM and Mayer Brown did not believe they were authorized to file a termination statement relating to the Term Loan by the Synthetic Lease Termination Agreement or any other act of JPMCB and its counsel. (JPMCB Rule 7056-1 Statement ¶¶ 101-111; JPMCB Mem. at 16-18; JPMCB Opp. Mem. at 7-10.)

IV. There Was No Apparent Authority To File The Unrelated Termination Statement

Relying chiefly on the Synthetic Lease Escrow Letter signed by Simpson on behalf of JPMCB, the Committee also argues that "Old GM's counsel [*i.e.*, Mayer Brown] was vested with apparent authority" to file a UCC-3 termination statement related to the Term Loan. (Committee Opp. Mem. at 16.) The Committee argues that through the "escrow instructions" signed by Simpson, "JPMCB manifested to the escrow agent" (*i.e*, LandAmerica) to release the

UCC-3 termination statement in question to Mayer Brown, and that the "escrow agent reasonably relied" on such instructions. (*Id.*) The Committee's argument completely distorts the law of apparent authority.

Apparent authority, as the Committee concedes, requires a showing that there was: "(1) a manifestation [by words or conduct] by the principal that the agent has authority and (2) reasonable reliance on that manifestation by [a third party] dealing with the agent." *In re Kollel Mateh Efraim, LLC*, 334 B.R. 554, 560 (Bankr. S.D.N.Y. 2005); *see* Restatement (Third) of Agency § 2.03 (2006). According to the Second Circuit:

> Apparent authority is based on the principle of estoppel. It arises when a principal places an agent in a position where it appears that the agent has certain powers which he may or may not possess. If a third person holds the reasonable belief that the agent was acting within the scope of his authority and changes his position in reliance on the agent's act, the principal is estopped to deny that the agent's act was not authorized.

Marfia v. T.C. Ziraat Bankasi, New York Branch, 100 F.3d 243, 251 (2d Cir. 1996) (citation omitted). For there to be apparent authority, "[t]here must be proof of reliance and change in position." *Id.* (citation omitted); *see also* 2A C.J.S. Agency § 142 (2010) ("The elements essential to apparent authority are acts or conduct of the principal, reliance thereon by a third person, and a change of position by him or her to his or her detriment.")

Thus, for the purposes of its apparent authority theory, the Committee must show that the principal (*i.e.*, JPMCB) made a manifestation to a third party that an agent (*i.e.*, Mayer Brown) had authority to file a termination statement relating to a Term Loan, that such third party relied on such manifestation and that such reliance resulted in a detrimental change in position *by that third party*. Under the circumstances here, the only potential third parties are entities who took some action or had a change in position prior to the Petition Date (*i.e.*, a creditor who made a loan to GM), to their detriment, in reliance on a JPMCB's manifestation

that Mayer Brown was authorized to file the Unrelated Termination Statement. Contrary to the Committee's argument, the third party cannot possibly be the "escrow agent" – which obviously did not, in dealing with Mayer Brown, rely on any manifestation of JPMCB, that resulted in a detrimental change in its position.

The Committee's argument regarding the Synthetic Lease Escrow Letter, signed by Simpson, is also flawed since "apparent authority is created only by the representations of the principal to the third party, and [courts] explicitly reject[] the notion that an agent [such as the principal's attorney] can create apparent authority by his own actions or representations." *Hidden Brook*, 241 F. Supp. 2d at 262; *see also Hallock v. State*, 64 N.Y.2d 224, 231, 485 N.Y.S. 2d 510 (1984) ("[e]ssential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. *The agent cannot by his own acts imbue himself with apparent authority*") (emphasis added). Here, the Synthetic Lease Escrow Letter was executed by Simpson, not JPMCB, and thus, JPMCB made no manifestations on which others could rely. (Callagy Decl. Ex. 19.) As a matter of law, that escrow letter could not have given apparent authority to anyone.[10]

Adding to its already convoluted argument, the Committee also asserts that "Mayer Brown reasonably relied" on the escrow instructions. (Committee Opp. Mem. at 17.) Thus, contradictorily, the Committee appears to suggest that Mayer Brown must have been the

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[10] The Committee also suggests that Simpson's actions were authorized because it has continuously represented JPMCB on a number of transactions since 1987. (Committee Opp. Mem. at 16, n.13.) The Committee, however, completely ignores the testimony concerning the scope of Simpson's representation of JPMCB. Both Mr. Duker and Mr. Merjian testified that Simpson was only retained to represent JPMCB on all matters related to the Synthetic Lease Transaction. (JPMCB Rule 7056-1 Statement ¶¶ 5 and 19.) Moreover, Mr. Merjian also stated that Simpson only represented JPMCB for "individual transaction[s]" for which JPMCB asks for legal advice. (Callagy Supp. Decl., Ex. 2 (Merjian Errata Sheet) at 61:11.) Indeed, first Cravath and then Morgan Lewis, not Simpson, represented JPMCB on the Term Loan. (JPMCB Rule 7056-1 Statement ¶ 18.)

third party. This argument also makes no sense because Mayer Brown is the agent for purposes of an apparent authority argument and the Committee cannot possibly show that Mayer Brown relied on any instructions to its detriment. Moreover, the Committee cannot possibly show that Mayer Brown reasonably relied on the Synthetic Lease Escrow Letter for its authority to file the UCC-3 relating to the Term Loan because Mayer Brown knew that Simpson only represented JPMCB in matters related to the Synthetic Lease Transaction. (Callagy Decl. Ex. 4 (Gordon Tr.) at 12; Ex. 2 (Green Tr.) at 23.) Thus, Mayer Brown could not have believed that Simpson was authorized to terminate JPMCB's interest in the Term Loan Collateral. Indeed, the testimony of Mayer Brown's, Ryan Green, belies the Committee's conclusory assertions:

> Q. Mr. Green, sticking with Plaintiff's Exhibit 22, did you have any understanding that the fact that Mr. Merjian signed the escrow letter gave you or Mayer Brown any authority to release security in connection with a term loan facility between General Motors and JPMorgan?
>
> ****
>
> A. No.

(Callagy Decl. Ex. 2 (Green Tr.) at 103.)

Finally, the Committee argues that it should not be subject to the reliance element of apparent authority under Section 544(a) of the Bankruptcy Code, but fails to cite any authority whatsoever for this assertion. (Committee Opp. Mem. at 17-18.) Indeed, the very language of Section 544(a) refutes the Committee's argument since the hypothetical creditor is "without regard to any knowledge . . ." 11 U.S.C. § 544(a). Furthermore, taken to its logical conclusion, the Committee's argument would mean that no debtor or creditor's committee would be bound by the provisions of Article 9 of the UCC requiring filings to be authorized. The Court should

not recognize an argument that could lead to such an absurd result.[11] The Committee's argument that cases like *In re Pac. Trencher & Equip., Inc.*, 27 B.R. 167 (B.A.P. 9th Cir. 1983) *aff'd*, 735 F.2d 362 (1984), did not impose a reliance requirement is severely misleading. As the Committee well knows, *In re Pac. Trencher*, and cases like it, did not concern authority at all, let alone apparent authority. Finally, the Committee's entire argument is premised on the notion that it is the third party, which is nonsensical because there obviously could not be any manifestations by JPMCB or Simpson to the Committee concerning this issue prior to the Petition Date.

V. JPMCB Did Not Ratify The Unrelated Termination Statement

The Committee next argues that JPMCB ratified the filing of UCC-3 termination statement related to the Term Loan. This argument is completely meritless.

Ratification can only occur "where the principal has full knowledge of all material facts and takes some action to affirm the agent's actions." *Prisco v. State of New York*, 804 F. Supp. 518, 523 (S.D.N.Y. 1992). Here, the Committee admits that all parties were unaware that a termination statement related to the Term Loan had been filed. (Committee Opp. Mem. at 13.)[12] The Committee's argument should be rejected for this reason alone. Further, the

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[11] The court in *In re Feifer Indus. Inc.*, 155 B.R. at 262 suggests that apparent authority principles ought to be followed in bankruptcy. In that case, the court found that one secured party's simple filing of a termination statement naming it and another secured party did not evidence that the secured party who filed the termination statement had apparent authority to file it for the second secured party. *Id.* Accordingly, the court held, the second secured party's interest was still perfected, notwithstanding the unauthorized filing of the termination statement, at the time the debtor filed for bankruptcy protection. *Id.*

[12] The Committee's suggestion that JPMCB purportedly "could have, or should have" discovered the filing of the Unrelated Termination Statement prior to the Petition Date is legally irrelevant as the Committee admits. (Committee Opp. Mem. at 13, n.11.) But that merely proves the point – that no one was aware that a termination statement relating to a Term Loan had been filed. (JPMCB Rule 7056-1 Statement ¶ 93.) Without such knowledge, JPMCB could not have ratified the filing of the Unrelated Termination Statement. (JPMCB Mem. at 37-38.)

Moreover, the evidence relied upon by the Committee does not remotely support its position. For instance, the Committee's argument that the November 30, 2006 date listed on the draft closing checklists and the draft Unrelated Termination Statement should have "stood out" from the other Synthetic Lease Transaction

evidence is clear that: JPMCB and GM believed that JPMCB continued to hold a perfected security interest in the Term Loan Collateral. For instance:

- GM engaged in negotiations to amend the Term Loan with JPMCB and the others lenders in early 2009. (JPMCB Rule 7056-1 Statement at ¶¶ 81-82.)

- In the First Amendment to the Term Loan, executed on March 4, 2009 (Duker Aff. Ex. N; JPMCB Rule 7056-1 Statement ¶¶ 83-84), GM repeated that the lien over the Term Loan Collateral remained perfected, and the parties agreed to an increase in fees to be paid to the Term Loan lenders, an increase in the Term Loan Collateral ratio and a requirement that GM provide a detailed Term Loan Collateral report on a quarterly basis. (*Id.*)

- Throughout the negotiations to amend the Term Loan, no one from GM or anywhere else suggested that the Term Loan lenders' security interests in the Term Loan Collateral were not fully perfected. (JPMCB Rule 7056-1 Statement at ¶¶ 85 and 89.)

- GM continued to provide Collateral Value Certificates to JPMCB throughout this period up to the Petition Date certifying that the net book value of the Term Loan Collateral met contractual requirements. (Duker Aff. Exs. G, N and O; JPMCB Rule 7056-1 Statement at ¶¶86-88.)

Relying on *Orix Credit Alliance v. Phillips-Mahnen, Inc.*, No. 89-Civ-8376 (THK), 1993 WL 1837666 (S.D.N.Y. May 26, 1993), the Committee also argues that JPMCB ratified Mayer Brown's actions because it "knew, *before filing*, that the Term Loan Termination Statement was going to be filed" and said or did nothing to stop the filing. (Committee Opp. Mem. at 18-19) (emphasis added). Ratification, however, authorizes the unauthorized acts of an

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UCC-3 termination statements is meritless. (Committee Opp. Mem. at 13, n.11.) Multiple draft Synthetic Lease Transaction UCC-3 termination statements - identified in the draft checklists and circulated - contained different dates, some of which were dated after 2006 (*i.e.*, 4/12/02; 1/10/03; 8/25/04; 5/21/07). (Callagy Decl. Ex. 15.) The Committee also suggests that Morgan Lewis, JPMCB's counsel in connection with the Term Loan (JPMCB Rule 7056-1 Statement at ¶ 18), could have become aware of the filing of the Unrelated Termination Statement. (Committee Opp. Mem. at 13, n.11.) The Committee, however, concedes that Morgan Lewis only ran a search concerning the twenty-six fixture filings securing the Term Loan Collateral. (*Id.*) Finally, although the Committee makes reference to a JPMCB lien perfection group in Bangalore, India, there is absolutely no evidence that this group received a copy of the Unrelated Termination Statement. (*Id.*) Moreover, the Committee concedes that Mr. Duker never received a filed copy of it from the JPMCB lien perfection group prior to the Petition Date. (*Id.*)

agent retroactively and a principal cannot ratify an agent's act before the act occurs. *See Banque Arabe et Internationale D'Investissement v. Maryland Nat'l Bank*, 850 F. Supp. 1199, 1213 (S.D.N.Y. 1994) (quoting *Julien J. Studley, Inc. v. Gulf Oil Corp.*, 282 F. Supp. 748, 751-52 (S.D.N.Y. 1968) ("In agency law, 'ratification is a form of *subsequent* authorization...'") (emphasis added). Moreover, *Orix* does not support the Committee's position. In *Orix*, the court found that the principal ratified his agent's forgery of the principal's signature on personal guaranties because the principal failed to object to the documents *after* he received copies of these guaranties in the mail. *Orix Credit Alliance*, 1993 WL 1837666 at *7. And here, there is no evidence whatsoever that JPMCB knew that a termination statement relating to the Term Loan was filed on October 30, 2008. (JPMCB Rule 7056-1 Statement at ¶ 93.) JPMCB could not ratify an act that it did not know occurred.

To support its position, the Committee distorts the law. It argues that JPMCB did not need "full knowledge of the relevant facts" in order to ratify the filing of the Unrelated Termination Agreement. (Committee Opp. Mem. at 18, n.14.) But case law it cites in support of its contention says otherwise. (*Id.*) For instance, in *Banque Arabe*, 850 F. Supp. at 1213, the plaintiff, after accepting the benefits of a contract which it had reason to believe was not precisely what the parties had agreed to, attempted to rescind the contract. The court denied plaintiff's attempt to rescind the contract because the plaintiff had ratified the contract. In so doing, the court made clear that *unlike the agent/principal relationships*, full knowledge of the facts was not required to ratify a contract:

> *Outside of the agent-principal relationship*, in contrast, ratification is not a form of authorization. It is, instead, an expression of willingness on the part of a party to a contract to abide by its terms, even after it has enough information upon which to exercise its right to disaffirm the contract ... Therefore, even though the standards for ratification are not the same as the requirements for

> asserting a rescission claim promptly, the Court finds that full knowledge is not necessary before there can be ratification. Ratification can occur even after a party has had notice of the facts that would invite reasonable inquiry.

Id. at 1213 (emphasis added). As further explained by the *Banque Arabe* court and entirely ignored by the Committee, "[*a*]*ctual knowledge is required in the agency context* because the underlying issue is whether the principal has authorized the agent to perform acts or enter into contracts, not whether the agent, himself, assumed those responsibilities." *Id.* (emphasis added); *see also Cooperative Agricole Groupement de Producteurs Bovins de L'Ouest v. Banesto Banking Corp.*, No. 86-Civ-8921 (PKL), 1989 WL 82454, at *16-17 (S.D.N.Y. 1989) *aff'd* 904 F.2d 35 (2d Cir. 1990). Accordingly, "[w]ithout knowing ratification, the agent's act is unauthorized and the principal is not obligated to perform." *Banque Arabe*, 850 F. Supp. at 1213; *see also In re Bennett Funding Group, Inc.*, 336 F.3d 94, 100-101 (2d Cir. 2003) (applying New York law).[13]

VI. JPMCB And The Term Loan Lenders Were Secured Creditors As Of The Petition Date Pursuant To Other UCC-1 Financing Statements

The Committee cannot dispute that pursuant to this Court's DIP Order, JPMCB and the other Term Loan lenders have been released from any and all claims and causes of action, including avoidance actions, related to the Term Loan except those relating to the perfection of their security interests in the Term Loan Collateral. (DIP Order at Chapter 11 Case Docket Entry 2529 at 25.) Paragraph 19 of the DIP Order specifically provided:

> (d) Effective upon entry of this Final Order, *the Debtors* (on behalf of their estates) and any successor thereto *release the Prepetition Senior Facilities Secured Parties . . . with respect to any and all actual or potential demands, claims, actions, causes of action (including* derivative causes of action), suits, assessments, liabilities, losses, costs, damages, penalties, fees, charges, expenses

[13] The other case cited by the Committee, *In re Fontanez*, 113 B.R. 136 (Bankr. W.D.N.Y. 1990) never addressed the issue of ratification. (Committee Opp. Mem. at 19.)

> and all other forms of liability whatsoever, in law or equity, whether asserted or unasserted, known or unknown, foreseen or unforeseen, *arising under the Bankruptcy Code*, state law or otherwise now existing or hereafter arising, directly or indirectly *related to the Prepetition Senior Facilities* and any and all dealings between the Prepetition Senior Facilities Secured Parties in connection with the Prepetition Senior Facilities, *provided, however, that such release shall not apply to the Committee with respect only to the perfection of first priority liens of the Prepetition Senior Facilities Secured Parties (it being agreed that if the Prepetition Senior Facilities Secured Parties, after Payment, assert or seek to enforce any right or interest in respect of any junior liens, the Committee shall have the right to contest such right or interest in such junior lien on any grounds, including* (without limitation) validity, enforceability, priority, perfection or *value*) (the "**Reserved Claims**"). The Committee shall have automatic standing and authority to both investigate the Reserved Claims and bring actions based upon the Reserved Claims against the Prepetition Senior Facilities Secured Parties not later than July 31, 2009 (the "**Challenge Period**"), provided, that upon the filing of any adversary proceeding prosecuting any reserved Claim, the Challenge Period shall be extended with respect to such adversary proceeding through and until a court of competent jurisdiction dismisses such adversary proceeding. The grant of automatic standing shall be without any further order of this Court or any requirement that the Committee file a motion seeking standing or authority to file a motion seeking standing or authority before prosecuting any such challenge. Any Prepetition Senior Facilities Secured Party accepting Payment shall submit to the jurisdiction of the Bankruptcy Court, it being understood that the respective administrative and collateral agents for the Prepetition Senior Facilities shall have no responsibility or liability for amounts paid to any Prepetition Senior Facilities Secured Parties and such agents shall be exculpated for any and all such liabilities, excluding only such funds as are retained by each such agent solely in its respective role as lender.

(*Id.*) (emphasis added).

The DIP Order does not preserve the Committee's right to contest the Term Loan lenders' security interest in the Term Loan Collateral on any ground other than perfection. (*Id.*) This is confirmed by the fact that the DIP Order specifically only preserved the Committee's right to raise issues other than perfection, where the Secured Parties sought to enforce rights

regarding junior liens – a situation not present in this case. (*Id.*) Accordingly, if JPMCB and the Term Loan lenders are found to have any perfected security interest in the Term Loan Collateral, the Committee has no standing or authority to contest that security interest on any other grounds.

Thus, the Committee does not and cannot contest the fact that JPMCB and the Term Loan lenders were also secured as of the Petition Date by (i) the twenty-six fixture filings filed by JPMCB in counties where Term Loan Collateral was located; and (ii) a Delaware UCC-1 financing statement filed with the Delaware Secretary of State against Saturn as debtor. (Duker Aff. Exs. I and J; JPMCB Rule 7056-1 Statement at ¶ 15.) Instead, in a footnote, the Committee incorrectly asserts that the only issue to be decided in this summary judgment motion is the legal effectiveness of the Unrelated Termination Statement. (Committee Opp. Mem. at 11, n.10.) This is wrong. The issue of perfection, the only cause of action that was preserved for the Committee to investigate, was the subject of pre-motion discovery, was noticed by JPMCB as one of the issues to be addressed in its summary judgment motion and thus is properly before the Court. Thus, for example, JPMCB gave notice of the existence of the twenty-six fixture filings and the Saturn UCC-1 in its Answer as one of its Affirmative Defenses. (*See* D.E. 12, Seventh Affirmative Defense at 81.) JPMCB also produced copies of the twenty-six fixture filings and the Saturn Delaware UCC-1 financing statement in the course of discovery. (Duker Aff. Ex. J.) And during the Local Bankruptcy Rule 7056-1(a) mandated pre-motion conference with the Court, the Committee represented to the Court that it did not need any further discovery despite the fact that these filings were produced and JPMCB had represented to the Court it would raise them in its motion for summary judgment. (D.E. 18, 19, 21, 22 and Chapter 11 Case Docket Entry 5903.)

Finally, the Committee's assertion that it would need additional discovery as to the value of the collateral secured by these additional filings is without merit. (Committee Opp. Mem. at 11, n.10.) As noted, the DIP Order is perfectly clear that the Committee is not permitted to investigate or challenge "value." Accordingly, JPMCB is also entitled to summary judgment because the Committee has not – and cannot – contest that JPMCB's security interest in the Term Loan Collateral remained perfected by the twenty-six fixture filings and a UCC-1 relating to Saturn.

VII. The Court Should Impose A Constructive Trust

The Committee argues that a constructive trust should not be found in this case because "there is no claim that Old GM engaged in wrongful conduct or otherwise intended to defeat the rights of JPMorgan." (Committee Opp. Mem. at 20.) Although "wrongful" conduct is not required for the Court to find a constructive trust,[14] the Court can find such conduct – which the Committee completely overlooks – by reviewing GM's covenant in the Term Loan Collateral Agreement to keep JPMCB's security interest perfected. (JPMCB Rule 7056-1 Statement at ¶ 17; Duker Aff. Ex. H.) Section 4.03(a) of the Term Loan Collateral Agreement provides:

> [GM and/or Saturn] shall maintain the security interest created by [the Term Loan Collateral Agreement] as a perfected security interest having as least the priority described in Section 3.02 and shall defend such security interest against the claims and demands of all Persons whomsoever . . .

(*Id.*)

Accordingly, assuming *arguendo* that the Unrelated Termination Statement is not a nullity, GM's failure to take the necessary steps to preserve JPMCB's security interest in the Term Loan Collateral is enough for this Court to find that there was "wrongful conduct" and for a constructive trust to exist in favor of JPMCB. The estate should not be unjustly enriched as a

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[14] *See In re Koreag, Controle Et Revision S.A.*, 961 F.2d 341, 354 (2d Cir. 1992), *aff'd*, No. 89 Civ 3071 (WK), 1992 WL 200748 (S.D.N.Y. 1992), *cert. denied*, 506 U.S. 865, 113 S.Ct. 188 (1992).

result of the unauthorized action of GM's counsel. *See, e.g.*, *In re Howard's Appliance Corp.*, 874 F.2d 88, 93 (2d Cir. 1989).

CONCLUSION

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

Dated: New York, New York
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Respectfully submitted,

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