UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case Nos. 09-50026(REG); Adv. 09-00504(REG)

- -x

In the Matter of:

MOTORS LIQUIDATION COMPANY, et al.

f/k/a General Motors Corporation, et al.,

Debtors.

- -x

OFFICIAL COMMITTEE OF UNSECURED CREDITORS

OF MOTORS LIQUIDATION COMPANY

f/k/a General Motors Corporation, et al.,

Plaintiff,

vs.

JPMORGAN CHASE BANK, N.A., et al.,

- -x

United States Bankruptcy Court

One Bowling Green

New York, New York

December 3, 2010

9:52 AM

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

HEARING re Motion for Summary Judgment on behalf of Official Committee of Unsecured Creditors of General Motors Corporation

HEARING re Motion for Summary Judgment on behalf of JPMorgan Chase Bank, N.A.

Transcribed by: Linda Ferrara

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P R O C E E D I N G S

THE COURT: Good morning. Have seats, please. We're here on Motors Liquidation, cross-motions for summary judgment and the creditors committee's adversary against JPMorgan Chase. I want to get appearances and then I want everybody to sit down. I have some preliminary comments.

MR. FISHER: Good morning, Your Honor. Eric Fisher from Butzel Long for the creditors committee.

THE COURT: Right, Mr. Fisher. You have Mr. Seidel with you.

MR. SEIDEL: Yes, Your Honor.

THE COURT: Okay.

MR. CALLAGY: Your Honor, John Callagy from Kelley Drye for JPMorgan.

THE COURT: Right, Mr. Callagy.

MR. PANARELLA: Nicholas Panarella from Kelley Drye for JPMorgan.

THE COURT: Fine.

MR. TODER: Richard Toder, Morgan Lewis also for JPMorgan.

THE COURT: Right, Mr. Toder.

MR. GOTTFRIED: Andrew Gottfried, Morgan Lewis, Your Honor.

THE COURT: Okay, Mr. Gottfried.

All right, folks, most of the time I start arguments

of this character by telling you to make your presentations as you see fit but then simply by the time that I'm done to address the stated questions and concerns. Today I want you to be a little more structured.

First, while I won't put a sock in anybody's mouth, Mr. Callagy, I discourage you from wasting your time and mine on arguments premised on constructive trust. Mr. Fisher and Seidel, I'd suggest that you do likewise on arguments based on the law prior to the amendments in the 2000 and 2001 time period or that construed Article 9 before the addition of the authorization requirement that's found in 9-509(d)(1).

Let me now turn from what I don't want you to discuss to what I do want you to discuss. Folks, I assume there's agreement that we look in the first instance to the Delaware UCC but very soon thereafter, we're going to be at a point where we're construing 9-509(d) unless you think I'm off base in doing that, and we'll be looking at agency law which can sometimes be statutory, is more commonly common law and I want to get the views of both sides as to whether you feel that a particular state's agency law should be applied. And also whether it matters, especially whether it matters considering that we're ultimately construing the UCC that's in a separate provision. In Chapter 1 of the UCC, 1-1022(c) talks about the need for uniformed construction or at least the desirability of uniformed construction.

It seemed to me upon review of your respective briefs that both sides looked principally to whatever cases you thought were most closely on point and if you'll forgive me for saying this, what you guys thought would support your respective positions. Given the uniqueness of the issues, the fact that we're talking about a uniformed statute, my inclination would be to get the greatest hits, the most significant authority from where ever in the country that might be found, but if anybody believes that I should follow a particular state's jurisprudence I need you to tell me that.

Next, those of you who have read the stuff that I've written know that on matters of statutory construction, I start with textual analysis. My tentative, subject to your respective rights to be heard, that this case is overwhelming about 9-509(d)(1) and how I should construe it and apply it, if anybody feels that I should be going elsewhere, I need you to tell me and I need you to at least touch the basis on textual analysis even though I think we're going to be moving off textual analysis into a lot of common law very quickly.

I also want to confirm my understanding that the word authorize or authorization is used in 9-509(d)(1) isn't defined in the UCC, either in 9-102 where you'd normally look for the definitions or otherwise.

I think we're going to be talking mainly about case law before we get into the facts. There are three cases that I

want you to focus on in particular; S.J. Cox, AF Evans and Roswell Capital Partners, the latter being the one by Judge Cote that was submitted by Mr. Fisher, I think in the last day or so. Obviously they cut in different directions.

I also want you all to discuss whether or not, and I'm going to say it evenhandedly, you guys believe that some of them may have reached the right result but for the wrong reasons or that in reaching their respective results, they may have made statements that were erroneous, incomplete or overly general.

I telegraphed my thinking on Kitchin and similar cases before but Mr. Fisher, Mr. Seidel, when it's your turn I'd like you tell me whether you think I really should care about pre-2001 cases unless they talk about principles of agency as contrasted to applying the UCC as it existed before the UCC was amended.

Both sides, how important is it that 9-509(d) as it's now drafted would often if not usually require some due diligence but a subsequent secured lender to verify termination?

While this particular case is hard, the extremes are easy. If we had an evil debtor who had simply filed a false termination statement without any authority whatever from what I'll call secured lender number one, I think many of us, if not all of us would agree that it wouldn't be effective to

prejudice secured lender number one.

So if you got a secured lender number two who is then going to make a loan and cares about having a valid collateral package, I would think that this statutory scheme inevitably requires lender number two to do some due diligence to protect itself against the evil debtor. And while evil debtors aren't that common, incompetent debtors are much more common. I see them in this court all the time. So I need your help in that regard.

Is the need for due diligence or some kind of estoppel certificate, kind of like you have in real estate purchaser financing transactions where you've got commercial tenants and you want to get estoppel certificates from those tenants because you care about the stream of rent payments that may support the loan, is that something that goes to statutory construction? And, of course, this was something that Judge Cote took some interest in and she seemingly thought it should or is it just the consequence of the statutory scheme?

More broadly and this is where I want you guys to spend the most time, what do the cases tell us about what is required for there to be an appropriate authorization? In particular, what case law standards do I have to work with in deciding whether or not something's been authorized or not?

Is there any case that articulates standards, underlying standards for a judicial determination of when

something's authorized or not or is this all kind of like potters do with pornography, where I'm supposed to know it when I see it?

And is it fair or unfair for me to think that when we look at these cases, they've simply talked about their various facts and then come to a conclusion on authorization without particularly expanding upon the standards upon which they came to those views?

Then I want you to move beyond the case law to what a guy in my position should do or what some might regard as a matter of almost, for lack of a better word, philosophy, does the required authorization under 9-509(d) require intent to cause the result here causing the end of the UCC-1 for the synthetic lease on the one hand or the term loan on the other? Or does it just require an intent to authorize an action, then has the result, underlying result whether intended or not, to authorize the termination of a UCC-1 with a specified number whose significance wouldn't be apparent until you matched up the number with the underlying UCC-1 that describes the collateral in question.

So are we talking about a traditional decision, whether or not to authorize something or are we looking for the application of what is almost like I knew or should have known standard with the emphasis of course not on the new part of that but on the should have known part of that.

Most of your briefs understandably, if I were in your spot I'd do the exact same thing, talk about your respective factual arguments, talking about the facts that support your respective positions. I want you to particular hone in on facts related to the synthetic lease termination agreement and the executed escrow instructions which are important facts, in one case support -- urged by one side and the other case urged by the other and how I should match up those two against each other in making the agency authorization determination which subject to your rights to be heard is where I think the action is on this motion.

Then it seemed to me that when I read your briefs that there were two separate actual or arguable agency relationships here. One between Chase and Simpson Thacher and another seemingly different one between Chase and Simpson Thacher on the one hand and GM or Mayer Brown on the other. When you're talking about agency relationships, I'd like you to be crisp in talking about which agency relationship you're talking about.

It would seem to me that, again subject to your rights to be heard, that the more significant agency relationship would be the one between Simpson Thacher on the one hand and GM or Mayer Brown on the other.

Finally, and I know I've been speaking at some length and I've given you a long list of things to address, each of

you in your briefs was largely arguing the facts. In some respects and ways that would be kind of like what I would expect more in a summation after a trial. Part of your arguments are on the law, of course, but in the most important cases were asking me to make findings which are probably mixed questions of fact and law which are inferences to be drawn on the largely or wholly undisputed facts.

And I want to ask both sides directly and to answer the question directly before you sit down, do you agree that the facts are so undisputed that based on those facts I can and should give summary judgment to one side or the other or if I don't subscribe to your views in full, do you then want a trial? Does either of you wish to test any witness' credibility? Or to probe his -- I'm not sure if there are any women -- her state of mind?

There are cases in the Second Circuit that tell guys like me to be wary of using summary judgment when state of mind is an issue but seemingly, both sides agreed in earlier proceedings that here state of mind was sufficiently agreed upon, that both sides thought that cross-motions for summary judgment would nevertheless be constructive.

After you've seen the full exchange of briefing and had a lot of chance to think about it, I want to confirm that that's still your view or whether you want to have the opportunity of a trial as a fallback position, if I'm not in a

position to fully agree with either side, so that ultimately I know whether once I form my views as to what I can, I should simply be entering judgment in favor of one side or the other or whether I should be teeing it up for a trial if I think it's somewhere in the gray area and between.

With that said, Mr. Fisher, Mr. Seidel, you're plaintiff and with these cross-motions I think I should probably start with you guys. So you know when you can plan your lives, I'm going to give both sides a chance, not just to make opening remarks but to reply and sur-reply. Obviously, the latter two have to be limited to new stuff that comes in based on what was said in the opening round.

Mr. Fisher?

MR. FISHER: Good morning, Your Honor. Eric Fisher from the law firm of Butzel Long for the creditors committee.

I know Your Honor is primarily interested, as you indicated, in the case law and in the textual analysis of the relevant UCC provision. I wanted to begin, Your Honor, by simply sketching out what I think the most material undisputed facts are because I think that those -- and then I will quickly proceed to the legal analysis but I think that those will help frame how it is that the creditors committee sees the legal analysis here.

We certainly agree that this is a UCC 9-509(d) case. It's a case about a UCC termination statement that was filed on

October 30, 2008 and the key question in this case is whether that filing was authorized by the secured party of record by JPMorgan.

At the outset of this case, all that was known to the creditors committee about the circumstances of the filing was contained in an affidavit that was provided by JPMorgan and there was an affidavit signed by a partner at Mayer Brown. And it said that "Unbeknownst to that partner, an unnamed paralegal had caused this filing." That's all we knew. We know a lot more now. The facts are simple and they're not disputed.

We know that JPMorgan received a closing checklist in connection with a different transaction, the Synthetic Lease transaction, and that that closing checklist listed the termination statement that's at issue in this case as a document that was going to be part of the Synthetic Lease closing. JPMorgan received that document on two different occasions; once from GM and another time from its counsel, from Simpson Thacher.

We also know that Simpson Thacher as counsel to JPMorgan received a copy of that same closing checklist, listing the termination statement as a document that was going to be part of the closing of the Synthetic Lease transaction. We also know that Simpson Thacher as counsel to JPMorgan received a draft of the termination statement that is at issue in this case before it was filed. We know that Simpson Thacher

commented on that draft to Mayer Brown and the comment was, "Nice job on the documents." As you would expect, Simpson Thacher took that draft termination statement and forwarded it to its client, JPMorgan. This was all in advance of the October 30, 2008 filing of the UCC.

And then finally, the last fact that I would draw attention to is that Simpson Thacher executed escrow instructions. Those escrow instructions listed UCCs that were going to be released to the debtor, to GM, upon the closing of the Synthetic Lease Transaction and listed in those escrow instructions was the very termination statement that is at issue in this case and of course those escrow instructions are fully consistent with all of the e-mail traffic that preceded the escrow instructions, transmitting the draft termination statement, transmitting the closing checklist and so on.

I think that those are the facts that drive the legal analysis in this case. I don't know that there are any other facts that are pertinent. And I want to move quickly to the legal analysis because I think that those facts make clear that this was an authorized filing, a term that we're going to need to define by wending our way through the cases. And because it was an authorized filing, even if mistaken the law is crystal clear that it is legally effective. I don't think that there's any dispute between the parties that the state of the law is that mistaken UCC filings are legally effective.

I do think, and I'll speak more specifically about the Roswell case, that the Roswell case may very well and Cox -- in addition Cox, which Your Honor mentioned, those two cases together may represent an advancement in UCC law that is specifically a post-2001 amendment phenomenon saying that even unauthorized termination statements are legally effective. I think those cases clearly say that and I think that that proposition was intended by the courts that so-held. And --

THE COURT: Pause please.

MR. FISHER: Yes.

THE COURT: You know I think the world of Judge Cote and without question, she was relying on the earlier Kentucky Cox case, but when you look at footnote 15 of her decision, she says at the end of that footnote, she says, "This argument need not be considered given that even if the UCC-3 termination statement was unauthorized. It nonetheless extinguished any perfected security interest JMB held in the collateral after the conversion."

I think she got the right result for the first ground that she talked about a page or two before that but isn't that statement flatly contrary to 9-509(d)(1) which says that it requires an authorization?

MR. FISHER: I don't believe so, Your Honor. I believe certainly 9-509(d)termination statement be authorized by the secured party of record. But it doesn't say what the

consequence is if an unauthorized termination statement is filed. And I think that it's important to note that in 2001 when the signing requirement for UCC termination statements was removed, another aspect of that amendment was the addition of Section 9-518 which provides for the filing of correction statements. Before the 2001 amendments, there was no way for a secured creditor to correct a mistake in filing short of going to court and seeking a judicial declaration. That filing ought to be corrected and that they still had a perfected security interest.

With the addition of 9-518, secured creditors now have a mechanism by which to correct the public notice system, the UCC system and so even more strongly than the pre-2001 code, it puts the onus on the secured creditor to police its own UCC filings because ultimately, let's say there is a rogue debtor or an incompetent debtor, it is the secured creditor looking out for that secured creditor's own collateral that is in the best position to know whether or not a filing was mistaken.

Now the creditor looked -- seeks to determine whether there are any mistake in filings, articles are recommending that the secured creditors do this on a fairly regular basis. Certainly when a company is in distress, you would expect a secured creditor to do a lien search and if there are any mistakes in the public record, there's an opportunity under

9-518 to correct that. And I think it's because of 9-518 that in the Roswell case Judge Cote is very explicit about where the burden lies in terms of detecting mistakes. The burden is not on the new creditor, that second creditor that comes along and wants to make a loan, it's on the creditor that has an interest in the perfection of its own security interest and she writes, this is at page 7 in the Westlaw version of the decision, "The UCC therefore places the burden of monitoring for potentially erroneous UCC-3 filings on existing creditors who are aware of the true state of affairs as to their security interests, rather than potential creditors who will not be in a position to know whether a termination statement was authorized or not."

And I think here, JPMorgan was the secured creditor of record. It was in a position to know whether it had a perfected security interest and this brings us to other facts that I think are less material to the case but that I think nonetheless shed light. For example, this term loan was amended in March 2009 before the GM bankruptcy was filed. Certainly that was an occasion when JPMorgan could have learned about the October 2008 termination statement.

THE COURT: When was that, please Mr. Fisher?

MR. FISHER: That was in March 2009.

THE COURT: About three months before the filing?

MR. FISHER: Correct. But then, Your Honor, in May 2009, we know from the deposition of the managing director at

JPMorgan who was responsible for both credits, for the term loan and also for the synthetic lease, we know that he asked internally at JPMorgan that a lien search be conducted with regard to the term loan. We also know that a lien search was conducted but not with respect to the correct collateral and so he got a result that wasn't meaningful and he never followed-up.

THE COURT: Pause please. I saw some reference in the papers to Bangalore; was that Bangalore, India?

MR. FISHER: Yes, it was. Apparently -- I learned this at the deposition -- JPMorgan outsources or has an office in India that is responsible for policing their liens and for providing information to other JPMorgan offices about the secured status of loans. And so that request went from New York to JPMorgan in India. A result came back that was just off-point. But it was an occasion certainly when JPMorgan could have learned that the termination statement had been filed and could have filed a correction statement under 9-518.

Similarly, you know, certainly JPMorgan knew that General Motors was in significant distress and that would be a trigger for JPMorgan to make sure that it had a perfected security interest in advance of the bankruptcy filing. Now we don't have any cases that say exactly what the outcome would be if we had a different set of facts here and if JPMorgan had learned of the termination statement and filed a correction

under 9-518 before the bankruptcy petition was filed. But there are articles that are being written about exactly this topic and some of them certainly suggest that that would have been enough to maintain the perfection of JPMorgan's security interest. It's just not what happened here.

But I think that what the Roswell case stands for is that that burden rests with the existing secured creditor and that's why I think that Judge Cote knew what she was doing when she concluded somewhat at odds with perhaps what you see as a trend in the pre-2001 cases but when she concluded that an unauthorized termination statement is nonetheless effective. I think that if that case had been decided before the briefing was concluded in this case, our briefing may have been somewhat different. I don't think Your Honor needs to go there because I think that the facts here are crystal clear that this was an authorized filing within the meaning of 9-509(d) and so I don't think Your Honor needs to go as far as Judge Cote did in saying that even an unauthorized filing would be legally effective. But I believe that that's the basis for that holding, Your Honor.

THE COURT: Continue, please.

MR. FISHER: I know Your Honor said that you don't believe that the pre-2001 -- that the cases that dealt with the UCC before 2001 are all that instructive. I would submit that before 2001, if a secured creditor signed a termination

statement and a termination statement got filed, I suppose the only way for a secured creditor to say that was a mistake and ought to be ineffective is to say that the signature was a forgery. And you don't have any cases like that.

But I think that the facts here make this a case that is quite similar to one in which JPMorgan had been handed a stack of UCCs to sign, signed all of them. All of them were correct except for one. Those UCCs got filed. I don't think that this case is any different because the specific document was provided in draft form. Secured lender's counsel said "Looks good to me." Secured lender's counsel signed escrow instructions that the clear implication of which was go ahead and file these UCCs.

So I don't think even though yes, there's a factual distinction to be made between a termination statement that's signed and one that's not, I don't think that that's all that meaningful a distinction in this case where you have such clear indications that this a document that if one imagines this were a pre-2001 case, Mr. Duker would have put his signature on that stack because, in effect, in this electronic age, that's what he did when he received those documents and received notice in numerous different ways that this document was going to be filed and didn't object.

So I do think that the pre-2001 cases are relevant and I think that they're all consistent. They all follow, of

course, the Kitchin case, (4th Cir. 1992) in saying that a mistaken termination statement is legally effective and all of the cases in the Bankruptcy context say that where a secured creditor has an unperfected security interest because a mistaken termination statement has been filed, the trustee's lien trumps that and the trustee gets the lien in that -- in the property where there's an unperfected security interest.

So I think that those cases are still good law. That's In Re: Hampton, York Chemical, Silver Nail, Pacific Trencher out of Ninth Circuit.

THE COURT: Well of course they're still good law for what they deal with, but the issue is the extent to which they should be carried over to the new authorization requirement that was implemented by 9-509(d)(1).

MR. FISHER: Right. So let me speak more particularly about the authorization requirement. To answer one of Your Honor's questions yes, you are correct, authorization is not a term that is defined in the UCC. But as a matter of textual interpretation, looking at 9-509(d), the filing of a termination statement requires authorization from the secured creditor, any kind of authorization. And the reason I say any kind of authorization is because in an earlier -- in Section A of that same provision when it talks about the filing of financing statements by the debtor, the UCC requires an authenticated record. And the omission of that from

Subsection (d) is notable. And I think the inference to be drawn is that an authenticated record is not required to evidence a secured party's authorization of the filing of a termination statement.

But I would say even there, even -- we have an authenticated record here. An authenticated record is defined in 9-102 of the UCC and it's a document that's signed. We have signed escrow instructions. I think that signed escrow instructions would satisfy almost any standard that I can think of for evidencing authorization.

I think, Your Honor, that JPMorgan's argument really blurs the line between authorization cases and mistake cases because when you consider the fact that we have signed escrow instructions that pertain to the Synthetic Lease pay-off, and that no one has ever disputed that Simpson Thacher was authorized to sign the escrow instructions in connection with the Synthetic Lease pay-off, they've never said that Simpson Thacher couldn't do that. Of course they didn't because most of the UCC terminations that were filed consistent with those escrow instructions were -- are not contested by JPMorgan.

What JPMorgan's argument really boils down to is that eight digits in those escrow instructions were unauthorized. The eight digits that identified the term loan financing statement; 64168084. And they're saying that everything was authorized except for those eight digits. And that's where

they conflate mistaken authorization. That's exactly what makes this a mistake case. Those eight digits made their way into the escrow instructions by mistake. We know it was a mistake. No one intended to terminate any collateral that related to the term loan. But because that mistake is in the escrow instructions, it doesn't mean that the filing was unauthorized and this comes to another question that Your Honor asked; what needs to be authorized, the consequences or just the act of filing the UCC. And I think the answer is clearly that it's just the act of filing the UCC termination statement. And the reason I say that is because all of the cases to address the UCC mistake situation say expressly that the parties in those cases did not intend the consequences of the filing.

Just to provide two examples, in the Silver Nail case, Middle District of Florida 1992, the Court notes "Even though the termination statement did not reflect the parties' true intent," it's legally effective. Similarly in York Chemical, all the parties agreed -- "All parties agreed that on September 28, 1981, no party to this action intended that the August 13, 1980 financing statement be terminated."

So in all of those cases where courts have found mistaken termination statements to be legally effective, it's clear as it in this case that no one intended the consequences of that filing. That's just the pertinent inquiry. I think

that in advancing their arguments, JPMorgan is always trying to frame the issue and they've submitted affidavits that say we weren't authorized to terminate any collateral that related to the term loan. That's not the relevant inquiry. The relevant inquiry was Mayer brown authorized on October 30, 2008 to direct the filing of that UCC termination statement. That's the relevant inquiry and the answer to that is clearly this; you need look no further than the escrow instructions, although if Your Honor wanted to look further, there are other facts to support that finding of authorization.

Your Honor also expressed particular interest in the A.F. Evans case which is a case that JPMorgan relies on heavily because they put it forward as a case decided under the post-2001 amendments where a UCC filing was found to be ineffective. And I think that that case is very easily distinguished from the facts of our case and that's because the case is an unauthorized modification case. It's a case in which the secured lender transmitted a UCC termination statement to an escrow agent and the termination box was not checked. The escrow agent, or maybe someone else, the Court isn't even entirely clear as to who put the check in the box, but someone other than the secured creditor checked the termination box and then it got filed.

Well that's a case in which I think the secured creditor had a pretty good argument, that it didn't authorize

the filing. That's not this case because the term loan termination statement at issue in this case was filed in exactly the same form in which it was provided to Simpson Thacher and to JPMorgan.

The A.F. Evans case is also distinguishable because the filing there was ambiguous. I think that the escrow agent that made the filing sort of made a mess of the form because the secured creditor had checked a partial termination box and then the escrow agent checked the complete termination box and the Court said well, any creditor coming across that UCC would see that there was some ambiguity and couldn't conclude with confidence that this was a complete termination.

THE COURT: Well I totally agree with you on that, Mr. Fisher, but A.F. Evans at least seemingly stands for the proposition that you can go behind the apparent termination to scrutinize the nature of the authority that was given to the incompetent escrow agent as part of that. Would you agree that it at least goes that far?

MR. FISHER: I do agree, Your Honor, and I do think to that extent it is intention with Roswell because the inquiry as to authorization is relevant to the A.F. Evans Judge but Judge Cote says expressly it's not even relevant to her. That's what she says in the footnote that Your Honor pointed to. She's not even interested in the argument that this was unauthorized.

In A.F. Evans, the Court is interested in whether or not this is authorized and again, if that's the inquiry that this court decides to make, the facts are distinguishable and the evidence of authorization here is overwhelming. And although the legal conclusion of authorization is of course in dispute, the facts that should give rise to that inference, I think are not reasonably in dispute. No one disputes that those are validly executed escrow instructions. We're arguing about six digits -- eight digits, I'm sorry, Your Honor, in those escrow instructions.

Your Honor also said and I agree, that a lot of the play in this case is between the Synthetic Lease termination statement agreement which JPMorgan argues is the sole source of authority for any filings that GM made in connection with the Synthetic Lease and the escrow instructions which I've been speaking about at some length.

I don't think that the argument that the Synthetic Lease termination agreement is the sole source of authority is a correct one. Undoubtedly, it is a source of authority for Mayer Brown to have filed the termination statements that it filed in connection with the collateral that pertained to the Synthetic Lease. There is nothing in that document that says it's the sole source of authority. There isn't even anything in that document -- there's no merger clause, there's no written amendment provision. There's nothing in that document

that says it cannot be superseded or supplemented in any way.

And here, it's supplemented by fully executed escrow instructions. I think it's also telling, there was the affidavit from the Mayer Brown partner that I made reference to at the very beginning. The version of -- the executed version of that affidavit that was provided to us, and this affidavit, Your Honor, the final version is found at Exhibit G in my declaration.

THE COURT: This is Gordon we're talking about?

MR. FISHER: Yes. So the final paragraph in the executed version says, "GM was not authorized by the termination agreement to termination any financing statement related to the term loan agreement." I think that sentence is tautological. No one can argue with that. The termination agreement definitely doesn't say anything about filing termination statements that relate to collateral other than the Synthetic Lease.

But I think it's interesting and telling that an earlier version of that same affidavit said, the last sentence said, "Accordingly, Mayer Brown was not authorized to terminate any financing statement related to the term loan agreement."

In other words, the earlier version said Mayer Brown had no authorization to terminate any financing statement related to the term loan and Mr. Gordon narrowed that and said Mayer Brown had no authorization under the termination

agreement. There could be other sources of authority. Here there clearly are. There's the course of conduct. There are the e-mail communications. There's the closing checklist. There's the draft term loan termination statement and there's the escrow agreement.

So I think in terms of how the escrow instructions versus the termination agreement, how that stacks up, I think that that can be harmonized easily. The termination agreement, it was the source of authority for Mayer Brown to file UCCs that related to the Synthetic Lease collateral. The escrow instructions also related to that but mistakenly provided authorization to file another UCC that pertained to a different loan. It was a mistake but it's legally effective because it was authorized.

In terms of the law of agency that governs here and I think it's really JPMorgan that makes this into an agency case, I don't think this is a difficult agency case, again because of the escrow instructions. I mean this is a situation where the secured lender's counsel authorized the release of a UCC termination statement to the borrower for filing. I think that JPMorgan quibbles as to whether or not it was released for filing or just released because they say that the words "for filing" are not in the escrow instructions. I don't think that that's a very serious argument because all of the other UCCs that were released were released for filing, were filed and are

not in dispute. It's only this one that's in dispute where they say that filing was not authorized.

So I think that this is a simple -- to the extent that it is an agency case at all, it's a simple express, actual authority case. The escrow instructions said we're going to release this termination statement. That's express actual authority. The lawyer at Simpson Thacher said about the draft term loan termination statement, looks good to me. That's actual authority. And I think that the inquiry can stop there.

The question is was Mayer Brown authorized to file what it filed? The answer is, look to the escrow instructions, look to the course of conduct, look to the e-mails. I don't think that this is a -- that we need to get to implied authority, apparent authority, ratification. As we argued in our briefs, I think we would win on any of those theories of authority but I just think the most natural fit is express, actual authority.

THE COURT: Pause please, Mr. Fisher. I don't know if they still teach this in cases in law school and I don't know if this is a fair analogy or not, but I remember a case from my first year in law school, forty-three years ago, it was called The Peerless case. And people wanted to ship some stuff on The Peerless and it turned out that there were actually two ships named The Peerless and if I recall correctly, that was one of the cases they used for mutual mistake, not

authorization, not agency, of course, but mutual mistake and said that contract could be formed by reason of that mutual mistake.

Here the reference is to numbers. I think that we wouldn't be here. You would have already taken the money and distributed it to your creditors if the escrow instructions had referred to term loan agreements in terms of the termination.

But can there be the requisite knowledge of authorization when people are on the seemingly mutual erroneous understanding that the eight digits that you describe which is probably as good a neutral way of describing that situation as one might come up with, don't relate to the term loan agreement -- excuse me, don't relate to the Synthetic Lease. They refer instead to the term loan agreement.

MR. FISHER: Your Honor, that question is addressed directly in Kitchin where the Court says that mutual mistake has no applicability in those kinds of -- in these kinds of cases. And for that reason, I don't even think JPMorgan is arguing that this is a mutual mistake case. I'm just quickly trying to find the pertinent language in Kitchin. The Court rejects a mutual mistake-type argument and says "In this case, the mistake was made in the context of a system designed to give notice to third-parties who by definition could not be party to the mistake. In addition, the mutuality of the mistake, if any, has been destroyed by the intervening Chapter

7 petition, here a Chapter 11 petition which gave the trustee the avoiding powers of a hypothetical lien creditor without knowledge of agreements between the parties," citing to 544(a). "Under the terms of the statute, the trustee cannot be considered a party to the mistake nor need he prove prejudice. In the cases dealing with inadvertently filed termination statements that were contested by a trustee in bankruptcy or a debtor-in-possession, courts have denied equitable relief to the improvident creditors."

And so that's a court specifically addressing the availability of a mutual mistake theory in a context such as this and saying it doesn't apply.

I think because the Court also asked what law should apply to the question of agency, and I think in our briefs we both agree that it's Delaware UCC law and the New York Law of Agency, but I agree with Your Honor; I don't think that there'll be any material difference among the state laws, certainly not if this is an actual -- an express, actual authority case and so it's best to look for those cases that are most on point. And we've tried to do that in our briefs. And to find authorization cases that are as close as possible to the facts of this case.

I think we continue to believe, Your Honor, that because the case turns on so few facts that are material and because those facts are not in dispute, and because this is not

supposed to be an inquiry into people's state of mind, just as in those other cases that go our way, no party here intended to terminate the collateral that related to the term loan. We know that. Intent is not relevant. The only question that's relevant is whether the act of making this filing was authorized and I think that the evidence, the undisputed evidence that it was is compelling and that's why the creditors committee believes that it is entitled to summary judgment in this case.

THE COURT: Okay. Thank you. Mr. Callagy?

MR. CALLAGY: Thank you, Your Honor. John Callagy from Kelley Drye for JPMorgan.

First of all, Your Honor, in connection with the issue of statutory construction, Your Honor mentioned 509. I think that 510 is also a critical component of the discussion because counsel for the creditors committee keeps on assuming that this filing was effective. 510(a) says "A filed record is effective only to the extent that it was filed by a person that may file it under Section 9-509." 9-509(d) of course says, "A person may file an amendment in this case if the secured party of record authorizes the filing."

So to answer Your Honor's question with respect to statutory construction, the filing if it's not authorized is not even effective. Now the question is when the UCC was revised in 2001, having taken away the requirement of a

signature and leaving the world open to the possibility that there could be errant filings such as in the case of -- the fraudulent case or the negligent case and so forth, the UCC regime added certain things and what they added was they added the need for further inquiry. And there's this question, and I'll get to the Roswell case in a second, but there's this issue of whether further inquiry only extended to the point of UCC-1s versus amendments or UCC-3S. The definitional Section of 102 of the UCC makes it quite clear that the -- further that a UCC-3 is a financing statement as defined in the UCC and therefore the duty of further inquiry extends to a searcher's responsibility with respect to what the obligation is.

Now the Roswell case --

THE COURT: Can you pause please, Mr. Callagy?

MR. CALLAGY: Yes, Your Honor.

THE COURT: You cited the definitional provisions. Was that the Article 9 definitional provisions or the --

MR. CALLAGY: Article 9 definitional; yes. 102, I think it is.

THE COURT: Give me a sec, please.

(Pause.)

THE COURT: And like a lot of definitionals it goes on. Which was the particular word, financing statement?

MR. CALLAGY: Financing statement.

THE COURT: Sub 39, I guess. I see it now. All

right.

MR. CALLAGY: It means a record or record composed of an initial financing statement and any filed record relating to the initial financing statement.

THE COURT: I'm with you now.

MR. CALLAGY: The UCC-3 here related to the initial financing statement. So, turning to Judge Cote's decision, as Your Honor asked us to do, I believe in direct response to Your Honor's question, I believe that Judge -- the result in Judge Cote's case is correct. JMB who was the belated creditor who comes in claiming they had some kind of a secured right, JMB had loaned some money to the party with some kind of a convertible feature that allowed them to turn that into equity. If the stock of the company fell below two dollars a share, they could put it back.

So the turned the loan into equity in the company and UCC-3 was filed. The stock fell below two dollars a share. They put the stock back to the company and in return got their debt back, got their obligation back but they did not, therefore, reinstate any kind of a lien with respect to collateral. You don't need to go too far into the law -- into the UCC-9 to make that determination.

I think the problem and again, we respect Judge Cote, as well, the problem is that gratuitously we believe she went on with having determined that the UCC-3 was not -- was

effective. She went on then to discuss the question of authority and sort of the regime of dealing with the defendant's argument with respect to the new regime under the UCC-1. And she denies the fact that -- on the one hand she cites the section of the statute that we've just been talking about 509 and 510, but on the other hand she says that regardless of authority, I think it's on the same page as the decision, regardless of the issue of authority, the UCC-3 was effective in that case. And that's again -- we're not disputing the result there but the analysis is just incorrect.

She also lays upon the debtor -- the creditor rather, the obligation to monitor filings. Well the comments to the UCC 509 and 510 specifically alleviate the obligation of a debtor or a creditor to monitor filings. So that's another imperfection in the case.

The net result of Judge Cote's gratuitous remarks with respect to the filing issue is that if a party -- if a UCC-3 is filed against a party, why would there be no -- there would be no need for that party to monitor the filings because it's a gotcha situation. You're out of luck. Your only remedy is to then go sue the person who filed the incorrect UCC.

THE COURT: Pause please, Mr. Callagy. Would you say that again slower? I missed the lead-in to that.

MR. CALLAGY: Well on the one hand she does cite the statute which talks about authority but then I believe the

language in the same page, she says that whether or not there's authority, it doesn't matter and she admonishes the creditor to monitor the state of filings with respect to their security interests.

THE COURT: Yes, I was with you on that part. It was what you said next where I lost you.

MR. CALLAGY: Well if that -- taken to its logical conclusion, Your Honor, why would a creditor -- if it's a gotcha situation and if the filing is on the books, what would be the point of monitoring the situation to see whether there's an errant filing or not? According to her, according to that opinion, the mere fact of filing whether authorized or not, creates a legal status which you can't do anything about except sue the person who did the unauthorized filing.

THE COURT: Well now stop there for a second because your opponent, Mr. Fisher contends in substance if I heard him right, not so much in his brief but in oral argument, that if as part of that monitoring process you find that there was you, as the secured creditor, what I'll call secured creditor number one, find that there was an unauthorized termination statement, and I think he even puts some meat on the bones to say that if your guy in Bangalore had done his job, then you could put in a correction statement under authority the UCC gives you. Do you want to comment on his position in that regard?

MR. CALLAGY: Yes, I think the UCC -- the present

regime and the comments make it quite clear that you do not have an obligation to file a correction statement because this never was effected to begin with. Under Section 510, the filing of that statement never became effective. So there is no burden or to monitor, there's no burden to make a correction statement.

And by the way, Your Honor, with respect to the Bangalore situation, my colleague, Mr. Fisher, slightly overstated the role of that. That is a receptacle administrative group. It receives filings made by, for example, UCC-1. To the extent somebody around the world sends it to Bangalore, it is received in Bangalore. The reality is during discovery in this case, as a result of the fact that it turned out that there was some inquiry with respect to Bangalore, we asked -- we tried to find out whether in fact there was the UCC-3 at issue here, whether that was ever filed there and of course it wasn't, otherwise we would have produced it to counsel. So I think the Bangalore issue is a bit of a red herring.

Now on the one hand, Your Honor, getting to the facts Your Honor again asked us to directly address the question of the termination agreement. And I'd like to deal with the termination agreement as it relates to the other facts, the so-called facts that support the authorization or the provision of authorization that the creditors committee suggests that we

gave.

As we know this whole scenario took place between October 8 and October 30, 2008 in the course of which JPMorgan -- excuse me, General Motors decided to pay off its Synthetic Lease loan which was then a sum total I believe, a balance of 150 million on three properties in Grand Blanc, Flint and Detroit. They hired Mayer Brown. JPMorgan hired Simpson Thacher to help to advise it in connection with the termination of the Synthetic Lease. Mayer Brown created a stack of documents. The stack of documents were the documents that Mayer Brown believed would be necessary, about a hundred pages would be necessary to pay off a Synthetic Lease. They also included this so-called checklist. And then later in the process, they created the escrow letter because it was decided along the way that because of the geography of where all the parties were, it would be best to close an escrow so that the cash and the releases and so-forth would be simultaneous.

Now the last thing to be signed -- I mean first of all, they recite the escrow letter. They recite Mr. Merjian from Simpson Thacher, his comments about nice job on the documents and so forth, but the last thing to be signed -- to be executed was the termination agreement. The termination agreement was effective as of October 30. I believe it was signed about the 27th or the 28th but it was signed -- it was effective as of October 30.

The termination agreement is the only piece of paper in this entire scenario which protests anything to anybody about what they should file in terms of UCC-3s and they are told the termination agreement from JPMorgan gives General Motors and its agent, Mayer Brown, the entitlement to file UCC-3s with respect to the properties. The properties are defined as Flint, Detroit and Grand Blanc in the other documentation.

Now first of all, by the timeline stand point, Your Honor, the things that preceded that, the escrow letter and so forth and so on, the drafts back and forth, you know, the last thing that happened in terms of any authorization at the very tail end of this process was the signed authorization.

But more importantly, or as importantly, excuse me, the materials that they're talking about, the escrow letter, the so-called -- what we call the unrelated UCC-3 which was passed back and forth, typically in a situation when we're talking about the question of authority here; did JPMorgan provide authority. One of the things that my colleague does not -- my adversary does not mention or does not focus on, what was the understanding of the agent? The cases are quite clear and I can get into that, Your Honor, the agent -- if the agent doesn't believe the agent has authority, the agent doesn't have authority. So whether it's express authority or implied authority, both of which are subsets of actual authority, Your Honor, if the agent doesn't believe that, then the agent

doesn't have authority.

So here you have a situation where Mayer Brown is drafting documents. They don't know that they have the unrelated UCC-3 is in there. They don't know when they file the escrow letter -- when they file the checklist with the eight digit number as Your Honor suggests we call it, they didn't know that that related to the term loan. When Simpson Thacher got it, they didn't know that. No -- so when Simpson Thacher said nice job on the documents and Mayer Brown got it back, Mayer Brown didn't hear that as being authorization. Mayer Brown heard nothing because Mayer Brown didn't know that the unrelated UCC-3 was in the stack of papers.

When Mayer Brown receives no comment back from Simpson Thacher on the checklist, Mayer Brown didn't hear authorization because Mayer Brown didn't know the checklist referred to the eight digit number. With respect to the escrow letter, it's the same issue, Your Honor, but even more so because from a factual stand point, from an evidentiary stand point, the escrow letter doesn't authorize the filing of any of these documents at issue.

I mean there is sort of a elliptical reference to the escrow letter as if it did but if you read the escrow letter with great care, documents that are at issue in this case are under the escrow letter, they are -- the parties are instructed to provide those particular documents after the closing to

Mayer Brown.

Now I will concede impliedly, I suppose, somebody could say well what was Mayer Brown supposed to do with them but in and of itself --

THE COURT: Well pause please, Mr. Callagy, because Mr. Fisher in oral argument made the point that -- very similar to what you were about to acknowledge or seemingly about to acknowledge. I think for most purposes, actual and implied authority don't vary very much in this case. But to the extent it does, if something is executed and stuck in an escrow and authorized to be released from the escrow, it kind of is implied that it's being -- it's got some purpose in life. It's going to be used in the way for which it was intended which would mean filing even if filing isn't stated in baby talk.

MR. CALLAGY: Well the questing though is -- the question is yes, I would agree with that but the question is does that constitute authorization, particularly when my prior scenarios JPMorgan doesn't know it's in there, nor does Mayer Brown know it's in there. So they're not hearing anything. What are they hearing? The only thing they know is the termination agreement which Your Honor asked the question about. The termination agreement signed as of October 30 was the single express authorization component of the entire scenario here. That's the thing that said they could file UCC-3s with respect to the properties.

So all the other stuff that we're talking about as if Mayer Brown understood when Mr. Merjian said nice job on the documents, as if Mayer Brown understood when they got the checklist back without comment, as Mayer Brown understood when they got the escrow letter back without comment, that somehow that constituted authority. It didn't. They couldn't have heard that because they didn't know those kinds of documents were in the stack of distributed papers.

So that's why I like to contrast the existence and the clarity of the termination agreement and the fact that the termination agreement, by the way, came at the tail end of the process against all of these earlier instances of documents passing through like ships passing in the night, nobody knowing the documents were in there and you know, let's step back for one second, Your Honor.

The term loan lenders led by J.P. Morgan, lend a billion and a half dollars to General Motors in 2006, fully secured. Comes 2009, General Motors asks us to modify it because they're having a problem obviously with going concern issues with their accountants. We modify it, directly focusing on the question that JP Morgan and the lenders have a secured interest here.

And then all of the sudden in the face of every single person in this scenario saying they didn't know it was in there. They didn't know the documents for the UCC was in

there, The UCC-3 was in there. They didn't know that it was passed back and forth. They never -- they were not authorized to release the term loan lien in any way, shape or form. JPMorgan did not authorize them to do it.

In the face of all that, the UCC -- excuse me, the creditors committee on a macro basis says sorry, gotcha, mistake, you're out of luck. So stepping back from the weeds which we have to do, we have to get into the details, but on a macro basis, Your Honor, I think that is the prism that some of these arguments need to be considered in the context of.

Again, one other point in terms of the scope of this issue is the perfection of the lien. I know we have raised both in our pre-motion letter, in our answer, in our papers, in our statement of undisputed facts, the existence of the twenty-six fixture filings. The twenty-six fixture filings were belt and suspenders, were made back in the context of 2006 and they were filed in the various counties where the equipment and fixtures was located.

Counsel for the creditors committee seems to suggest that that's not an issue in the case, at this particular proceeding. I don't understand that given the record here. The reality is, those fixtures cover the exact same -- excuse me, those filings cover the exact same collateral that we're talking about in connection with this Delaware State filing which was the subject of the authority issue.

THE COURT: Well pause, please, Mr. Callagy because I thought the reason why they were only moving for partial summary judgment, rather than total summary judgment is that they recognize that the collateral secured by the separate fixture filings would have value, that they weren't in a position to value that value, if I can be circular, and that they recognized that the secured lenders, even if they lost the benefits of their Delaware filing would have the benefit of all of those fixtures regional filing. And that was why they were simply not asking me for relief on anything else. Am I mistaken in that regard, do you think?

MR. CALLAGY: I'm not going to -- you're not mistaken, Your Honor, but I believe they're mistaken. The fact of the matter is, Section 19(d) of the DIP order in this case preserves one issue to the creditors committee and that is the question of perfection. And, in fact, that very same order, the very same section talks about a different scenario where the question of value is preserved but as it relates to this particular inquiry, Your Honor, the question of value is not preserved and the only issue, at least under the DIP order as we read it and as the creditors committee in the context of the motion made by the United States in terms of the proceeds, where they also admit that the DIP order is quite clear on its face, the only issue that's preserved is the question of perfection. We believe that those twenty-six fixture filings

should end the issue but that's obviously the issue -- we need to deal with the issues that they've raised.

THE COURT: Go on.

MR. CALLAGY: Thank you. So, I mean the question of authority, this idea of was there express authority or implied authority, counsel says they also believe that there is a -- the same facts would support an argument for apparent authority and ratification. We believe that is not just the case. The apparent authority issue requires the presence of some third-party either being misled or of taking some action with respect to the state of affairs and the filings that somehow led them astray. There's not an apparent authority case, Your Honor. It is not a ratification case.

A ratification case would require that there be some kind of -- that following the acknowledgement that the UCC-3, the unrelated UCC-3 had been filed, that JPMorgan had continued without taking some action with respect to that, there's not a speck of evidence in this record that would -- and, in fact, that would suggest that between the time the UCC-3 was filed in October 30, 2008 and sometime two or three weeks after the filing of the General Motors Bankruptcy petition, that anybody at JPMorgan or any of its agents or any of its lawyers or accountants or so forth, knew that this unrelated UCC-3 had been filed. So I believe that's out of the case. So in that sense, it makes it easy for all of us, I guess, because all

we're dealing is with the question of actual authority, be it express or implied.

I think the question of the pre-200 cases, you know, those cases are again, we all understand the Kitchin case, the Trencher case, and even the case -- and even to the extent the Kilpatrick -- the Roswell case relies on that or the Kentucky case relies on those cases, those cases all are under the concept that a UCC-1 or an amendment thereto is signed by the party who is getting the benefit of it by the -- in most cases, by the debtor -- by the creditor or the debtor.

So the reality is, there's no question of authority. His signature is on the document and the fact that the signature's on the document from a prima facie stand point would suggest that the person who signed it intended to sign it.

And that's why in those cases, you hear about mistake being discussed but you do not hear about authority being discussed. It's when they take the -- it's when you take the signature requirement away that you then need to deal with the question of was it authorized. So I believe Your Honor is correct, aside from the fact that those cases predate the change, there's a reason why from a conceptual stand point, why those cases do not apply in the situation where there is no requirement for signing.

And that is why the entire UCC regime changes to

become one of mere notice, increased due diligence, increased inquiry on the part of the searcher, as opposed to the creditor. And also, the UCC puts an additional safeguard in favor of making sure that there's an -- that the filing is effective because they require the office, the filing offices to retain all the paperwork, the original UCC-1 for a much longer period of time. Prior to that, I believe it was only one year. Now I believe it's a year after the original financing statement terminated which would be five or six years.

So the drafters of the new regime were well aware of the fact that they were creating a situation that required the searchers and new lenders and so forth to do due diligence. There was a notice system put; them on notice. It did not like Judge Cote suggest create a gotcha situation where the person who believed they were secured had an obligation to continue to monitor on a regular basis. And if by the way, you didn't monitor it this month or next week, you always had your claim under 625 against -- 625 of Article 9 for a person who wrongfully filed it. That is not the correct state of the law.

In terms of a couple of Your Honor's questions, specifically I believe that the -- I don't believe that well we've cited New York law and Delaware law which is the same effect with respect to the question of authority, I believe that because of the uniformity of the UCC, the cases from around the country are relevant. I mean obviously Judge Cote

decided Roswell. It's under Florida law, as I understand, as I recall. And as far as the evidence --

THE COURT: Reliance on Florida law and heavy reliance on a Kentucky case.

MR. CALLAGY: Heavy reliance on Kentucky Bankruptcy Court case, Your Honor, which that Kentucky Bankruptcy Court case interestingly enough did no authority analysis and that case really went off on the question of well, given the existence of the -- in that case, the offending UCC-3, who was responsible for it and was there a claim against the third party who had caused that filing? So that was really the focus of that case. There was no authority situation.

The only place where there was a discussion of the new -- of the effect of 9-509 and 9-510 which goes to -- how I started, which goes to the question of the effectiveness of the statement, the only case is the Evans case. I don't know why it's the only case, Your Honor, but obviously it needs to be addressed further. And I'm sure Your Honor will do that.

But the reality is, under the Evans case, they distinguish that on the basis that somehow or another it was so -- it was a mistake of the agent. Well in our case, I harkens back to what I said before, in this case -- and the agent did something in the Evans case and the party -- the principal had nothing to do with the mistake the agent made, again focusing on mistake. The focus on mistake is not the end of this

inquiry. The question is was there authority? Obviously in the Evans case, the escrow agent did not have the authority to mark the termination box.

And similarly in this case, unless there was authority given to Mayer Brown/General Motors, they had no authority as well. And the fact of the matter is, that GM and Mayer Brown had testified they never knew the document was in there and they did not believe they were authorized to file that document. They did not believe they were authorized to terminate the lien on a billion and a half dollar loan.

Counsel says well, that's irrelevant. It's an assertion or a conclusion of law. It is for the province of the Court. Obviously the issue of authority, the determination of whether there was authority is for the province for the Court. And our briefs are replete with cases where the Court clearly looks to the state of mind of the agent as to whether he or she believed that they had authority. The restatement is quite clear that if the -- and we cite that in our brief, if the agent does not believe that they were authorized, there is not authority.

We cite an (indiscernible) provision. If the -- which is secondary source, obviously as well.

THE COURT: Cited which, Mr. Callagy?

MR. CALLAGY: We cite --

THE COURT: No, I'm sorry, I just didn't hear you.

MR. CALLAGY: We cite several secondary sources for the proposition --

THE COURT: Oh.

MR. CALLAGY: -- that if the agent does not believe or she is authorized from the stand point of an implied authority analysis, he or she is not authorized. And then going beyond that, Your Honor, we provide all sorts of cases in the briefs and I have new cases which I've found where courts are finding the opinion of the -- or the testimony of the agent as to whether or not they were authorized, far from finding that superfluous or inadmissible because it's conclusory, they in fact require or will determine what was the state of mind of the agent at the time they performed the act. What was their belief as to whether they were authorized. Here, to a person, the people who were involved in this scenario have said, I didn't authorize him. I wasn't authorized and that to me should be end of the inquiry.

One further point, Your Honor, under a -- if this were a waiver situation, we would -- based on the facts here, first of all, silence cannot -- you can't waive a substantial right by silence. You can't waive a substantial right inadvertently. You can't waive a substantial right by negligence.

So in a way, the creditors committee is suggesting that we have waived our entitlement to a billion and a half

dollars worth of assets, collateral, even though based upon -- if this were a waiver argument or if this were a waiver theory or if this were a waiver -- they were claiming a waiver, there's no way that they would be able to establish waivers. So, they are back-dooring it by coming into this expansion of authority issue in spite of the fact that the so-called agent or the agent who was responsible for doing this, clearly states that he did not believe that he was entitled to do what he did. Thank you, Your Honor.

THE COURT: Thank you. All right. We'll take a ten minute recess and then I'll take reply and sur-reply. Be back here at 11:20 please, folks. We're in recess.

(Recess from 11:12 a.m. to 11:20 a.m.)

THE CLERK: All rise.

THE COURT: Have seats, please.

Mr. Fisher, reply?

MR. FISHER: Your Honor, one of Mr. Callagy's refrains was JPMorgan didn't know the document was in there and Simpson Thacher didn't know the document was in there and Mayer Brown didn't know the document was in there. And this may be a fine point but I think it's a very important point. Everyone knew the termination statement was in there, unless they didn't read their e-mails and except for Mr. Duker who belatedly contended through counsel that that particular file was corrupted, but unless they didn't read their e-mails, they all

knew that that document was in there.

They didn't appreciate the consequences of the filing. They didn't appreciate that that document related to the term loan and not to the Synthetic Lease and that's exactly where the line between mistake and authorization is. That's exactly what makes this a case about an authorized but mistaken UCC filing.

Simpson Thacher is not a law firm that would go off and sign escrow instructions without any authority from its client to do so. It had authority to sign escrow instructions and it signed escrow instructions. The problem is that those escrow instructions contained a mistake, a reference to the termination statement. That's what makes this a mistake case, not an authority case.

Your Honor had earlier asked about the agency relationships between and among the parties here. Simpson Thacher did what it was supposed to do in terms of sharing all the relevant information with its client. It shared the term loan termination statement in draft form with its client. It shared the closing checklist with its client. It signed the escrow instructions after sharing those documents with its client.

So there's no question that Simpson Thacher here was acting as agent for JPMorgan. There's also no question that both JPMorgan and Simpson Thacher made a mistake in including

the incorrect termination statement as a document to be released upon the closing of the Synthetic Lease transaction. And I think the relationship between Mayer Brown and Simpson Thacher I think the question there or the agency question there is was Mayer Brown authorized to file what it filed? And the answer is clearly yes, they were acting pursuant to escrow instructions that told them that those documents could be released.

The collateral agreement in connection with the term loan, for example, specifically says that GM is not allowed to ask about the authority of JPMorgan to take any act. When JPMorgan issues instructions, they're presumed to be valid instructions. And I think one way to illustrate this point is what happened after the bankruptcy petition was filed when the fact of this mistake in UCC filing finally came to the attention of JPMorgan. There was a call from Morgan Lewis, who was then representing JPMorgan to Mayer Brown, who was GM's counsel at the time that the mistake in filing was made. And the question, of course, was what in the world happened here? How did this get filed? And there's undisputed testimony in the record from Ryan Green who was the associate at Mayer Brown who was involved in the closing on the Synthetic Lease and he talks about going to the partner, going to Mr. Gordon's office and showing Mr. Gordon that this termination statement was listed on the closing checklist and was listed in the escrow

instructions. So Mr. Green at Mayer Brown believed that it was okay to file that document.

Now if Simpson Thacher or JPMorgan at any point in time before that document were filed had said wait a second, that's not the right termination statement. That date over there, 11/30/06, that has nothing to do with the Synthetic Lease. What's that date? And had found out that in fact they were directing a termination that related to a different loan and had said to Mayer Brown at any point in time, there seems to be a mistake here, take that document out of your pile of closing documents, you can bet that the term loan termination statement never would have been filed which is just another way of illustrating that it was authorized by JPMorgan.

I think that if Mr. Callagy's arguments are taken, not even to an extreme, I think the logical implications of Mr. Callagy's arguments would lead to a very chaotic UCC system. Mr. Callagy's argument is essentially that JPMorgan had no duty to apprise itself of the perfection of its own security interest and that even if it became aware of a mistake, it had no duty to file any corrections.

You can quickly see how the UCC system would fall apart as a reliable public notice system if third-party creditors cannot trust the -- cannot presume the integrity of filings. Mr. Callagy also asks --

THE COURT: Pause please, Mr. Fisher.

MR. FISHER: Yes.

THE COURT: Because I certainly understand your policy point but your first time through until Mr. Callagy corrected me, or commented, at least, I hadn't been very sensitive, in fact I probably was ignorant to 9-510(a) as compared and contrasted to 9-509(d)(1).

From time to time we bankruptcy judges seek statutory provisions that are circular, tautological, make no sense at all, most significantly the safe harbor provisions, the catapult provisions and the like, but 9-510(a), it's pretty clear, isn't it?

MR. FISHER: It is clear that an unauthorized filing is not effective. The question is, of course, 9-509(d), was this an authorized filing? And so, assuming that the Court does not pursue the Roswell or the S.J. Cox path, which says that the question of authorization is not relevant and the Court looks to the question of authorization, I don't think that there's any other legal conclusion to be drawn from the undisputed facts about authorization. I can't really think of a stronger indication of authorization than escrow instructions and e-mails.

I also think that the way that Mr. Callagy reads the termination agreement, the one that specifically says that GM can file termination statements that relate to the Synthetic Lease properties, it's as though Mr. Callagy adds the words,

but if you make a mistake, those particular filings are not authorized. Essentially, that's JPMorgan's position. I can only authorize correct filings that relate to the properties where I'm trying to terminate my security interest. And the consequence of that is that there will never again be a mistake in UCC case because every mistake in UCC filing, the secured creditor will say well, because that was incorrect, it was unauthorized and therefore, it's not a mistake. It's unauthorized. It's ineffective under 510. And as a result, every mistake would be treated as an unauthorized and void filing.

And again, from a policy point of view, I think the UCC public notice system would fall apart, not to mention as I did earlier that that is not how the termination agreement is drafted. It's not drafted to say, and if you file anything by mistake, that's void for lack of authority. It's not drafted to say this is the sole source of authority. It's not drafted to say it can't be supplemented by other instructions.

So even if it were the duty of some creditor coming to the scene to perform due diligence and determine whether or not that termination statement was authorized, I would think that a second creditor coming to the scene behaving reasonably, conducting due diligence, reviewing the escrow instructions, reviewing the e-mail communications would conclude that it was an authorized filing. It happens to be the case that there is

no such duty in this case because it's a bankruptcy context and because the debtor-in-possession is presumed to take the property without knowledge. But even if that kind of inquiry were required, I think that it would lead to a conclusion that the termination statement was authorized.

Mr. Callagy argues that if this were a waiver case, we haven't established that JPMorgan waived its rights in the collateral. I guess the first response is this is not a waiver case. It's a UCC case and you don't find any UCC case importing waiver law to determine whether or not a termination statement is effective.

But if it were a waiver case, then this very well might be a case where because through the escrow instructions and otherwise, they indicated that they were waiving rights in certain collateral but that turned out that that wasn't the right collateral, it might be that mutual mistake as a doctrine would common save them and a court could provide them with equitable relief and say there was a mutual mistake here. You intended to waive certain rights but not the rights in term loan but as previously argued, mutual mistake is not applicable and -- in the bankruptcy context because of 544(a) and there's no case that holds to the contrary and that imports the doctrine of mutual mistake to a situation such as this.

I think, Your Honor, if the Court has no further questions, I'll be seated.

THE COURT: No, thank you.

Mr. Callagy, any sur-reply?

MR. CALLAGY: Yes, thank you, Your Honor. Your Honor, Mr. Fisher suggests that the scenario that I have described with respect to the new regime the UCC would lead to a chaotic system. I am not -- didn't make this system up, Your Honor. Let me read the comments of the draft amendments, the Uniform Commercial Code under Section 9-518 comment 2, July 2010. "Just as searchers --"

THE COURT: You said July 2010?

MR. CALLAGY: Yes.

THE COURT: As compared and contrasted to back in 2000 or 2001?

MR. CALLAGY: Correct, Your Honor. As obviously as the experience has continued to comment on the significance of their -- what they originally created. Just as searchers bear the burden of determining whether the filing of initial financing statement was authorized, searchers bear the burden of determining whether the filing of every subsequent record (it refers to a termination statement) was authorized. So that is the system, chaotic or not, that is the system that is contemplated with the change in regime. Now --

THE COURT: Pause please.

MR. CALLAGY: Yes, sir.

THE COURT: Some of the authorities you and your

opponents cited were from practitioners who write secondary authority in this area and some of it was from bodies of a more official character. Who were you just quoting from?

MR. CALLAGY: I was quoting from the draft -- the National Conference of Commissioners on Uniform State Laws, Draft Amendments to Uniform Commercial Code Article 9, Section 9.518.

THE COURT: Okay. Thank you.

MR. CALLAGY: So the other thing is that Mr. Fisher suggests that again, this is a mistake case, not an authority case. That is a distinction that does not exist in the -- if you look at the law in this area. The question under 509 and 510 is whether it was effective -- if it's effective, it had to have been authorized. So the question is when Mr. Fisher says well, this is not a question -- this is a question that the parties didn't appreciate the consequences of the documents that were passing back and forth. That is the case, Your Honor. And maybe he can call that a mistake but that does not confer authority.

So to the extent they did not appreciate the consequences, it would be a different case, Your Honor, somewhat different case, if Mayer Brown and General Motors were in here saying, you know, I thought I was entitled to do that. I understood that I was entitled to do that. You didn't say anything to me about the stack of papers that I sent you and so

forth. What are you talking about? I believed I was entitled to do it. Then Your Honor would be in a position where you would then have to assess whether that was a reasonable position.

But here, the agent says it's not a question of not appreciating the consequence. I didn't know the documents were in there. I did not believe I -- if I had known that, I do not believe I would have had authority to do that. And I did not have authority to do that.

So you're not talking about the same situation where, you know, it's not just a question of mistake as Mr. Fisher would suggest. It's a question of what is the -- how does that impact on the question of authority? And that is under the statutory analysis, that has to be the first determination.

In terms of the -- he references the term loan is the fact that under the term loan there were certain provisions that should have put everybody on notice. Your Honor, under the term loan, we were not even in the position to release the lien with respect to the way it happened. It would have had to have been done in writing and so forth.

One further factual comment, Your Honor. The parties we're talking about --

THE COURT: I lost you on the last one, Mr. Callagy.

MR. CALLAGY: Well there's a provision in the term loan that prevents us from releasing the lien without the

consent of all the constituent lenders. So in the --

THE COURT: When you said us, you're talking about JPMorgan --

MR. CALLAGY: JPMorgan.

THE COURT: -- Chase's agent for the facility?

MR. CALLAGY: Correct, Your Honor.

THE COURT: And then you have term lenders in a syndicate.

MR. CALLAGY: Correct, Your Honor.

THE COURT: And it required syndicate member's consent to release their lien?

MR. CALLAGY: Correct. So I mean -- and this is a deal that we're dealing with -- we're dealing with General Motors. Now keep in mind, Your Honor, and one thing that's important to remember, General Motors was represented by Mayer Brown. JPMorgan was represented by Simpson Thacher. Simpson Thacher never represented JPMorgan in connection with the term loan. Mayer Brown never represented General Motors in connection with the term loan. They both only represented JPMorgan in connection with the Synthetic Lease transaction. Different law firms.

So in terms of appreciating the consequence of what was going on here, of course they didn't appreciate the consequence of what was going on here. They had no knowledge that the eight digit number referred to the question of the

term loan. Now you could say they should have. That's a different issue. Different situation. But the reality is, it did not confer authority. The fact that somebody should have known something does not mean that the agent was conferring with authority to do something, particularly when the agent didn't believe that he was conferred with that authority.

And I noticed, Your Honor, that the counsel does not -- did not address the question of the twenty-six fixture filings. I think that the reality is that if you look at the paragraph 19(d) of the DIP order, it specifically tracks the release that was provided to the senior lenders, JPMorgan and its syndicate. It accepts only the question of perfection and it goes -- and in terms of interpreting that order, in terms of -- just in terms of making sure that there's no misunderstanding about that, there is a separate proviso following that language in 19(d) which says that if the senior lenders, i.e., JPMorgan and Company, if they pursue junior liens with respect to other assets that -- other loans that apparently were outstanding at the time, then issues such as valuation, execution, and it lists a laundry list of things that would then be permissible for the committee to pursue. So clearly at the time that was drafted, there was an understanding there was a difference between perfection as a concept and all the other concepts that were mentioned in the same paragraph. So there was an intent to limit the scope of

this proceeding just to the question of perfection.

And I again recite the fact that those twenty-six fixture filings, they've been on record ever since the beginning of this -- ever since before the filing of the Chapter 11. They continue there. There's no question about their effectiveness. There's no question about their propriety. They've been in the case. They were subject to discovery to the extent that the creditors committee wanted to pursue them and they haven't done so. Thank you.

THE COURT: All right. Thank you, folks. Not surprisingly, I'm going to have to take this under submission. Mr. Callagy, in the course of your first remarks you said that there were some new cases that you believed exist which I understood to be talking about a proposition for which you are arguing if an agent doesn't believe he has authority, he doesn't have authority.

MR. CALLAGY: Correct, Your Honor.

THE COURT: Can you get me those cases?

MR. CALLAGY: I can read them into the record if you would like.

THE COURT: All right. Better yet.

MR. CALLAGY: Okay.

THE COURT: I was going to give you a week to do it but I'll give you --

MR. CALLAGY: I found them.

THE COURT: Okay.

MR. CALLAGY: Opp v. Wheaton 231 F.3d 1060 (7th Cir. 2000).

THE COURT: What was the page cite on that 231 F.3d? And it was F.3d rather than F.2d?

MR. CALLAGY: F.3d 1060.

THE COURT: Okay.

MR. CALLAGY: At 1065. Big Bear Import v. LAI Game Sales, District Court Arizona, 2010 Westlaw 729208. And Sinclair v. Town of Voe (ph.), Supreme Court of New Hampshire 1984. And obviously this is sort of a mixture of different cases but they go directly to the proposition Your Honor said and that is that they're arguing that the testimony or the statement of the agent to whether or not the agent believes he or she had authority is inadmissible and they cite a case called River lee (ph.), one single case to that effect which was a case --

THE COURT: Well, pause. I had always thought that an agent can't confer authority on himself.

MR. CALLAGY: He does not.

THE COURT: And his understanding that he has authority doesn't give him authority if he doesn't otherwise have it but you're saying something different. You're saying that if the agent doesn't believe that he has the authority, then he doesn't have the authority.

MR. CALLAGY: That's correct, Your Honor.

THE COURT: What was the third cite you had, the New Hampshire one?

MR. CALLAGY: Town v. Voe, New Hampshire, 1984.

THE COURT: Do you have a Northeast or Atlantic reporter or wherever New Hampshire cases are reported or for that matter a West or --

MR. CALLAGY: I apologize. I do not have it and I will provide that momentarily.

THE COURT: Okay. Well what I'm going to do is go back to what I originally said. I'm going to give you a week to give me the actual authority with citations and Mr. Fisher, I'm going to give you a week after he gives me whatever he has to submit any cases without argument that you think I also need to consider in the same context.

Thank you very much, folks; very helpful. We're adjourned.

MR. FISHER: Thank you, Your Honor.

(Whereupon these proceedings were concluded at 11:40 a.m.)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Linda Ferrara, certify that the foregoing transcript is a true and accurate record of the proceedings.

Linda Ferrara
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Date: December 6, 2010