Hearing Date and Time: October 21, 2010 at 9:45 a.m. (Prevailing Eastern Time)

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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., *et al.*,	
Defendants.	

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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The Official Committee of Unsecured Creditors (the "**Committee**" or "**Plaintiff**") of Motors Liquidation Company f/k/a General Motors Corporation ("**Old GM**") respectfully submits this reply memorandum of law in further support of its motion for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, Rule 7056 of the Federal Rules of Bankruptcy Procedure and Rule 7056-1 of the Local Bankruptcy Rules.

PRELIMINARY STATEMENT

At the heart of this case lies a mistake: the filing of the Term Loan Termination Statement.[1] JPMorgan has sought to evade responsibility for this mistake, ever since it recognized the significant economic ramifications of the mistake back in June, 2009. At that time, JPMorgan's counsel prepared an affidavit for Robert Gordon's signature that laid responsibility for this mistake upon an unnamed paralegal at Mayer Brown, who supposedly acted without the knowledge of Mr. Gordon, the supervising Mayer Brown partner on the transaction.

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[1] Terms not otherwise defined herein shall have the meanings set forth in Plaintiff's Memorandum of Law in Support of Motion for Partial Summary Judgment dated July 1, 2010 (Docket Entry 26) ("**Plaintiff's Summary Judgment Brief**"). The following terms shall have the following meanings: "**7056-1 Statement**" refers to Plaintiff's Statement of Undisputed Material Facts Pursuant to Local Bankruptcy Rule 7056-1 dated July 1, 2010 (Docket Entry 25); "**Plaintiff's Opposition Brief**" refers to Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment dated August 5, 2010 (Docket Entry 45); "**Plaintiff's Counter-Statement**" refers to Plaintiff's Counter-Statement of Material Facts Pursuant to Local Bankruptcy Rule 7056-1 dated August 5, 2010 (Docket Entry 46); "**JPMorgan 7056-1 Statement**" refers to Rule 7056-1(b) Statement of Undisputed Material Facts of Defendant JPMorgan Chase Bank, N.A. in Support of its Motion for Summary Judgment dated July 1, 2010 (Docket Entry 30); "**JPMorgan Opposition Brief**" refers to 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 dated August 5, 2010 (Docket Entry 48); "**JPMorgan Counter-Statement**" refers to Response of JPMorgan Chase Bank, N.A. to Plaintiff's Statement of Undisputed Material Facts dated August 5, 2010 (Docket Entry 49); and "**Callagy Decl.**" refers to the declaration of John M. Callagy, dated July 1, 2010, filed in support of JPMorgan's summary judgment motion (Docket Entry 41).

That affidavit, which was provided to all interested parties in order to induce Old GM to pay the Term Loan Lenders in full, leaves readers with the false impression that the Mayer Brown paralegal was off on a frolic and detour when he submitted the Term Loan Termination Statement to be filed with the Delaware Secretary of State. In fact, discovery in this case has shown that the Mayer Brown paralegal was only doing what he was told, and that he acted consistent with escrow instructions that were signed on behalf of JPMorgan, and emails between and among JPMorgan, Old GM and their respective counsel.

In a continuing effort to deflect responsibility for the mistaken instruction to file the Term Loan Termination Statement, JPMorgan's litigation counsel now argues for the very first time and without factual support that the JPMorgan managing director responsible for the Term Loan did not authorize the filing of the Term Loan Termination Statement because he was unable to open the PDF file containing the draft Term Loan Termination Statement, which was attached to an email he admits to having received.

Even if the Court considers this argument of counsel, which should be disregarded because it is factually-unsupported, and contradicts the JPMorgan managing director's prior testimony in this case and prior statements by JPMorgan to this Court, JPMorgan cannot run away from the following facts:

(i) JPMorgan and its counsel received checklists indicating that the Term Loan Termination Statement would be filed;

(ii) JPMorgan could have – and should have – found a way to open the PDF file containing the draft Term Loan Termination Statement;

(iii) JPMorgan's counsel expressed approval of the documents prepared by Old GM's counsel, including the draft Term Loan Termination Statement; and

(iv) JPMorgan's counsel signed escrow instructions that expressly provided for the release of the Term Loan Termination Statement to Old GM.

In sum, the undisputed facts show that the mistake that drives this litigation was JPMorgan's mistake. JPMorgan, as administrative agent for the Term Loan, mistakenly authorized the filing of the Term Loan Termination Statement. The legal consequences that flow from JPMorgan's mistaken authorization of the Term Loan Termination Statement are clear: The Term Loan Termination Statement is legally effective, and the Term Loan Lenders' security interest was, therefore, unperfected as of the Petition Date.

ARGUMENT

I. The Committee Is Entitled To Partial Summary Judgment Because There Is No Genuine Issue As To Any Material Fact

The Committee is entitled to an award of partial summary judgment because "there is no genuine issue as to any material fact" with respect to the legal effectiveness of the Term Loan Termination Statement. Fed. R. Civ. P. 56(c). In an effort to create the false appearance of disputed material facts, JPMorgan's opposition to the Committee's summary judgment motion quibbles over terminology, advances arguments that are unsupported by affidavits or other evidence, and asserts positions at odds with its own witness' prior sworn testimony and its prior submissions to this Court. JPMorgan cannot defeat the Committee's motion through such improper tactics. *See, e.g.*, *Giaccio v. City of New York*, 502 F. Supp.2d 380, 389 (S.D.N.Y. 2007) (disregarding arguments advanced in opposition to summary judgment motion because "[p]laintiff's brief in opposition [to summary judgment] contradicts his deposition testimony"); *Heil v. Santoro*, 147 F.3d 103, 110 (2d Cir. 1998) ("party opposing summary judgment does not create a triable issue by denying his previously sworn statements"); *Keddy v. Smith Barney, Inc.*,

No. 96 Civ. 2177 (DAB), 2000 WL 193625, at *5-*8 (S.D.N.Y. Feb. 16, 2000) (disregarding factual assertion in opposition to summary judgment because assertion not supported by the record); *Vann v. New York City Transit Auth.*, 4 F. Supp.2d 327, 330 (S.D.N.Y. 1998) (same).

As the Second Circuit has explained, "[s]ummary judgment is called for where it clearly appears that the [disputed] issues are not genuine, but feigned." *United Nat'l Ins. Co. v. Tunnel, Inc.*, 988 F.2d 351, 354 (2d Cir. 1993). Here, as explained below, the JPMorgan Counter-Statement fails to raise any genuine issues with respect to the key facts that entitle the Committee to partial summary judgment. Those facts conclusively demonstrate that JPMorgan authorized the filing of the Term Loan Termination Statement.

Those key facts, which are discussed briefly below, are that: (i) Simpson Thacher and JPMorgan received several versions of the closing checklist, each of which identified the Term Loan Termination Statement as a document to be filed; (ii) Simpson Thacher and JPMorgan received a draft of the Term Loan Termination Statement itself; (iii) in an email, Simpson Thacher affirmatively expressed its approval of a group of documents that included the Term Loan Termination Statement; and (iv) Simpson Thacher executed escrow instructions that identified the Term Loan Termination Statement as a document to be released upon closing.

A. JPMorgan's Counsel Received The Closing Checklist Identifying The Term Loan Termination Statement

Simpson Thacher, counsel for JPMorgan, received several versions of the closing checklist, all of which identified the Term Loan Termination Statement as a document to be filed in connection with the Lease Payoff. 7056-1 Statement ¶¶ 32, 33. In its Counter-Statement, JPMorgan does not dispute that Simpson Thacher received the closing checklist. Rather, JPMorgan purports to dispute this fact because the closing checklist did not "refer to the Term Loan." JPMorgan Counter-Statement at Response Nos. 32, 33. This attempt to artificially

manufacture a disputed fact is semantic gamesmanship. The closing checklist did not use the phrase "Term Loan." However, it is undisputed that the closing checklist referred to terminating the UCC-1 financing statement filed on November 30, 2006 with the filing number 6416808 4. As JPMorgan concedes in its opposition brief, ***that filing "number was a reference to the Term Loan."*** JPMorgan Opposition Brief at 13 (emphasis added). Moreover, it is undisputed that the Term Loan Agreement is dated as of November 29, 2006. JPMorgan Counter-Statement at Response No. 1. Thus, there is no genuine basis to dispute that the closing checklist provided for the filing of a termination statement to terminate the financing statement that related to the Term Loan collateral.

B. JPMorgan's Counsel Received A Draft Of The Term Loan Termination Statement

Simpson Thacher, counsel for JPMorgan, received a draft of the Term Loan Termination Statement before it was filed. 7056-1 Statement ¶ 34. In its Counter-Statement, JPMorgan uses many words to try to create the appearance of a dispute about this simple fact. This is, however, a feigned dispute because there is no reasonable basis to dispute that Simpson Thacher received the draft Term Loan Termination Statement. As JPMorgan concedes, "[o]ne of the ten draft UCC-3 termination statements" sent to Simpson Thacher "corresponded to the UCC-1 financing statement numbered 6416808 4." JPMorgan Counter-Statement at Response No. 34. For obvious advocacy reasons, JPMorgan refers to this draft termination statement as the "Unrelated Termination Statement," instead of adopting the Committee's nomenclature and calling it the Term Loan Termination Statement. Regardless, both sides are referring to the same document: the termination statement which, on its face, terminates the Term Loan Financing Statement. This document indisputably was received by Simpson Thacher before it was filed.

C. JPMorgan Received The Closing Checklist Identifying The Term Loan Termination Statement

Before the Term Loan Termination Statement was filed, Old GM and Simpson Thacher transmitted the closing checklist to Richard Duker, the managing director at JPMorgan with responsibility for the Term Loan Agreement and the Lease Payoff. 7056-1 Statement ¶¶ 31, 33. JPMorgan admits that the closing checklist was sent to Mr. Duker by Old GM and Simpson Thacher. JPMorgan Counter-Statement at Response Nos. 31, 33. As with the transmission of this same checklist to Simpson Thacher, JPMorgan disputes only that the closing checklist "refer[s] to the Term Loan." It remains undisputed, however, that this checklist referred to termination of the UCC-1 financing statement numbered 6416808 4 filed on November 30, 2006, which is what the Committee accurately refers to as the Term Loan Financing Statement. Thus, this fact is not genuinely in dispute.

D. JPMorgan Received A Draft Of The Term Loan Termination Statement

Before the Term Loan Termination Statement was filed, Richard Duker of JPMorgan received a draft of the Term Loan Termination Statement. 7056-1 Statement ¶ 36. In response to this straightforward assertion, JPMorgan contends for the very first time in this case that the email transmitting this draft termination statement was "corrupted" and that most of the attachments were "unreadable" by Mr. Duker. JPMorgan Counter-Statement at Response No. 36. This attempt to dispute Mr. Duker's receipt of the draft Term Loan Termination Statement should be disregarded for numerous reasons.

As an initial matter, this belated assertion contradicts Mr. Duker's prior sworn testimony, as well as prior statements by JPMorgan to this Court. Mr. Duker previously testified about this same email and the attached draft Term Loan Termination Statement as follows:

Q. I'm handing you what's previously been marked as Plaintiff's Exhibit 32. Is this an e-mail that Mr. Merjian forwarded to you?

A. It appears to be, yes.

Q. Do you believe that Mr. Merjian also forwarded to you the attachments to this e-mail?

MR. CALLAGY: Objection to the form.

A. Could you repeat that, please?

Q. Did Mr. Merjian also forward to you the documents that are attached to this e-mail?

MR. CALLAGY: Objection to form.

A. It appears to be, yes.

Q. Would you turn, please, to page 296 of this exhibit.

MR. CALLAGY: 296 being the number in the lower right.

MR. FISHER: Yes.

Q. Can you identify the document that appears at page 296?

A. It appears to be a draft of the financing statement termination that related to the Term Loan.

Callagy Decl. at Ex. 6 (Duker Tr.) at 42:5-43:3. In addition, in its March 29, 2010 pre-motion letter to this Court, JPMorgan stated that a "draft of the termination statement was also circulated by Mayer Brown ***to JPMCB*** and Simpson." (emphasis added). JPMorgan now contradicts itself when it disputes receipt of the draft Term Loan Termination Statement.

Moreover, the claim that the relevant email attachment was "unreadable" and "corrupted" is nothing more than a factually-unsupported argument of counsel and should thus be disregarded. *See, e.g., Holtz v. Rockefeller & Co.*, 258 F.3d 62, 73 (2d Cir. 2001) (factual assertions should be disregarded where the cited materials do not support such assertions);

Magadia v. Napolitano, No. 06 Civ. 14386, 2009 WL 510739 at *2 (S.D.N.Y. Feb. 26, 2009) (same). In particular, the supplemental affidavit submitted by Mr. Duker does not say anything at all about whether, when, or how the email allegedly became "corrupted," and indeed does not even use the words "corrupted" or "unreadable." All of these words and concepts have been introduced by counsel – not the affiant. Accordingly, they should not be given any weight. *Simpson v. AWC 1997 Corp.*, No. 1:08-CV-545, 2008 WL 2884999, at *4 (N.D.N.Y. Jul. 23, 2008) (disregarding contention that Wordperfect file could not be opened because movant "provides no evidence of this fact, such as an affidavit from someone responsible for overseeing its computer operations. Moreover, at no time does [movant] affirmatively state that it was unable to open the document").

Further, if – as JPMorgan's counsel now contends – the email attachments were "unreadable" at the time the email was received, there is no evidence that Mr. Duker took any reasonable, or even minimal, steps to read the attachments. For example, there is no evidence that he asked Simpson Thacher to resend the email, or hand-deliver or fax the attachment, or that he conferred with anyone at JPMorgan who could provide the technological support needed to open the email attachments. *Id.* (Movant "similarly fails to rule out the possibility that whatever word processing program it does have, or other programs available to it, could open the Wordperfect attachment"). JPMorgan cannot bury its head in the sand, and then claim that it was unaware of the draft Term Loan Termination Statement. *United States v. Swiftships, Inc.*, No. Civ. A. 94-2597, 1995 WL 696614, at *3 (E.D.La. Nov. 22, 1995) ("a lender is not entitled to bury its head in the sand").

This Court also should not credit this belated assertion about the unreadability of the draft Term Loan Termination Statement, not only because it is unsupported by facts and contradicts

prior testimony, but also because it defies credibility that JPMorgan lacked the technological capacity to open a PDF attachment to an email. *See Software for Moving, Inc. v. La Rosa Del Monte Express, Inc.*, No. 08 Civ. 986, 2009 WL 1788054, at *6 (S.D.N.Y. Jun. 23, 2009) (finding contention that sophisticated party could not open email attachments to be "implausible"); *Cefalo v. Mitchell*, No. 09-151-P-S, 2009 WL 3300007, at *3 (D.Me. Oct. 13, 2009) (it is "difficult to see how the law firm could be operating in 2009 in ignorance of how to find, view and print an attachment to an email"); *Simpson*, 2008 WL 2884999, at *4 ("[i]t is difficult to conclude that G.E.'s counsel, a large firm consisting of over 400 attorneys with thirteen offices in the United States and Europe, could not open a Wordperfect document"). Simply put, there is no record evidence establishing that the attachment to the email could not be opened by Mr. Duker; and even if there were, it stands to reason that JPMorgan could have opened – or at least arranged for the opening of – the PDF attachment containing the draft Term Loan Termination Statement.

Finally, whether Mr. Duker did open, or could have opened, the draft Term Loan Termination Statement attachment that was sent to him is not a dispositive fact and, even if genuinely disputed, does not preclude summary judgment. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510 (1986), *remanded*, 1991 WL 186998 (D.D.C. 1991) ("the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of *material* fact") (emphasis in original). As explained below, even if the draft Term Loan Termination Statement had never been sent to Mr. Duker (which it was), JPMorgan's counsel affirmatively approved the draft Term Loan Termination Statement in email

correspondence and signed, written escrow instructions. These facts alone lead to the conclusion that JPMorgan authorized the filing of the Term Loan Termination Statement.[2]

E. JPMorgan's Counsel Affirmatively Expressed Approval Of The Term Loan Termination Statement

Simpson Thacher expressly approved the draft of the Term Loan Termination Statement, when Mr. Merjian of Simpson Thacher wrote to Mr. Green of Mayer Brown: "Ryan Nice job on the documents." 7056-1 Statement ¶ 37. JPMorgan contends, in substance, that this statement should not be construed as approval of the documents; rather, as understood by Mr. Green of Mayer Brown, it was an indication that Simpson Thacher "didn't have additional comments to the documents." JPMorgan Counter-Statement at Response No. 37. This is meaningless hair-splitting. It is undisputed that Mr. Merjian told Mr. Green that he had done a "Nice job on the documents," including the draft Term Loan Termination Statement, and that Mr. Merjian never expressed a wish to make any revisions to the documents. Mr. Merjian's positive response to Mr. Green's email transmitting proposed closing documents has been fairly characterized by the Committee as an expression of approval for the documents, including the draft Term Loan Termination Statement.

F. JPMorgan's Counsel Executed Escrow Instructions That Referenced The Term Loan Termination Statement

Simpson Thacher executed escrow instructions, identifying the Term Loan

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[2] In the event that this Court finds the issue of the "readability" of the email attachment to constitute a *genuine* dispute about a *material* fact, which the Committee contends it is not, the Committee respectfully requests leave to file a Rule 56(f) affidavit, detailing additional, limited discovery to be taken with respect to this issue – an issue raised for the very first time in JPMorgan's opposition papers filed on August 5, 2010. *See generally Foresta v. Centerlight Capital Mgmt., LLC*, 23 A.D. Cas. (BNA), 2010 WL 2131000, at *1-*3 (2d Cir. 2010).

Termination Statement as a document to be filed upon the Lease Payoff. 7056-1 Statement ¶¶ 38-43. JPMorgan concedes that Simpson Thacher executed the escrow instructions, but again purports to dispute this point on the grounds that the escrow instructions do not use the words "Term Loan." As already explained above, this dispute is not genuine, as JPMorgan concedes that the escrow instructions refer by number to the termination statement that would terminate the Term Loan Financing Statement.

JPMorgan also concedes that the escrow instructions provided for the release of the Term Loan Termination Statement to Old GM's counsel upon the closing of the Lease Payoff, but argues that the escrow instructions "did not provide any instructions or authority to [Old] GM's counsel as to what to do with those documents upon their delivery." JPMorgan Counter-Statement at Response Nos. 42-43. This frivolous contention makes nonsense of the escrow instructions. Clearly, Old GM was authorized to file all of the UCC termination statements released to it pursuant to the escrow instructions. Indeed, the Term Loan Termination Statement is the only document released to Old GM's counsel that JPMorgan contends was filed without authorization. Three other Delaware UCC termination statements were all filed upon their release to Old GM's counsel pursuant to the same escrow instructions without any protest from JPMorgan. Thus, the escrow instructions authorized Old GM's counsel to file the Term Loan Termination Statement.

In a futile attempt to avoid the consequences of the signed escrow instructions, JPMorgan also argues that it was not represented by Simpson Thacher with respect to the Term Loan, and therefore Simpson Thacher's execution of the escrow instructions on JPMorgan's behalf is not binding on JPMorgan. This argument is without merit. First, this mistake occurred in the context of the Lease Payoff, and it is undisputed that Simpson Thacher was retained by

JPMorgan to represent it with regard to that transaction. JPMorgan Counter-Statement at Response No. 13. Second, the scope of Simpson Thacher's representation of JPMorgan was broad. Mardi Merjian of Simpson Thacher has represented JPMorgan and its predecessors in a significant number of transactions since 1987, and representation of JPMorgan in different secured lending transactions has accounted for approximately forty percent of Mr. Merjian's overall practice. Callagy Decl. at Ex. 5 (Merjian Tr.) at 7-8. Simpson Thacher continues to represent JPMorgan on an ongoing basis. *Id.* Third, with respect to the Lease Payoff in particular, Simpson Thacher was acting in the absence of any engagement letter limiting the scope of the representation. Callagy Decl. at Ex. 5 (Merjian Tr.) at 44. Finally, when it directed the filing of the Term Loan Termination Statement through email approval and escrow instructions, Simpson Thacher was acting with the knowledge of Mr. Duker of JPMorgan at all times.[3]

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[3] The cases cited by JPMorgan in a futile effort to distance itself from acts of Simpson Thacher of which it had knowledge are easily distinguished. *Guidi v. Inter-Cont'l Hotels Corp.*, No. 95 Civ. 9006 (LAP), 2003 WL 1878237 (S.D.N.Y. Apr. 14, 2003) (filings made by Egyptian attorney in Egyptian proceeding did not bind the client because the Egyptian attorney was under explicit instructions that no filings could be made without prior approval of U.S. counsel); *In re Wells*, 129 Misc. 2d 56, 492 N.Y.S.2d 349 (N.Y. Surr. Ct. Queens County 1985) (client not bound by unilateral actions of attorney in appealing a judgment because client had never been made aware of such appeal); *Bryan v. State-Wide Ins. Co.*, 144 A.D.2d 325, 533 N.Y.S.2d 951 (2d Dep't 1988) (plaintiff not bound by actions of attorney waiving its rights because plaintiff had never been made aware of actions taken by attorney); *Gordon v. Town of Esopus*, 207 A.D.2d 114, 486 N.YS.2.d 420 (3d Dep't 1995), *appeal denied*, 65 N.Y.2d 609, 494 N.Y.S.2d 1028 (1985) (same); *Bank of New York v. Alderazi*, 28 Misc. 3d 376, 900 N.Y.S.2d 821 (N.Y. Sup. Ct. Kings County 2010) (nominee's assignment of mortgage was unauthorized because nominee was designated to act in a very limited way); *Ellicot Machine Co. v. United States*, 44 Ct. Cl. 127 (Ct. Cl. 1908) (contract upheld despite agent's mistake because a party cannot set up its own negligence and call it mutual mistake). Here, unlike those cases, Simpson Thacher acted with the knowledge of JPMorgan at all times.

II. The Undisputed Facts Establish That JPMorgan Authorized The Filing Of The Term Loan Termination Statement

The facts summarized briefly above, along with other facts set forth in the 7056-1 Statement, lead inexorably to the legal conclusion that JPMorgan authorized the filing of the Term Loan Termination Statement. This legal conclusion is warranted because JPMorgan and its counsel received the checklist referencing the Term Loan Termination Statement and the draft Term Loan Termination Statement, and did not lodge any objection to its filing; JPMorgan's counsel expressed approval for the draft Term Loan Termination Statement; and the Term Loan Termination Statement was released for filing pursuant to written escrow instructions signed by JPMorgan's counsel.

As explained in Plaintiff's Opposition Brief, the above facts demonstrate that JPMorgan conveyed express, actual authority to Old GM's counsel to file the Term Loan Termination Statement. Plaintiff's Opposition Brief at 8-11. Moreover, these same facts, *a fortiori*, also lead to the conclusion: that JPMorgan implicitly authorized the filing of the Term Loan Termination Statement, *id*. at 11-15; that Old GM's counsel had apparent authority to file the Term Loan Termination Statement, *id.* at 15-18; and that the filing of the Term Loan Termination Statement was ratified by JPMorgan, *id*. at 18-19.

In a futile effort to resist this conclusion, JPMorgan argues that the Committee's motion fails to address the "key undisputed facts." JPMorgan Opposition Brief at 6. According to JPMorgan's mistaken view these key "facts" are that: (i) the Termination Agreement was "the only source of [Old] GM's and Mayer Brown's authority to file any UCC-3 termination statements in October 2008"; and (ii) the "consistent testimony…that no one gave, or believed they had, authority to file" the Term Loan Termination Statement. *Id.*

As an initial matter, neither of the above two assertions is an assertion of fact. Rather, each is a conclusion of law without factual support. JPMorgan's approach to this case from the outset has been to rely on conclusory statements from Mr. Duker, Ms. Hoge (of Old GM) and others to the effect that no one intended to terminate any security interest with respect to the Term Loan and no one intended to authorize any filing that would have had such a consequence. Those statements about intent are likely true, but they are irrelevant because they establish nothing more than that JPMorgan and others made a mistake. To the extent that those witnesses' statements go beyond descriptions of intent and stretch to say that the filing of the Term Loan Termination Statement was not authorized, they go beyond the appropriate ambit of fact testimony and encroach upon the province of this Court, whose task it is to draw the appropriate legal conclusion from the facts before it. *See, e.g., Rivoli v. Gannett Co.*, 327 F.Supp.2d 233, 239 (W.D.N.Y. 2004) (courts are "free to ignore legal conclusions . . . cast in the form of factual allegations") (internal citations omitted).

In any event, JPMorgan's conclusion that the Termination Agreement was the sole source of Old GM's authority to file UCC termination statements is wrong. There is nothing inside or outside the Termination Agreement to indicate that it is the sole source of Old GM's or Mayer Brown's authority to file UCC-3 termination statements. The Termination Agreement contains no language to that effect. Moreover, the Termination Agreement does not have a merger clause or integration clause and, therefore, was subject to supplementation and amendment by subsequent written or oral agreement (*e.g.*, the escrow instructions signed by JPMorgan's counsel) and by the parties' course of conduct (*e.g.*, JPMorgan's receipt of the checklist and draft Term Loan Termination Statement without objection, and JPMorgan's counsel's expression of

approval for the closing documents, including the Term Loan Termination Statement).[4] JPMorgan's mistake in this case was in authorizing the filing of a termination statement that affected collateral beyond the "Properties," as that term was defined in the Participation Agreement. In doing so, JPMorgan made a mistake; however, Simpson Thacher and Mayer Brown did not act without JPMorgan's authority.

III. As A Matter Of Law, The Term Loan Termination Statement Is Effective, Even Though JPMorgan Did Not Intend To Terminate The Security Interest With Respect To The Term Loan

The legal principles that should guide resolution of these motions are well-established. First, a termination statement that is filed by mistake, like the Term Loan Termination Statement at issue in this case, is legally effective. *See generally In re Silvernail Mirror and Glass, Inc.*, 142 B.R. 987, 989 (Bankr. M.D. Fla. 1992) ("[t]he Termination Statement gave all indications to the world that [the creditor] was terminating its security interest in all its collateral. The filing of a Termination Statement is a method of making the record reflect the true state of affairs so that fewer inquiries will have to be made by persons who consult the public records"); *Crestar Bank v. Neal (In re Kitchin Equip. Co. of Va., Inc.)*, 960 F.2d 1242, 1245-47 (4th Cir. 1992) (holding that a bankruptcy trustee could avoid a lien under section 544(a) of the Bankruptcy Code because the effect of a termination statement "on a secured interest is dramatic and final," even though

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[4] A written contract may be modified by the parties' post-agreement course of conduct. *See, e.g., General Elec. Capital Commercial Automotive Fin. v. Spartan Motors*, 246 A.D.2d 41, 51, 675 N.Y.S.2d 626, 633 (2d Dep't 1998) ("[i]t is well established that the terms of a written security agreement may be amplified by 'other circumstances including course of dealing or usage of trade or course of performance'") (internal citations omitted); *Clark Oil Trading Co. v. J. Aron & Co.*, 172 Misc.2d 552, 557-58, 659 N.Y.S.2d 426, 429-30 (N.Y. Sup. Ct. N.Y. Cty. 1997) (parties' course of conduct demonstrated modification of contract term); *In re Estate of Prime*, 184 Misc.2d 796, 799-800, 710 N.Y.S.2d 810, 813 (N.Y. Surr. Ct. Erie Cty. 2000) (contract modification, whether oral or written, may be proved by circumstantial evidence such as the parties' conduct).

the box marked "termination" was checked in error); *In re Pac. Trencher & Equip., Inc*., 27 B.R. 167, 168 (B.A.P. 9th Cir. 1983), *aff'd*, 735 F.2d 362 (1984) (holding that "pursuant to clearly articulated authority," the creditor's "prior U.C.C. filings lost even marginal sufficiency upon the filing of a termination statement, albeit erroneous, and that in turn effected a lapse in perfection"); *Rock Hill Nat'l Bank v. York Chem. Indus., Inc.* (*In re York Chem. Indus., Inc.)*, 30 B.R. 583, 586 (Bankr. D.S.C. 1983) (creditor's "lien was unperfected as to the debtor in possession" because creditor had terminated its "financing statement – albeit unintentionally and inadvertently"). Second, if a security interest is unperfected prepetition due to the filing of a termination statement, the creditor's security interest will be trumped by the statutory lien of the trustee (or debtor-in-possession) upon the filing of the bankruptcy petition. *In re Kitchin Equip. Co.*, 960 F.2d at 1249. Taken together, these two uncontroversial propositions of law establish that the Term Loan Lenders' security interest in the Term Loan collateral was unperfected as of the Petition Date, and that their Lien is trumped by the statutory lien of the debtors-in-possession pursuant to section 544(a) of the Bankruptcy Code.[5]

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[5] JPMorgan's reliance upon *In re A.F. Evans*, No. 09-41727 (EDJ), 2009 WL 2821510 (Bankr. N.D. Cal. July 14, 2009) is misplaced. In *A.F. Evans*, after the secured lender transmitted approved UCC forms to an escrow agent for filing, the escrow agent mistakenly checked the termination box before filing the UCC termination statement. In ruling that the secured lender's perfected security interest was not terminated by the UCC filing, the Court relied upon the fact that the UCC form transmitted to the escrow agent did not have the termination box checked, and that the filed form thus differed from the form approved by the secured lender. *Id.* at *3. In *A.F. Evans*, in other words, the mistake was that of the escrow agent – not the secured lender. In this case, however, the Term Loan Termination Statement was filed in exactly the same form in which it had been transmitted to JPMorgan before it was filed. Thus, unlike *A.F. Evans*, this is not an "unauthorized modification" case, *id.* at *4, as the filed version of the Term Loan Termination Statement corresponds exactly to the draft version received by JPMorgan and its counsel before the filing. There were no surprise or unreviewed alterations or modifications to the Term Loan Termination Statement between the time that JPMorgan and its counsel received it for review and the time it was filed. Nevertheless, in a last ditch attempt to make the facts of this case appear similar to those of *A.F. Evans*, JPMorgan claims, without merit, that the Term Loan Termination Statement "differed on its face" from the draft circulated to JPMorgan and its counsel. JPMorgan Counter-Statement at Response No. 46. The only plausible basis for JPMorgan's assertion is that the filed copy of the Term Loan Termination Statement includes a file stamp showing that it was accepted and recorded by

JPMorgan attempts to distinguish the compelling authority on which the Committee relies by arguing that the facts underlying the above cases transpired before the 2001 revisions to Article 9 of the UCC that eliminated the requirement that termination statements be signed. This is not a valid distinction, and these cases would have been decided in the same way even after the revisions to Article 9. The purpose behind the deletion of the signature requirement was administrative – not substantive. The intent of the amendment was to "do away with the nonuniform, often idiosyncratic, requirements encountered by filers in certain filing offices around the country." Harry C. Sigman, *The Filing System Under Revised Article 9*, 73 AM. BANKR. L. J. 61, 68 (1999). Revised Article 9 still requires that filings be authorized in order to be effective. *Id*. "Essentially, there is no change in the substantive concept, but the deletion of the signature requirement" eliminates the inquiry as to whether a filing is signed. *Id*. at 70-71. Despite the elimination of the signature requirement, the UCC's filing regime remains a system of public notice. Paula J. Jacobi, *Section 9-518 Correction Statements: Protecting Lien Priority or Preferential Transfer?,* XXVIII Am. Bankr. Inst. J. No. 3: 38, 55, April, 2009 (public disclosure "is the key to the UCC filing system"); Amanda Royal, *Banks May Lose $51 Million in Heller Dispute,* The Recorder, January 6, 2009, http://www.law.com/jsp/article.jsp?id=1202427230393 ("[p]eople do rely on the public record. You either had an effective financing statement or you didn't").

People's Bank of Kentucky, Inc. v. U.S. Bank, N.A., (In re S.J. Cox Enterprises, Inc.), No. 07-50705, 2009 WL 939573, *3-*6 (Bankr. E.D. Ky. Mar. 4, 2009) is on point. That case

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the Delaware Secretary of State. This is yet another example of JPMorgan's attempt to create the appearance of a dispute when, in fact, none exists. As the case law previously discussed makes clear, such feigned disputes are not grounds for denying the Committee's summary judgment motion.

involved termination statements that were electronically filed by mistake in May, 2005, under the new UCC regime which does not require a signature on the termination statement. One secured lender, mistakenly and without authorization, terminated another bank's UCC financing statement. Following *Silvernail* and *Kitchin*, the court granted summary judgment, ruling that the termination statements could not be invalidated because "the filing of a termination statement cannot be considered a minor error." *Id*. at *6. The court further ruled that the secured lender, whose employee had mistakenly caused the filing, was "liable for the effect of the termination." *Id*. The same conclusion should be reached here. JPMorgan, as administrative agent for the Term Loan, was responsible through its actions (and inaction) for the mistaken filing of the Term Loan Termination Statement. There is no basis in law to nullify that filing.

As stated in JPMorgan's opposition brief, the Committee relies on "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 [Term Loan] Termination Statement," and "the Committee would have the security interest in the $1.5 billion Term Loan deemed lost solely based on the inclusion of the [Term Loan] Termination Statement in the stack of draft documents." JPMorgan Opposition Brief at 1. While the preceding analysis of the Committee's position ignores that the Term Loan Termination Statement was explicitly referenced in the checklists and escrow instructions, the inclusion of the Term Loan Termination Statement within the draft documents is enough by itself to lead to the Committee's conclusion, which is supported by the law, both before and after the 2001 revisions to Article 9. A termination statement filed with proper authorization is effective, regardless of whether it contains a mistake or is filed by mistake. Today, inasmuch as termination statements no longer require the secured party's signature, the determination of whether a particular termination

statement has been authorized by the secured party requires an examination of the facts and circumstances surrounding the filing. Despite JPMorgan's attempts to invent facts and create uncertainty about the authorization issue, in the case at bar, there is no real dispute that JPMorgan authorized the filing of the Term Loan Termination Statement. As a consequence, the Term Loan was not fully secured and should not have been paid in full.

Moreover, increased diligence on the part of secured creditors is mandated now that termination statements are no longer required to be signed by secured creditors. *See* Paula J. Jacobi, *Section 9-518 Correction Statements: Protecting Lien Priority or Preferential Transfer?,* XXVIII Am. Bankr. Inst. J. No. 3: 38, 55, April, 2009 ("[g]iven the increased ease with which records can now be recorded with secretaries of state, secured creditors would be well advised to do a UCC search of each of its borrowers on a periodic basis"); Susan Rosenthal & Alan Winick, *Detecting Signs and Taking Action When a Loan Default is Imminent,* N.Y.L.J. Aug. 13, 2009 at 2 (advising lenders to "[c]heck the UCC financing statements to see that you have maintained perfection of your security interest in your collateral"); *see also* Joshua Stein, *Troubled Loans: Overview, Options, and Strategy,* 564 PLI/Real Estate and Practice Course Handbook Series, 83, 94 (2009) (suggesting that lenders obtain an updated search for UCC filings to check for any "gaps or glitches" in their filings).[6]

In this case, JPMorgan had several opportunities to discover its mistake in time to pursue remedial efforts, and its unexplained failure to do so further demonstrates that the mistake at the

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[6] The assortment of blogs and other secondary materials relied on by JPMorgan in its opposition brief also demonstrate that, in the wake of the elimination of the signature requirement JPMorgan should have had controls in place to prevent exactly the mistake that occurred here. *See, e.g.*, First Corporate Solutions, *Tips for Tackling Fraudulently Filed Termination Statements*, UCC & Corporate Due Diligence (June 5, 2009) (suggesting monthly lien monitoring in order to uncover critical filings that may jeopardize priority).

heart of this case is JPMorgan's. First, the draft Term Loan Termination Statement (and each listing of it on the closing checklist) referenced November 30, 2006, the date following the closing date on the Term Loan Agreement. Plaintiff's Counter-Statement ¶ 50. In this way, it stood out from the other UCC termination statements identified in the Lease Payoff closing documents. Second, in March 2009, the Term Loan Agreement was amended because Old GM's financial situation was deteriorating. JPMorgan 7056-1 Statement ¶¶ 81-82. If routine UCC searches had been conducted at that time, as the secondary literature recommends, the mistake would have been discovered. Third, in May 2009, Morgan Lewis, on behalf of JPMorgan, conducted lien searches in connection with the Term Loan Agreement, but failed to conduct a state-wide search in Delaware until after the Petition Date. Plaintiff's Counter-Statement ¶ 91. A routine Delaware search would have brought the Term Loan Termination Statement to light before the Petition Date. Finally, on May 6, 2009, Mr. Duker asked JPMorgan's lien perfection group, which is located in Bangalore, to send him a report of all UCC filings in connection with the Term Loan Agreement. *Id*. The group in Bangalore responded with irrelevant information, and Mr. Duker did not follow up. *Id.* If Mr. Duker had received the results of the routine collateral search he had requested, he likely would have become aware of the mistaken filing with time to direct a corrective filing before the Petition Date. While such a corrective filing would not necessarily have rendered the Term Loan Termination Statement ineffective, it may have strengthened JPMorgan's position somewhat.[7]

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[7] It should be noted that, even the filing of a correction statement pre-petition, may not save a secured creditor whose security interest was terminated by mistake. In *Official Comm. of Unsec. Creditors v. Bank of America, N.A. (In re Heller Ehrman LLP)*, Ch. 11 Case No. 08-32514, Adv. No. 09-03071 (Bankr. N.D. Cal. Apr. 23, 2009), which remains sub judice, the question presented is whether the filing of a correction statement during the ninety days before commencement of a bankruptcy can preserve a creditor's security interest when a termination statement was filed erroneously.

Finally, in its opposition brief, JPMorgan misconstrues the Committee's position, arguing that the Committee disregards the issue of authority to file and that its "position would render every filed UCC-3 termination statement effective regardless of whether it was authorized." JPMorgan Opposition Brief at 14. According to JPMorgan, the Committee's supposed position "could lead to a substantial increase of fraudulently filed statements." *Id*. This argument is misguided. If the Court were to rule on summary judgment that the Term Loan Termination Statement is legally effective, this case would stand for the limited and uncontroversial proposition that, where a secured lender's counsel affirmatively approves of a UCC filing and with its client's knowledge executes escrow instructions that contemplate the UCC filing, then the filing has been authorized by the secured lender. This conclusion is precisely what the law requires because it is based upon undisputed facts indicating that the Term Loan Termination Statement was mistakenly authorized by JPMorgan. Any other conclusion would cause confusion and uncertainty in commercial transactions, undermining the clarity and precision required by the UCC. Moreover, adopting JPMorgan's position would permit secured lenders to disclaim the consequences of their UCC filings and avoid responsibility for their mistakes. Such an outcome would promote carelessness and willful ignorance on the part of secured creditors.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests entry of an order: (i) granting the Committee's motion for partial summary judgment; (ii) ruling that the Lien was unperfected as of the Petition Date and, thus, avoidable under 11 U.S.C. § 544(a); and (iii) providing such other and further relief as the Court deems just and proper.

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