Syndicated Credit Facility Restructuring and Workouts: Lender Strategy, Decision-Making and the Role of the Agent

Navigating Divergent Interest of Lenders, Confidentiality Among Lenders, Avoidance of Privilege Waivers and More

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Supplementary Materials

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Introduction

There are a number of inter-lender matters which will need to be dealt with in the typical syndicated loan transaction. The first will be to determine the appointment of various lenders and third parties to fill roles and functions for the lending group as a whole. Such roles may include an agent appointed to the hold security for the interest of each of the lenders and another responsible for the collection and remittance of payments and advances. An administrative agent will often be appointed to be responsible for the collection of financial and other information from the borrower group and the dissemination of this information to the lender group. There may be a syndication agent who will be responsible for assembling, forwarding, and dealing with communication within the lender group and there may also be a managing agent who will deal with matters such as the oversight of lender relationships. There is frequently aggressive negotiation for these roles and functions which affect the showing of lenders in industry "league tables". The lawyer's job is to appropriately document these roles as to the responsibility of these various agents to the balance of the lender group and the extent of relief from liability and indemnity for each role.

Documentation of intercreditor arrangements should outline the rights among the lenders as to priorities, preferences, or participation in the payments to be made by the borrower. This can include disproportionate allocations of fees, priority of payment, varying interest rates, among other matters. These are a matter of business discussion between the lenders and there can be allocations which do not result in a simple pro rata, pari passu allocation of rights among the lenders.

The borrower will have granted to the lenders which act as agent the right to take steps and actions for and on behalf of the lender group in those various roles and capacities. The lender group will have provided authority to the agent lenders to take the delegated steps and actions
on their behalf, as agent. In some non-Canadian jurisdictions this is a legally complex relationship and in others it is not possible at all. Throughout North America agency relationships are well established and legally supported. The ability to appoint an agent and to delegate powers and responsibilities for the agent to exercise rights for the lenders needs to be carefully considered in each of the jurisdictions where this is relevant both as to authority to act and liability to other lenders for doing so. There may need to be adjustments to the standard clauses used in Canada to deal with specific legal issues in connection with the use of agents or trustees for the lenders in other jurisdictions.

Lawyers, and their clients, can most easily access information as to what constitutes the current market approach to dealing with intercreditor relations and agreements in a number of jurisdictions using the industry developed standard forms. In North America the accepted standard form is that of the LSTA (the Loan Syndications and Trading Association) and in the United Kingdom and to a fair extent in Europe, there is the LMA (the Loan Market Association, based in England, it holds itself out as being the authoritative voice of the European loan market.) Each of these two organizations has developed recommended standard form provisions for the loan syndicate aspects of credit agreements, and have specifically attempted to provide base clauses for most of the provisions which would form the intercreditor agreements in the syndicated transaction. Using the LSTA or LMA form as a base, the drafting is likely to be accepted as forming a reasonable start to the documentation of the relationship. The "standard: clause may be altered by business considerations, such as some lenders may be providing products that others are not, including letters of credit or derivative products. The rights attaching to these products as to priority and sharing of security with the balance of the lenders need to be considered and documented among the lenders. The rights and benefits to be considered include sharing of current payments, priorities of repayment, the priority and sharing of collateral, among others. There may be jurisdiction specific requirements as these products may have different rights and benefits by law or custom in the various jurisdictions involved in the transaction which will need to be considered.

**Voting Rights**

The credit agreement will normally include contractual agreements to supplement the limited statutory and common law applying to lender relations, usually setting out rights and remedies among the lender group in the syndicated loan and delegating the exercise of those rights and remedies to an agent lender or lenders. If any of the agent roles can be affected by the law in
jurisdictions which impose lender liability, there will need to be consideration in the agency delegation to a sharing or curtailment of power and authority on a jurisdiction or lender specific basis.

The credit agreement for a syndicated loan will commonly include provisions regarding the required approvals for the exercise of lender rights such as increased monitoring on the occurrence of triggering events, the calling of default, the choice of remedy and the requirements for waiver of defaults and rights. These will be the subject of required voting arrangements among the lenders, with various levels of voting requirements being applicable to the specific instruction or approval; these have fairly common market norms in Canada and the United States. Voting is frequently based on a required percentage of the principal amount of the loans then outstanding held by the lenders, although in some instances, there are variations such as lender by lender voting regardless of the extent of the hold.

Terms will be included which deal with the approval requirement for amendment of the credit arrangements. Frequently, an administrative agent will have the right to agree to non-material amendments to the credit arrangements, but a significant percentage of lenders (two-thirds or three quarters) will be required to vote as to more significant changes with unanimity required where the vote would affect the priority or payment rights for the lender. The list of unanimous vote requirements is fairly consistent for smaller syndicates but will often be reduced or eliminated for widely held issues.

The most common voting levels provide that the majority of the lenders, generally 50% or more of the aggregate credit exposure, will approve more routine waivers or amendments which are of less credit concern. The required lenders will be increased to approve more significant matters, often $66^{2/3}\%$, but at times requiring a 75% approval. There is frequently included some matters which require unanimous approval, these include changing the amount of commitment made by any lender, modifying the rates of interest payable, modifying the payments terms or maturity.

There are generally voting approval requirements for changes to payment requirements such as the time, amount, or manner of application of proceeds of mandatory repayments, changes to the rights as among the lenders or classes of lenders, or changes which would effect the priority of entitlement, the timing and amounts of payments, and potentially the rates of interest. All will
generally require voting at the significant levels of two-thirds or three quarters to approve these changes, and frequently requiring a unanimous approval in a smaller syndicate.

Examples of unanimous approval requirements include:

(a) any reduction of or compromise with respect to any obligations of the borrower including, without limitation, the terms and amounts of any payment to be made;
(b) any reduction in the interest rates, fees or other charges applicable to any particular type of accommodation or otherwise payable by the borrower;
(c) any provision for the ordering of priority of entitlement to security or distribution of proceeds, release and discharge of any security held by or on behalf of the lenders to secure payment of the indebtedness and liability of the borrower;
(d) any waiver, termination or release of any guarantors from its obligations unless the release is accompanied by a replacement;
(e) any increase in the amount of the maximum available facilities and/or the commitments, and the amount or timing of any payments to be made;
(f) any amendment to the term to maturity of the facilities;
(g) any change in the identity of the borrower, which requires an assignment or transfer of the rights or obligations hereunder to a person other than a direct legal successor of the borrower pursuant to restructuring otherwise permitted under this Agreement;
(h) any change to the types of the facilities; and
(i) any change to the allocation of payments by the borrower or the guarantors.

If there are a small number of lenders, often called a "club deal", the required lenders concept may be simplified such that there is a simple voting of the lenders ignoring the amount which each holds. Where there are several tranches documented in the credit agreement, different syndicate for separate credit facilities or a different priority of credit facilities, certain matters will be voted upon by the lenders as a whole, and others on a per tranche basis or facility, generally this applies if the changes would effect one facility or tranche differently than another.

The borrower considering the voting provisions needs to recognize that there is a balancing between making approval of the calling of default, acceleration and exercise of remedies more difficult and having a higher percentage for obtaining amendments, waivers and consents which
is then more difficult. The borrower will generally try to have the obtaining of waivers and consents at a majority level and matters such as acceleration and exercise of remedies on default at a higher required lenders level.

**Lender Assignment Rights**

The voting arrangements among lenders in the syndicated loan will frequently vary based upon the size of the lending syndicate. In a smaller syndicate higher levels of voting, and more inclusion of matters requiring unanimous approval will occur. This is done on the basis that the club style deal will require the agreement of each of the holders, with the holders holding roughly equivalent amounts of the debt outstanding. This will alter where there are larger and smaller holders, with the voting arrangements generally being such that a smaller holder would not be able to veto or hold up decisions of the larger holders, this is done by setting the holding levels required for voting at a lower level, and minimizing the requirements for unanimous approval. In the very large, public, syndicate it is recommended that much lower voting levels be required, that a longer list be included in the ordinary or majority voting category, that there be a lesser number of approvals in the special, or higher voting levels, and effectively no requirements for unanimous approval. Recent experience in working with an older trust indenture, and notes issued, where there were approximately 148 holders resulted in 1 person holding out on the unanimous approval of the extension of the maturity date potentially jeopardizing all of the remaining holders. Drafting to require unanimous approval of these types of requirements, can be catastrophic if a restructuring is required, and the vast majority approve the restructuring. The holdout can either be holding out for full payout in a financial difficulty circumstance, or may simply be unavailable to express their vote. Consideration should be given to the size and nature of the syndicate, and the voting arrangements tailored to the number of syndicate participants, and the relative size of the holdings of those syndicate participants.

Rights to assign or grant participations in the credit arrangements will often be governed by the credit agreement. Lenders will generally have some restrictions placed on them as to assignment, either by the borrower requiring consent that there be no change in the tax or structuring of the transaction as a result of the assignment, or, by the other lenders who often want a say as to membership in the lending syndicate. Lenders will, however, generally be allowed some flexibility to assign, and considerably more flexibility to participate without active involvement as to their portion of the credit arrangements.
Most lenders will require the ability to assign the credit as a matter of their credit policy. This is required for portfolio balancing or if the lender wants to exit at the time of financial or business difficulty on their part or the part of the borrower. A provision which the lenders will often permit is to allow the borrower some degree of control, by way of requiring borrower consent, up to the time of default. In addition, lenders will often permit a clause to be included that the credit arrangements will not be sold to a competitor of the borrower, which provision will often be applicable both before and after default. Restriction on assignment to a non-resident lender, which could create tax cost is often included. If the borrower originally entered into a credit arrangement with an all domestic panel of lenders, they may not have viewed the need for allocation of tax costs in the same manner as they would have if there was a non-resident lender at the time of entering into the agreement, or, if there was a possibility of an assignment to a non-resident lender.

**Binding Effect**

The credit agreement will provide that once voted on as required by this agreement any amendment or waiver will be binding on the borrower and guarantors, each of the lenders and the agents, and for the period of time and subject to such conditions as are specified in the instrument containing the amendment or waiver. In the case of a waiver of any event of default, the borrower, the lenders and the agent are usually restored to their former positions and rights under and the event of default waived deemed to be cured and not continuing. A waiver or amendment does not extend to any subsequent or other event of default or impair any right consequent.

Lenders who default on their obligations under the credit agreement, usually this will be a funding default, will normally have their voting rights suspended but remain bound by the decisions reached by the rest of the lenders.

Another provision which may be included to deal with defaulting or uncooperative lenders is a concept of the ability of other lenders to buy out a lender, or the lenders or borrowers to force a replacement, where there is consistent difficulty in dealing with that lender, or default on the part of that lender with regard to the satisfaction of their obligations under the credit arrangements. This may be at par, usually for lack of cooperation, or at a discount, usually for a defaulting lender. This may be referred to as the "yank a bank" term.
Set-off Issues

It is common that the operating accounts for the borrower will be maintained with one of the lenders in a syndicated transaction. As a consequence, that bank's rights which arise outside of the loan documentation need to be considered and appropriately documented both as to the effect it has on the borrower and as an interlender matter. A bank, in most jurisdictions, has a right under banking law and practice, to set off allowing the bank to take amounts which are in the borrower's account and apply those against the indebtedness to the bank. The set off right will have priority over other lenders rights even if senior secured and this priority will usually be waived in favour of pro rata rights among the lenders. The loan agreement should contemplate the fit of the right of set off with the balance of the credit arrangements, and provide the mechanics for the application and timing for the funds in the account. The most common clause requires a disgorgement of amounts recovered by the operating bank lender over the amounts it would be entitled to absent the right of set off.

The lenders will agree to priority and sharing of the payments made by the borrower, because there is privity of contract between each of the lenders and the borrower each lender may set off against the borrower’s obligations to it the amount of the borrower’s deposits with it requiring careful drafting for these provinces. In most instances, the amounts on deposit in accounts with each of the lenders will vary from lender to lender. The lenders may agree to share the amounts they set off so that all of the lenders will obtain the same pro rata reduction of debt resulting from the set off, notwithstanding the amount on deposit with any particular lender. The lenders will often effect such a set off by purchasing participations in each other’s loans. Such participations ensure that the net loans outstanding to each lender will remain in the same percentage of its original commitment. The use of an agreement to participate to return loan outstandings to a pro rata basis, as originally agreed, is an agreement among creditors only, accordingly the status of the borrower will be irrelevant to the undertaking of the transaction and the agreement will survive borrower insolvency. There is no restriction under Canadian law to credit trading among the syndicate members, particularly when based upon the original agreements of indemnity, contribution and acquisition of participation for the purpose of regularizing holdings in the debt.

Agent Indemnity
The syndicate agreements will include releases and indemnities for the agents with regard to the agent undertaking their duties and responsibilities. Negligence, frequently to the level of gross negligence and deliberate misdealing, are generally excluded from these indemnities but otherwise the indemnities provided to agents are very broad ensuring that they will undertake their duties in the ordinary course without fear of claims from the remaining lenders. The general standard for undertaking agent duties is to a commercially reasonable standard, based upon usual industry practice and their own self practices in transactions which they hold on their own behalf. Lenders are specifically entitled to rely upon certificates, notices and professional communications provided by the borrower without having to enquire behind those. The agent is generally required to transmit payments and information only as received.

Issues
Legal counsel for each of the issuer, the arranger, the agents, and syndicate members, particularly selling syndicate members, will need to consider the scope, extent, and availability of the indemnifications being provided in the syndicate agency provisions. In the public bond issue the indemnifications are essentially only provided by the issuer to specifically named parties. Syndicate members may provide indemnification to the agent, but the agent does not provide indemnification to the syndicate members. This usual protocol will need to be examined, and it will need to be determined whether the issuer indemnification should extend to a broader group, including syndicate members or whether indemnifications between the agent and the syndicate members should also be considered. This will be dependent on the transaction and the strength of the issuer indemnifications, both as to available indemnification and as to the strength of the issuer to satisfy the indemnification.

It will be necessary to ensure that responsibility for the preparation, accuracy, and release, of issuer information is clearly outlined, delineating responsibility between the arranger, and the remaining syndicate members in a clear and enforceable manner. The standard form agency clauses provide a commonly used protocol around the appointment of an agent, and the outline of the duties, obligations and responsibilities of the agent. These provide an industry standard approach to agency relationships and the syndicated debt transaction in North America. Where there is a clearly and specifically stated lack of ability to rely upon the information provided, it is necessary to consider whether there has been suitable regulatory compliance if the participant used only information provided by the arranger which is fully protected from the consequences.
The agency arrangements in the syndicated debt transaction will include fairly extensive outlines of the matters for which the arranger is not responsible, where the arranger effectively divests itself of liability. Dependent upon the nature of the syndicate, the ability of the syndicate to assess the matters relevant to the transaction, and the information provided, these will need adjusting specific to the transaction and the composition of the syndicate. A more active syndicate may well have extensive opt outs for arranger responsibility, a more passive syndicate, particularly a larger syndicate, will likely require the ability to rely on the arranger’s work in many categories and this will need to be tailored to the transaction is a very broad and far reaching disclaimer of responsibility or liability and should be viewed as such.

In addition to the clear contractual terms excusing the arranger from responsibility for information obtained and provided to the syndicate members, the method of delivery of such information can introduce further risks. The risk of materials and information being distorted, through incomplete delivery is exacerbated by the very frequent use of electronic delivery systems. Most modern credit arrangements, with syndicate terms, will specifically provide for the method by which materials and information are to be provided, providing yet again another layer of exclusion, lack of reliance and indemnity provisions.

**Joint Loan Arrangements**

In joint loan transactions each lender is in direct privity of contract with the borrower and has rights and may have claims that are assertable directly against the borrower. Each lender is independent of the other lenders in the joint loan. Information concerning the borrower’s financial situation is obtained directly from the borrower and not generally from co-lenders or an agent, although, a lead lender may serve as a limited authority agent to receive and distribute information and will usually be exculpated from liability for technically failing to do so.

In a joint loan arrangement, the lenders agree among themselves as to the per cent or number of lenders required to approve certain acts or occurrences relating to the borrower or the loan despite each having direct independent rights but agreeing to act in concert. The lenders may agree that the requisite percentage to approve an act of the borrower is a majority in amount of the then outstanding principal amount of the loans, or that the requisite percentage is satisfied by a majority in number of the holders of the borrower’s individual debt obligations. For instance, a majority vote of the lenders may be necessary to consent to sales of assets, or acquisitions, or declarations of dividends by the borrower, or other similar corporate events relating to the
borrower. A similar percentage may be required to waive the borrower’s failure to maintain agreed amounts of net worth, working capital or acceptable financial ratios. A percentage of lenders may be required to accelerate the loan and demand immediate repayment thereof, after an event of default has occurred and has not been remedied within the applicable grace periods. In a joint loan arrangement the agreement may permit each lender to determine independently of the others whether to accelerate its own loan after a default by the borrower, such right of independent action is usually allowed only if the loan is unsecured, and some joint or coordinated rights and actions are agreed to. Generally, the agreement of all of the lenders would be required to extend new loans in excess of the limit provided for in the agreement, to reduce interest rates, or to grant a moratorium on the payment of principal or interest. These provisions and the percentages of outstanding loan amounts or numbers of lenders applicable in each instance are generally among the most discussed portions of a loan agreement by the various lenders in a "joint loan" arrangement.

**Information Asymmetry**

The syndicate participant is generally coming into a relationship with the borrower group where there is a significant asymmetry in the information held between the syndicate arranger and that syndicate participant. The arranger will generally have come into the transaction with an ongoing relationship, or the ability to interact in such a way as to build the relationship, with enhanced ability to gain information as compared to the balance of the syndicate. This information asymmetry can result in an inability to execute and demonstrate execution of appropriate credit assessment. It can introduce a moral hazard as to diligence and monitoring on the part of the arranger, enticing the arranger to draw syndicate participants into weaker credits where it wishes to divest itself of the credit risk. It also can result in a lower standard of care being applied in the initial gathering of information, and ongoing monitoring, as a result of the arranger having less risk in holding the credit which has been divested to syndicate members and can result in the agent poorly delivering on the responsibilities related to initial credit assessment. Even if the syndicate arrangements place the responsibility for information gathering with the arranger, the financial institutions participating in syndicate remain directly responsible for the adherence to the required practices and policies needed to satisfy their regulatory responsibilities and internal policies and procedures. Each lender will need to ensure access to credit approval and credit monitoring information meets regulatory and internal credit policy requirements.
In syndicates where participants are allowed some direct, or relatively direct, contact with the borrower, the arranger will still have the primary control of, or responsibility for, the collection and assessment of information and the ongoing monitoring of the state of such information. Despite the information being provided directly by the borrower to the syndicate participants, the information asymmetry which is held by the arranger can result in insufficient verification or credit assessment on the part of the syndicate participants who are relying on the apparent active participation by the arranger.

The procedural requirement for syndicate participants to rely on the information obtained by the originator, lead arranger or administrative agent, and provided to each of the syndicate participants should be viewed in the context of the usual syndicate provisions of the credit agreement which set out extensive exclusions from responsibilities, and indemnities, for the arranger or agent acting in that role. Credit agreements drafted using industry recommended provisions for the agency arrangements will generally state that arranger is not responsible for the accuracy or completeness of the information provided, that there is no right on the part of the syndicate participants to rely upon those materials or information, and that the arranger is fully indemnified for any actions which might be taken in connection with the provision of such information. Effectively, as a result of the exclusions, there is no right to rely and the indemnities result in the delivery of materials or information in relation to which the syndicate participants have no legal right to look to any party as being liable or responsible for the completeness or accuracy of the materials provided.

A syndicated loan is unlike a regular credit arrangement where there is a direct, bilateral, relationship transaction allowing the lender to have knowledge based upon their relationship with the borrower and the direct ability to obtain the further materials which will underpin their regulatory responsibility of the lender and contractual obligations directly owed by the borrower. The syndicate participant is not only obtaining these materials, including the verification of the materials, indirectly through the arranger, they are usually doing so in the context of an explicit written agreement which states that they do not have any right to rely upon the party which acquired and verified such information as to its accuracy or completeness. This necessarily gives rise to questions as to whether the syndicate participant was reasonable, or justified, in relying upon the information as provided to satisfy the necessary regulatorily required obtaining and verification of customer information, or the assessment of the credit as a credit to be held on its balance sheet.
In recent years there has been an influx of new players stepping into the roles of agent and lead in small and large syndicated transactions and in participated loans. Not all of them have been fully up to the task of leading a multi-lender transaction. The purpose of this article is to help the reader avoid being injured in a multi-lender transaction and to provide for a better parachute should the transaction require a change in leadership.
In recent years there has been an influx of new players stepping into the roles of agent and lead in small and large syndicated transactions and in participated loans. Not all of them have been fully up to the task of leading a multi-lender transaction. The purpose of this article is to help the reader avoid being injured in a multi-lender transaction and to provide for a better parachute should the transaction require a change in leadership.
Imagine you and your loved ones are planning a vacation. You find a tour company that has just the itinerary that you are looking for and, better yet, they will transport you in a luxury coach with all of the amenities. You don’t know anyone who has traveled with this company, but you have seen the company’s advertisements and through their advertising, they appear to have a good reputation. You all board the bus and sit back, having a wonderful time. Then suddenly, as the bus is speeding along in excess of the speed limit, you become concerned that the bus driver does not know what he is doing. You reach your first destination safely, but you are fearful that you, your loved ones and the rest of the passengers are at risk. What do you do? You may not even know how to reach an appropriate person at the tour company. Do you refuse to get back on the bus?

Now imagine that you have been invited to participate in a multi-lender transaction – a club deal, syndication or participation. During due diligence you have minimal contact, if any, with the borrower but, instead, have relied on the financial information provided to you by the agent. The facility closes and you continue to fund the revolver and review the information only provided to you by the agent.

Imagine further that, from time to time in your review of information provided by the agent, you recognize some irregularities and point them out to the agent. The agent assures you that “everything is okay” and you continue on. This continues and at some point you realize that your agent, like the bus driver, does not know what he is doing.

In recent years we have seen an influx of new players stepping into the roles of agent and lead in small and large syndicated transactions and in participated loans. Not all of them have been fully up to the task of leading a multi-lender transaction. In certain situations where the documentation so provided, the agent might have been removed. In other situations, the “club” had to live with the agent.

The purpose of this article is to sensitize the reader in the hopes of helping the reader avoid being injured in a multi-lender transaction and to provide for a better parachute should the transaction require a change in leadership.

Let us start with reviewing some typical clauses from syndicated loan agreements:

- Agent shall not, except as expressly set forth herein, have any duty to disclose, and shall not be liable for the failure to disclose any information relating to the borrower or any of its affiliates.
- Bank will furnish copies of the Loan Agreement, any financial information received and any other material certificates, documents, or instruments received by bank but shall not be required to obtain or furnish other information not referred to above.
- Lender shall provide a copy of all financial statements, statements of income and expenses, copy of the monthly balance sheets, a monthly report prepared by lender depicting trends of each borrower’s business, and copies of lender’s field examination reports.
- Agent agrees to notify lenders promptly of any borrower default of which agent has knowledge. If bank has actual notice of or receives written notice of default, bank shall promptly forward such notice to each participant.
- Agent shall use commercially reasonable efforts to provide each lender with information in agent’s possession and copies of financial statements upon receipt of such lender’s written request provided, however, nothing shall impose liability upon agent for its failure to provide any lender any of the foregoing even after a request thereof.

Multi-lender documents typically contain broad exculpatory provisions protecting the agent or lead. For example, agreements typically say that the agent shall not:

- Be subject to any fiduciary duties.
- Be liable for any action taken or not taken by it in the absence of its own gross negligence or willful misconduct.
- Be deemed to have knowledge or notice of any default unless agent has received notice of such default.
- Be responsible for any recitals, statements, representations or warranties.
- Be responsible for or have a duty to ascertain or inquire into any statement, warranty or representation made in connection to the validity, enforceability, effectiveness or genuineness of this Agreement or any document.
- Be subject to any fiduciary duties.
- Be liable for any action taken or not taken by it in the absence of its own gross negligence or willful misconduct.
- Be deemed to have knowledge or notice of any default unless Agent has received notice of such default.
- Be responsible for any recitals, statements, representations or warranties.
- Be responsible for or have a duty to ascertain or inquire into any statement, warranty or representation made in connection to the validity, enforceability, effectiveness or genuineness of this Agreement or any document.

In addition, the documents require each member of the club to acknowledge that it has not relied on the agent in making its loan and that it has received full disclosure. Typically, absent of default, club members are not entitled to reimbursement for their legal expenses or other costs, although it is not uncommon for club members to request and obtain a modest budget for review of loan documents.

Consider the present market where there are more lenders chasing deals than there are deals, coupled with the pressure to employ funds. Too often club members sign onto deals relying too much on the agent although they have represented in writing that they have not so relied.

Imagine This Situation

During the course of a collateral audit conducted by an outside auditing firm,
the auditor provides the agent with information indicating that there are significant indicia of fraud but the agent fails to disclose that to the co-lenders. Over the course of several days, the auditor wrote to the agent’s account officer:

\[
\text{I have very little confidence in the aging by due date, as the due dates listed for invoices do not always correspond with the terms listed for the invoice.}
\]

In the verification process, some of the invoices listed on the aging with an invoice date of 10/30/08 had actual invoice dates in 2007 per the customer.

It appears we are looking at significant ineligibles due to “issues” and your general concern.

[Borrower’s controller] has said that the errors thus far are due to system errors, and possible entry errors. This very well may be the case given the accounting system they are running, but it is my first instinct to become skeptical, particularly when considering their current liquidity position.

The 10/26/08 aging listed this invoice with an invoice date of 9/28/08. The 10/26/08 aging listed this invoice with an invoice date of 8/1/08. The 8/31/08 aging listed this invoice with an invoice date of 7/31/08. The 7/27/08 aging listed this invoice with an invoice date of 5/1/08, which matches the remittance.

The agent did not reveal any of this information to the club members. However, some three months later when the audit was released to the agent, the agent was then obligated to share the audit report with its co-lenders. You can imagine what happened next. The agent had no duty to provide any of this information to the co-lenders and did not provide – admittedly at its own peril because, shortly following the time when the audit report was delivered to the co-lenders, the fraud was discovered.

Now Consider the Following Scenario
Borrower is in default. Lead and participants disagree on a strategy – the lead believing that it should force a bankruptcy and the participants believing that additional funding should be provided as part of a forbearance agreement and in return for some additional collateral. The lead and participants spend considerable time negotiating a term sheet for such additional funding that the lead takes to a “closed door” meeting between the lead and the borrower. However, the lead never presents the term sheet from the lending group and, instead, merely declines to make additional advances by virtue of the existing defaults. A review of the loan documents does not provide any requirement that the lead comply with instructions from the participants unless expressly obligated to do so under the loan document.

What recourse do the participants have in situations like these? Typically none. Generally, co-lenders and participants are without recourse to recover damages caused by an agent or lead not acting as a prudent secured lender, unless it is acting with gross negligence or willful misconduct which, at best, is a difficult standard to meet.

It is important to keep in mind that only the agent has the right to enforce remedies. Co-lenders lack standing to act on their own behalf once they have appointed the agent to act on their behalf.

In order to minimize the risk of being trapped in a runaway bus, it is suggested that when negotiating multi-lender transactions as a co-lender or participant:

- Be sure the documents provide terms upon which the agent may be replaced. (Unfortunately, this issue is more challenging in a participation, where the lead is the only party in contract with the borrower)
- Seek to minimize the exculpatory provisions.
- Monitor the loan as if you were the agent or lead.
- But, most of all, know your lead/agent!

Finally, in situations when you are the lead or the agent, keep in mind the Golden Rule: Treat your co-lenders and participants as you would like to be treated. 

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Syndications: Can Agents and Co-Lenders Find an Equal Ground?

January 08, 2014, 07:00 AM
By: Jeffrey A. Wurst
Topic: Legal Issues
Related: Jeffrey Wurst, Ruskin Moscou Faltischek

In multi-lender transactions – whether syndicated or club deals or participations – agents demand and consistently receive very strong exculpatory protections. Certainly, following the rule of no good deed goes unpunished, if what can't go wrong does go wrong, the agent does not want to find itself defending itself against claims by the other lenders. Similarly, the co-lenders want and need to be apprised of all material events concerning the loan.

The purpose of this blog is not just to put out a thought for people to consider but, in fact, to invite a dialogue toward a more effective methodology to be utilized in multi-lender transactions.

Too often club members rely extensively on the agent and do not engage in any independent due diligence before entering into a multi-lender transaction. This practice continues after the loan is closed. Of course, this is never a problem – until the loan goes south.

Consider this very standard provision:

Agent shall have no duty or responsibility to provide any Lender with any credit or other information, whether coming into its possession at any time except as shall be provided by any Borrower.

Now, imagine that during the course of a collateral audit, the auditor sends an email to the agent that says, in sum and substance:

In the course of our examination, we have discovered some significant accounting irregularities including the redating of all receivables originally dated July to October.

Based on this provision, the agent has no obligation whatsoever to share this information with the other lenders. I am confident that we all agree that the lender should share this information however, (and this is based on a real experience), the agent did not. In fact, the other lenders did not learn about the problem until three months later and after a massive fraud was disclosed.

Understandably, the agent does not want to be in a position where it must include co-lenders in every bit of minutia. However, there must be a balance between the agent not being obligated to forward any information other than information received from the borrower and requiring the agent to provide all material information to the other lenders.
But what is material? An agent does not want to find itself second guessed some time down the road when what appeared to be immaterial at first with hindsight later turns out to be material.

However, in this electronic era it is very easy to have emails forwarded to the other lenders. Thus, I am suggesting that the above-stated very standard provision be modified so as to require an agent to forward to the other lenders all writings of every kind and nature received by the borrower and by every vendor in connection with the loan. In the event the agent is using its own internal auditors to examine its borrower, then all writings from those auditors as well would be provided.

Consider, also, the following very standard provision:

*Agent shall not be required to make any inquiry concerning either the performance or observance of any of the terms of this Agreement or the existence of any Event of Default.*

Doesn't this mean that even after the agent is told by the auditor about “accounting irregularities” (auditors’ jargon for *there is a fraud*) that the agent has no obligation to share that information with the other lenders? Isn’t there something wrong with that? So that leaves us with a situation when the only default that the agent needs to share with the club is a default voluntarily disclosed by the borrower -- covenant defaults and situations when the borrower comes in to say “Oh yes, and, by the way, I have been borrowing against fictitious receivables.”

I am not suggesting subjecting agents to risk (take note, agent clients). I am suggesting, however, that the agent act in the best interests of the entire lending group and accept the responsibility for disseminating information to the group. I would rather see the agent err on the side of caution by sharing each piece of immaterial data with the other lenders than failing to send the material piece – such as the notice of *accounting irregularities*.

This is the food for thought. Please scroll down to post a comment and let us know what you think. (If you are not yet a member, you need will to register to post a comment).

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**Jeffrey A. Wurst**  
Partner | Ruskin Moscou Faltischek, PC  
Jeffrey A. Wurst is a partner at the New York law firm, Ruskin Moscou Faltischek, where he is the chair of the firm’s Financial Services, Banking, & Bankruptcy Department. Wurst is an industry leader known for his expertise in syndications, asset-based lending, factoring, and most other areas of commercial finance, bankruptcy and turnaround situations. He is actively involved in the documentation of commercial finance transactions as well as in litigation that may arise out of or in connection with such transactions.

He is the immediate Past Chairman of the New York Institute of Credit and a past Vice President of the Turnaround Management Association Global. Wurst is a director of the Association of Commercial Finance Attorneys and was elected as a fellow of the American College of Commercial Finance Lawyers.

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**Comments From Our Members**

Matthew Kalamaris  
1.28.2014 @ 1:31 PM

Very good points Jeffrey. I would add that Section 3 of the Loan Sales & Trading Association’s Model Credit Agreement Provisions state that the Administrative Agent shall not have any duties or obligations except those expressly set forth within the agreement, and its duties shall be “administrative” in nature. From a purely administrative perspective, it is my opinion that it would be reasonable for the agent to "promptly" deliver all non-operational information received from the borrower (or any non-affiliated, third-party consultants) with lenders. The use of email and virtual data rooms (Intralinks, SyndTrak, etc.) make the sharing of info much easier than it was years ago.

With regards to internal audit groups, banks should strongly consider the use of external firms to perform collateral audits on agented transactions. This would mitigate risk for the bank by eliminating any potential customer relationship concerns from a negative audit and would avoid compliance concerns about sharing internal work product with external parties. I have seen a few instances where banks establish their collateral audit groups under separate legal entities from the lending arm.
Brave New World —
Community Banks & Credit Unions Enter Syndication Market

BY JEFFREY A. WURST, ESQ.

Regular ABF Journal contributor Jeffrey Wurst was puzzled by a recent news announcement that smaller institutions such as community banks and credit unions have shown up as participants in large transactions facilitated by web-based portals. In this article, Wurst tries to imagine what would happen if such a deal defaulted or worse yet, with a complete breakdown of the facility, how all the participants would deal with each other.

We all know how challenging the present market is for lending institutions that are determined to fulfill their mission to employ funds, while at the same time do so prudently and in full compliance with growing requirements from the OCC. Large money center institutions have long dominated the syndicated market. Their credit limits are sufficiently high to take on larger credits and, of course, their taste for larger deals can be insatiable. However, over the past decade or so as interest margins have shrunk, we have seen some of these institutions exit the small business lending markets only to reenter them when they reconsidered the opportunities they were missing to employ funds. During these periods, smaller institutions such as community banks and credit unions servicing the smaller business markets have seen opportunities come and go, often as a result of the change in direction from the larger institutional banks.

In early December, as I was reviewing my daily email from the ABF Journal, the following headline struck my eye: BancAssets/MidFirst Close $100MM U-Haul Loan. Headlines such as this are not uncommon in this publication that regularly touts the accomplishments — large and small — of the industry. However, I was unfamiliar with BancAssets and MidFirst. I was not unfamiliar with U-Haul or the concept that U-Haul might take on a $100 million loan. I might have expected a loan like that to have been made by one of the “usual suspects” and not from “a network of community financial institutions” as described in the article. In fact, less than a year earlier another morning headline in the ABF Journal daily email announced that AIG Commercial Asset Finance added $75 million to an existing $105 million facility, AIG being one of the “usual suspects.”

I quickly became curious about this facility and wanted to know more about it. Who is BancAssets? Who is MidFirst? Why are they arranging a $100 million loan for U-Haul? Why is the loan not coming from one or more lenders that I would have expected to see make a loan like this?

My visit to their website disclosed that:

BancAssets, LLC, in partnership with BancVue, Ltd., offers an institutional-grade platform to bring Main Street to Wall Street. We provide corporate, commercial, and consumer loan programs, administration, servicing, and due diligence support through an established national network of community financial institutions.

OK. That told me about BancAssets.

The 10Q filed by AMERCO, the parent company to U-Haul, on November 6, 2013 for the period ending September 30, 2013, disclosed (as an event subsequent to the close of the reporting period):
On October 8, 2013, various subsidiaries of AMERCO Real Estate Company and U-Haul International, Inc. entered into a real estate loan for $120 million. This loan matures in October 2016, with an option to extend for four more years. This loan is secured by certain properties owned by the borrowers. The interest rate for this loan is the applicable LIBOR, plus an applicable margin of 2.50%.

The loan agreement was not attached to the filing, so we will need to wait until the 10K is filed to see how this loan, made by "23 community financial institutions" with an average exposure of less than $5 million each, was structured.

According to a December 3, 2013 article in the Credit Union Times, the loan was made by four credit unions and 19 banks as follows: Alliance Bank of Arizona; Atlantic Regional FCU in Brunswick, ME; Bankers Trust Co.; Blue Ridge Bank; City National Bank of New Jersey; Cross Keys Bank; ESB Financial, EVR; First Chatham Bank; Kennedy National Bank; Leaders Credit Union in Jackson, TN; Metropolitan Bank; MidFirst Bank; Mohave State Bank; Money One Federal Credit Union in Largo, MD; Murphy-Wall State Bank and Trust Co.; Sacramento Credit Union in Sacramento, CA; Southeast National Bank; Sycamore Bank; Texas First Bank; The Bremerton National Bank; The Clay City Banking Co. and The First National Bank and Trust Co. of Bodon Arrow.

Recent articles that I have authored have addressed challenges facing co-lenders in their dealings with agents in multi-lender transactions. As a result, my imagination started to run amok about what might occur if what can't go wrong, does go wrong and how this group of 23 might approach a workout situation?

Does MidFirst have the capability and experience to agent a deal like this? What is the reporting methodology between the agent and co-lenders? What is the mechanism for resolving disputes, if any, among the co-lenders?

Based upon the very limited information contained in the 10K, it appears that this is structured as a single advance facility and not as a revolver as I had originally thought when I saw the initial announcement. Thus, the co-lenders may expect that they can sit back and collect their share of return each month. Hopefully, this will be the case.

Now please join me in imagining this loan as a revolver. Can it be done? Can a group like this deal with daily or even weekly or monthly borrowing base certificates, advances, collections and settling up? How? How would they deal with defaulting lenders? How would they deal with covenant defaults or worse yet, with a complete break down of the facility? How would they deal with each other?

We all know how difficult it is to get a consensus in small club deals let alone large multi-lender syndications. Imagine that conference room when my theoretical $100 million revolver by 20 institutions goes into default and the lenders are called to a meeting.

As you can see, I am fascinated with the concept created by BancAssets. But they are not the only one with a platform bringing parties together. The Receivables Exchange is another electronic platform bringing together parties to financial transactions. According to its website:

The Receivables Exchange is an electronic exchange for the sale and purchase of accounts receivable. In association with NYC Exonet, [it] connects large corporate sellers of receivables with diversified sources of liquidity, including banks, family offices and asset management funds. Transactions over the Receivables Exchange are structured to result in a "true sale" of the receivables, thus offering balance sheet benefits to sellers and attractive risk-adjusted returns to buyers.

Sound like factoring? Well, maybe, but not exactly.

DealVector is another web-based portal. But instead of bringing together funding sources and funding users, DealVector provides a platform for investors to anonymously communicate with each other. According to its website:

Participants in CDOs, CLOs, derivatives, hedge funds and other alternative investments have no easy way to identify other parties to their deals. This imposes large costs with respect to price discovery governance, covenant solicitations, liquid asset sourcing, creditor class formation and many other relevant events requiring communication among deal participants... DealVector provides a confidential deal registry, secure online communication tools, and a validated membership base that make it easy to answer the question "Who's in my deal?"

So what is the take-away of all of this? We all know that we are living in the most challenging time for financial institutions to responsibly employ funds. We also know that as the bank regulators continue to tighten the reins on how regulated institutions may employ their funds, competition increases from non-regulated sources for funding. The Internet has created opportunities that enhance this competition.

At the risk of giving away my age (do I really care?), I must confess that although I have jumped into and have welcomed the new opportunities created from the web, as an attorney, I remain very traditional in approaching the structure and administration of financial transactions.

So, for those entering this Brave New World of finance — Caveat Emptor! (Buyer beware.)

JEFFREY A. WURST, ESQ., is a senior partner and the chair of the Financial Services, Banking & Bankruptcy Department at Rustkin Moscov Gallisau, P.C., Uniondale, NY. He can be reached at (516) 362-6630 or at jwurst@rmfgpc.com.
JOINT DEFENSE AND COMMON INTEREST AGREEMENT

This Joint Defense and Common Interest Agreement ("this agreement") is made as of the 30th day of July, 2012, by and among those parties on the annexed Schedule of Parties (the "Lenders") and their undersigned counsel (collectively the Bank and each of the Lenders, together with their counsel as executing below, the "Parties").

WITNESSETH:

WHEREAS, the Bank has made certain credit and loans available to ...... (the "Borrowers") pursuant to the .......... (collectively, the "Loan Agreement"), and the Borrowers’ obligations under the Loan Agreement are guaranteed by .......... (the "Guarantors"), pursuant to certain unconditional guaranties (the "Guaranties," and, together with the Loan Agreement and other agreements executed by the Borrowers and/or the Guarantors for the benefit of the Bank, the "Loan Documents");

WHEREAS, each of the Lenders is a party to the Loan Agreement and the interests of each of the Lenders under the Participation Agreement shall be collectively referred to herein as the "Lender Rights";

WHEREAS, certain Events of Default under the Loan Agreement have occurred, as set forth in the letter dated [redacted] from the Bank to the Borrowers captioned "Notice of Event of Default; Reservation of Rights";

WHEREAS, the Events of Default described above create an imminent threat of litigation between the Bank and the other Parties hereto, on the one hand, and the Borrowers and/or the Guarantors, on the other, regarding such Events of Default and the Borrowers’ and Guarantors’ obligations under the Loan Documents ("Litigation");

WHEREAS, the Lender Rights and the Loan Documents establish identical legal and factual interests of and among the Parties regarding the Borrowers, the Guarantors, and the potential Litigation, and these common questions of law and fact affect the ability of each of the Parties to defend itself and assert all of its rights as against the Borrowers and the Guarantors, creating a mutuality of interest among the Parties;

WHEREAS, at and since the time of the foregoing described events, the Parties had or have retained counsel, as indicated below, and each of such respective counsel and the Parties have formed and are acting in accordance with a common interest agreement and in anticipation of litigation, as described above;

WHEREAS, the Parties and their undersigned counsel wish to memorialize all terms and conditions of their understanding;
WHEREAS, in order to represent their clients adequately and effectively under these circumstances, the Bank, the undersigned counsel to the Bank, the other Parties and / or their counsel have shared, and / or will share communications (including notes thereof), documents, electronically or computer generated data, research, factual material and summaries, digests, strategy, mental impressions, memoranda, reports and other information, consisting of, containing or reflecting confidences of each client and other material that is subject to the attorney-client privilege, the attorneys' work product doctrine, and other related or applicable privileges and protections (hereinafter collectively referred to as "Common Interest Materials"), in the pursuit of their separate but common interests, and wish to avoid any suggestion of waiver of the confidentiality of privileged communications and documents;

WHEREAS, in the absence of such sharing, these Common Interest Materials would be protected from disclosure to adverse or other parties as a result of the attorney-client privilege, the attorneys' work product doctrine, and other related or applicable privileges; and

WHEREAS, it is the purpose of this agreement to ensure that exchanges and disclosures of Common Interest Materials do not diminish in any way the confidentiality of the Common Interest Materials and do not constitute a waiver of any privilege otherwise applicable.

IT IS NOW, THEREFORE, agreed as follows:

1. In light of their mutual interests, past and present relationships, and recognized and applicable attorney/client, joint defense or common interest privileges, each of the undersigned Parties and their undersigned counsel has obtained and provided and may continue to obtain and provide to any and all other signatories to this agreement Common Interest Materials, without in any way waiving, abridging or diminishing the confidentiality and privileged nature of such materials. It is the intent of this agreement that the legal privileges and confidentiality applicable to such Common Interest Materials shall apply to all Common Interest Materials shared among the undersigned to the same extent as if the Common Interest Materials had not been so shared or disclosed.

2. Any Common Interest Materials shared or received pursuant to this agreement shall be used solely in the preparation, conduct, or defense of the Litigation and related activities in preparation thereof or therefor, or in the contemplation thereof.

3. The Parties and their below counsel will use their best efforts to stamp or designate all written materials subject to this agreement as “Privileged and Confidential: Pursuant to Common Interest Agreement,” or words to that effect, although the absence of such a stamp or other similar designation shall not mean that a document is not privileged or not subject to this agreement.

4. No Common Interest Materials shared or received pursuant to this agreement shall be disclosed to any person or entity except: (a) the undersigned Parties and their undersigned counsel; (b) attorneys within the firms of the undersigned counsel and their employees and agents; and (c) outside experts and consultants working with the undersigned counsel, who are required to assist in the preparation, conduct and defense of the Litigation,
without the prior express written consent of the Party or its counsel that provided such Common Interest Materials. Nothing contained herein shall limit the right of any undersigned counsel to disclose any Common Interest Materials obtained exclusively from that counsel's client or clients, or any documents or information that have been obtained by such undersigned counsel independently of this agreement.

5. All persons permitted access to Common Interest Materials obtained pursuant to this agreement shall be advised specifically that such Common Interest Materials are privileged and subject to the terms of this agreement. No person will be permitted access to Common Interest Materials obtained pursuant to this agreement unless that person is among the classes of persons identified in paragraph 4 above and that person, individually or by counsel, agrees in writing or is otherwise under a duty to maintain the confidentiality and privileged nature of such materials and abide by the terms of this agreement. Notwithstanding the above, persons who come into contact with the Common Interest Materials for clerical or administrative purposes and who do not retain copies or extracts thereof, as well as employees and agents of the Parties, of the Parties’ counsel and of any other party agreeing in writing to be bound by the terms of this agreement (who otherwise is permitted access to the Common Interest Materials under this agreement), are not required to execute in writing such agreement, provided that such persons are informed that such information is subject to this agreement, must be held in confidence and cannot be disclosed to anyone, and that such persons agree to be bound by these terms. It will be the responsibility of each Party, its counsel and any other party agreeing in writing to be bound by the terms of this agreement, to ensure that its employees and agents maintain the confidentiality of the Common Interest Materials and abide by the terms of this agreement.

6. All obligations under this agreement shall continue in effect notwithstanding any conclusion or resolution of any of the Litigation, or any preparation therefor.

7. If any person or entity other than those set forth above in paragraph 4 hereof requests or demands, by subpoena or otherwise, any Common Interest Materials received pursuant to this agreement other than Common Interest Materials independently obtained as defined in the last sentence of paragraph 4 above, any Party who becomes aware of such request or demand shall promptly notify all of the undersigned Parties and their counsel and provide all of the undersigned Parties and their counsel with a copy of such request or demand, unless non-disclosure has been ordered by a court having jurisdiction over the matter. In addition, any recipient of Common Interest Materials under this agreement to whom such a request or demand is addressed shall -- to the extent that the request or demand seeks testimony, production of documents or other tangible things, or other action that would reveal such Common Interest Materials or any of their contents -- (a) assert the joint defense privilege, the common interest privilege, the attorney-client privilege, the attorney work product doctrine, and any other applicable privilege, doctrine, or rule that renders confidential the demanded or requested common interest materials, or any portion thereof; (b) on that basis, object to any request or demand if compliance therewith would reveal Common Interest Materials or their content; (c) not waive any such privilege or objection without the consent of all undersigned counsel whose clients have standing to raise any legal privilege applicable to the requested or demanded defense material; and (d) make every other reasonable effort to prevent or limit disclosure of the requested or demanded Common Interest Materials. In the absence of a waiver by the client(s) of the undersigned counsel who have standing to raise any legal privilege applicable to the
requested or demanded material, each Party and their counsel notified in accordance with the first sentence of this paragraph shall take all reasonable steps necessary to facilitate the assertion of all applicable rights and privileges with respect to the requested or demanded Common Interest Materials and shall cooperate fully with all other undersigned Parties and counsel in any judicial proceeding relating to the disclosure of Common Interest Materials.

8. Counsel for Parties not presently individually represented by undersigned counsel may become signatories and parties to this agreement, if any only if, (a) all signatories to this agreement agree that such additional signatories and parties should be permitted to enter into this agreement; and (b) such additional counsel executes and agrees to be bound by this agreement.

9. Participation in this agreement creates no attorney-client or other fiduciary relationships for any purpose. Each undersigned counsel understands that it is his or her sole responsibility to represent his or her respective client and that none of the other signatories to this agreement have in any way assumed any such responsibility as to another counsel's client or as to any other Party. The participation in this agreement, or the transmission or receipt of any Common Interest Materials pursuant to this agreement, shall not disqualify any signatory or any law firm of any signatory from accepting any other future engagement, including, without limitation, representing a client in enforcing any contract or other rights that such client may have against any other client whose counsel is a signatory to this agreement or who itself is signatory hereto.

10. In the event that any Party becomes a witness who may be called upon to provide evidence concerning the other Parties, or in any way undertakes any act or position that may be construed to be adverse to any other Party (including but not limited to appearance as a witness adverse to any other Party), nothing in this agreement shall be deemed to create a conflict of interest so as to require the disqualification of any counsel. No undersigned counsel or law firm of any undersigned counsel shall be disqualified from examining or cross-examining any Party who testifies at any proceeding, whether under grant of immunity or otherwise, because of such counsel's participation in this agreement or because such counsel has been privy to privileged information pursuant to this agreement. Each signatory to this agreement specifically understands and, in the case of counsel, has advised his or her client of this paragraph.

11. Any Party may withdraw from this agreement for any reason upon giving prior written notification to all other signatories hereto, which will thereupon be terminated as to the withdrawing Party and any undersigned counsel thereof. Such a withdrawal shall not be effective unless and until the Party against which it is asserted shall have received the required written notification. No termination shall affect or impair the privileges or obligations of confidentiality with respect to Common Interest Materials previously furnished pursuant to this agreement. In the event that any of the undersigned Parties or their counsel determines that it, or his or her client, no longer has, or no longer will have, a commonality of interest with the other Parties, such Party or counsel therefor, as applicable, must withdraw from this agreement in the manner and under the terms and conditions set forth above in this paragraph.

12. All Common Interest Materials that have been received pursuant to this agreement that are contained in tangible form, and all copies thereof, must be delivered back to the Party or counsel who provided them, within ten days after any of the following events:
withdrawal of the receiving Party or counsel from this agreement; the termination of the receiving counsel’s representation of the Party in question; the conclusion of the Litigation as to the receiving Party; the termination of this agreement; or a request by a Party to this agreement supplying the Common Interest Materials. Upon the consent of all of the Parties and / or their undersigned counsel who remain subject to this agreement, the receiving Party or counsel who must return Common Interest Materials pursuant to the immediately preceding sentence shall be permitted to destroy all such Common Interest Materials and copies thereof, in lieu of returning them, in which event the Common Interest Materials and all copies thereof shall be destroyed forthwith.

13. This agreement may be terminated by the withdrawal of all but one remaining Party or by written consent of all Parties that have not previously withdrawn. Termination pursuant to this paragraph shall become effective upon the date of execution of the written withdrawal or consent of all such Parties and shall operate prospectively only. Termination shall in no way affect the obligations set forth in this agreement to preserve the confidentiality of all Common Interest Materials obtained pursuant hereto, nor shall termination hereof affect the Participation Agreement, nor any of the Parties rights and obligations thereunder.

14. Each signatory to this agreement who is a counsel has advised his or her client of its contents and represents that such client has indicated that it understands the provisions of this agreement and agrees to be bound hereby. This agreement may be executed in counterparts and by facsimile signature by Parties and counsel.

15. This agreement does not require disclosure of information or transmission of any Common Interest Materials to anyone, including to any of the undersigned counsel, nor does it require disclosure thereof to all remaining Parties and their counsel upon or after disclosure to any other Party or its counsel. Rather, any disclosure of Common Interest Materials pursuant to this agreement is voluntary. Except as otherwise specifically provided herein, nothing in this agreement shall require any undersigned Parties or their counsel to share Common Interest Materials with other Parties or the other Parties’ counsel.

16. Neither the Bank nor its counsel makes any representation or warranty, and hereby disclaims any such representation or warranty, with regard to the accuracy, completeness, veracity, quality or timeliness of any information, documents or analyses, or otherwise any Common Interest Materials, that either may provide to the Lenders, or any one of them, or their counsel. No Participant or its counsel shall have any claim against the Bank or its counsel arising from or otherwise based on the provision, the lack of provision, or the accuracy, completeness, veracity, timeliness or quality of any information, documents or analyses, or otherwise any Common Interest Materials, that the Bank or its counsel may provide. Notwithstanding the foregoing, nothing herein diminishes any obligation that the Bank may have regarding the provision of any materials as may be required by the Participation Agreement, nor does anything contained herein diminish any rights, protections, indemnifications, waivers or releases in favor of the Bank in the Participation Agreement or the Loan Documents. The requirements of confidentiality set forth herein are in addition to the confidentiality terms set forth in the Participation Agreement.
17. Each of the Parties hereby waives, to the fullest extent permitted by applicable law, any right it may have to trial by jury in respect of any litigation directly or indirectly arising out of, under or in connection with this agreement. Each Party hereby (a) certifies that no representative, agent or attorney of any other Party has represented, expressly or otherwise, that such other Party would not, in the event of litigation, seek to enforce the foregoing waiver, and (b) acknowledges that it and the other Parties have been induced to enter into this agreement, as applicable, by, among other things, the mutual waivers and certifications of this paragraph.

18. This agreement shall be governed by New York law, without regard to any provisions thereof for the selection of another jurisdiction’s laws. Any modification, amendment or revision of this agreement must be in writing and signed by each of the undersigned Parties.

19. No adequate remedy at law is available for a breach of this agreement. In addition to any other remedies available, performance of this agreement may be specifically enforced or a breach thereof may be enjoined, or both.

20. In the event that any or all Parties elect to waive any of this agreement’s provisions with respect to any particular Common Interest Materials, such a waiver shall not be construed as a waiver with respect to other provisions of this agreement or as to other Common Interest Materials.

21. This agreement supersedes and memorializes earlier oral agreements between and among the undersigned pursuant to which Common Interest Materials have been transmitted and applies to all previous sharing of such materials among the undersigned on or prior to the date hereof.

IN WITNESS WHEREOF, the Parties and undersigned counsel, on behalf of themselves and their respective clients, have executed this agreement as of the date first above-mentioned:

AGREED TO:
TERM LOAN AGREEMENT

among

GENERAL MOTORS CORPORATION,
as the Borrower

SATURN CORPORATION,
as a Guarantor

THE SEVERAL LENDERS
from Time to Time Party Hereto,

CREDIT SUISSE SECURITIES (USA) LLC,
as Syndication Agent,

BARCLAYS BANK PLC,
CITIGROUP GLOBAL MARKETS INC.,
DEUTSCHE BANK SECURITIES INC.,
MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,
and
MORGAN STANLEY SENIOR FUNDING, INC.,
as Co-Documentation Agents,

and

JPMORGAN CHASE BANK, N.A.,
as Administrative Agent

Dated as of November 29, 2006

J.P. MORGAN SECURITIES INC.
and
CREDIT SUISSE SECURITIES (USA) LLC
as Joint Lead Arrangers and Joint Bookrunners

[CS&M No. 6701-619]
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TERM LOAN AGREEMENT, dated as of November 29, 2006, among GENERAL MOTORS CORPORATION, a Delaware corporation (the "Borrower"); SATURN CORPORATION, a Delaware corporation, as a Guarantor; the LENDERS party hereto (the "Lenders"); CREDIT SUISSE SECURITIES (USA) LLC, as Syndication Agent (the "Syndication Agent"); BARCLAYS BANK PLC, CITIGROUP GLOBAL MARKETS INC., DEUTSCHE BANK SECURITIES INC., MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, and MORGAN STANLEY SENIOR FUNDING, INC., as Co-Documentation Agents (the "Co-Documentation Agents"); and JPMORGAN CHASE BANK, N.A., as Administrative Agent (in such capacity, the "Agent").

The Borrower has requested the Lenders to extend credit in the form of Loans (such term and each other capitalized term used and not otherwise defined herein having the meaning assigned to it in Article I) to the Borrower on the Funding Date in Dollars in an aggregate principal amount of $1,500,000,000. The proceeds of the Loans are to be used for general corporate purposes of the Borrower and its Subsidiaries.

The Lenders are willing to extend such credit on the terms and subject to the conditions set forth herein. Accordingly, the parties hereto agree as follows:

ARTICLE I
Definitions

SECTION 1.01. Defined Terms. As used in this Agreement, the following terms shall have the following meanings:

"ABR": for any day, a rate per annum (rounded upwards, if necessary, to the next 1/16 of 1%) equal to the greater of (a) the Prime Rate in effect on such day and (b) the Federal Funds Effective Rate in effect on such day plus 1/2 of 1%. If for any reason the Agent shall have determined (which determination shall be conclusive absent manifest error) that it is unable to ascertain the Federal Funds Effective Rate for any reason, the ABR shall be determined without regard to clause (b) of the first sentence of this definition until the circumstances giving rise to such inability no longer exist. Any change in the ABR due to a change in the Prime Rate or the Federal Funds Effective Rate shall be effective as of the opening of business on the effective day of such change in the Prime Rate or the Federal Funds Effective Rate, respectively.

"ABR Loans": Loans bearing interest at a rate determined by reference to the ABR.

"Affiliate": with respect to any Person, any other Person directly or indirectly controlling or that is controlled by or is under common control with such Person, each officer, director, general partner or joint-venturer of such Person, and each Person that is the beneficial owner of 10% or more of any class of voting stock of such Person. For the purposes of this
definition, "control" means the possession of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities, by contract or otherwise.

"Agent": as defined in the preamble to this Agreement.

"Agreement": this Term Loan Agreement, as amended, supplemented or otherwise modified from time to time.

"Applicable Lending Office": for any Lender, such Lender's office, branch or Affiliate designated for Eurodollar Loans or ABR Loans, as applicable, as notified to the Agent and the Borrower or as otherwise specified in the Assignment and Acceptance applicable to such Lender, any of which offices may, subject to Section 2.15, be changed by such Lender upon 10 days' prior written notice to the Agent and the Borrower.

"Applicable Margin": with respect to any ABR Loan, 1.375% per annum, and, with respect to any Eurodollar Loan, 2.375% per annum.

"Applicable Percentage": as to any Lender at any time, the percentage which such Lender's Commitment then constitutes of the aggregate Commitments or, at any time after the Funding Date, the percentage that the principal amount of such Lender's Loans then outstanding constitutes of the aggregate principal amount of the Loans of all Lenders then outstanding.

"Arrangers": J.P. Morgan Securities Inc. and Credit Suisse Securities (USA) LLC.

"Assignee": as defined in Section 10.06.

"Assignment and Acceptance": as defined in Section 10.06.

"Attributable Indebtedness": at the time of determination as to any lease, the present value (discounted at the actual rate, if stated, or, if no rate is stated, the implicit rate of interest of such lease transaction as determined by a Financial Officer of the Borrower), calculated using the interval of scheduled rental payments under such lease, of the obligation of the lessee for net rental payments during the remaining term of such lease (excluding any subsequent renewal or other extension options held by the lessee). The term "net rental payments" means, with respect to any lease for any period, the sum of the rental and other payments required to be paid in such period by the lessee thereunder, but not including, however, any amounts required to be paid by such lessee (whether or not designated as rental or additional rental) on account of maintenance and repairs, insurance, taxes, assessments, water rates, indemnities or similar charges required to be paid by such lessee thereunder or any amounts required to be paid by such lessee thereunder contingent upon the amount of sales, earnings or profits or of maintenance and repairs, insurance, taxes, assessments, water rates, indemnities or similar charges; provided that in the case of any lease which is terminable by the lessee upon the payment of a penalty in an amount which is less than the total discounted net rental payments required to be paid from the later of the first date upon which such lease may be so terminated and the date of the determination of net rental payments, "net rental payments" shall include the
then current amount of such penalty from the later of such two dates and shall exclude the rental payments relating to the remaining period of the lease commencing with the later of such two dates.

“Borrower”: as defined in the preamble to this Agreement.

“Business Day”: any day that (i) is not a Saturday or Sunday and (ii) is (A) when used in connection with any ABR Loan, any day on which banks are open for business in New York and (B) when used in connection with any Eurodollar Loan, any day on which dealings in Dollars can occur in the London interbank market and on which banks are open for business in New York.

“Capital Lease Obligations”: as to any Person, the obligations of such Person to pay rent or other amounts under any lease of (or other arrangement conveying the right to use) real or personal property, or a combination thereof, which obligations are required to be classified and accounted for as capital leases on a balance sheet of such Person under GAAP and, for the purposes of this Agreement, the amount of such obligations at any time shall be the capitalized amount thereof at such time determined in accordance with GAAP.

“Code”: the Internal Revenue Code of 1986, as amended from time to time.

“Co-Documentation Agents”: as defined in the preamble to this Agreement.

“Collateral”: all property of the Loan Parties, now owned or hereafter acquired, upon which a Lien is created in favor of the Agent for the benefit of the Secured Parties by any Security Document.

“Collateral Agreement”: the Collateral Agreement, substantially in the form of Exhibit C, to be executed and delivered by the Loan Parties and the Agent, as such agreement may be amended, restated, supplemented or otherwise modified from time to time.

“Collateral Value”: as of any date of determination, the aggregate net book value of the Collateral located in the United States of America as of the end of the most recent fiscal quarter of the Borrower, excluding (i) any Collateral Disposed of since the last day of such fiscal quarter, (ii) any Collateral subject to third-party Liens securing Indebtedness (or securing other monetary obligations, if all such third-party Liens securing other monetary obligations, in the aggregate, would materially reduce the value of the Collateral taken as a whole), (iii) all Collateral owned by any Guarantor if any of the events described in paragraph (e) of Article VII shall have occurred and be continuing as of such date with respect to such Guarantor (with references in such paragraph (e) to the Borrower being deemed for purposes of this clause (iii) to be references to such Guarantor), and (iv) any Collateral installed or located on or at any facility or other real property not owned by a Loan Party or subject to any Lien securing Indebtedness (other than Obligations) or any sale and lease-back arrangement, unless (x) the Agent shall have received a landlord waiver, bailee letter or other access agreement reasonably satisfactory to it, executed by each applicable owner of or holder of such Lien on such facility or other real property (or a representative authorized to act on its behalf) on customary terms or (y) the Agent shall have agreed with the Borrower in writing that such a waiver, letter or agreement is not required with respect to such Collateral. Notwithstanding the foregoing, for purposes of
determining Collateral Value, Collateral shall not be excluded pursuant to subclause (iv)(x) of the preceding sentence prior to February 1, 2007 (or, as to the Collateral installed or located on or at any particular facilities or other real properties, such later date or dates as the Agent shall agree) so long as the Borrower shall be endeavoring in good faith to obtain the required landlord waivers, bailee letters or other access agreements.

"Collateral Value Certificate": a certificate in substantially the form of, and containing the information called for by, Exhibit F-1, signed by a Financial Officer of the Borrower and setting forth the Collateral Value as of the last day of the fiscal period covered by the financial statements to which such certificate relates.

"Commitment": as to any Lender, the commitment of such Lender to make a Loan hereunder on the Funding Date, expressed as an amount representing the maximum principal amount of the Loan to be made by such Lender hereunder, as such commitment may be reduced or increased from time to time in accordance with the provisions of this Agreement. The initial amount of each Lender’s Commitment is set forth on Schedule 2.01, or in the Assignment and Acceptance pursuant to which such Lender shall have assumed its Commitment, as applicable.

"Conduit Lender": any special purpose funding vehicle that (i) is organized under the laws of the United States or any state thereof and (ii) is engaged in making, purchasing or otherwise investing in commercial loans in the ordinary course of its business.

"Contractual Obligation": as to any Person, any provision of any security issued by such Person or of any agreement, instrument or other undertaking to which such Person is a party or by which it or any of its property is bound.

"Default": any of the events specified in Article VII, whether or not any requirement for the giving of notice, the lapse of time, or both, or any other condition, has been satisfied.

"Designated Refinancing": (a) any prepayment of all or a substantial portion of the Loans with the proceeds of a replacement loan or credit facility of the Borrower or any of its Subsidiaries or (b) any amendment to this Agreement that reduces the Applicable Margin, in the case of each of clause (a) or (b), made or effective on or prior to the first anniversary of the Funding Date.

"Disposition": with respect to any property, any sale, lease, sale and lease-back, assignment, conveyance, transfer or other disposition thereof. The terms “Dispose” and “Disposed of” shall have correlative meanings.

"Dollars" and “$”: dollars in lawful currency of the United States of America.

"Environmental Activity": any past, present or future activity, event or circumstance in respect of a Hazardous Substance, including its presence, storage, use, holding, collection, purchase, accumulation, assessment, generation, manufacture, construction, processing, treatment, stabilization, disposition, handling, disposal or transportation, or its spill,
discharge, leak, release, leaching, dispersal or migration into the environment, including the
movement through or in the air, soil, surface water or groundwater.

"Environmental Laws": all applicable laws regulating, relating to or imposing
liability or standards of conduct concerning protection or quality of the environment, human
health, employee health and safety or Hazardous Substances.

"Equipment": as defined in the Collateral Agreement.

"ERISA": the Employee Retirement Income Security Act of 1974, as amended
from time to time.

"Eurodollar Loan Group": a Loan Group comprised of Eurodollar Loans.

"Eurodollar Loan": any Loan bearing interest at a rate determined by reference to
the Eurodollar Rate.

"Eurodollar Rate": with respect to an Interest Period pertaining to any Eurodollar
Loan, the rate of interest determined on the basis of the rate for deposits in Dollars for a period
equal to such Interest Period commencing on the first day of such Interest Period appearing on
Page 3750 of the Telerate Screen as of 11:00 a.m., London time, two Business Days prior to the
beginning of such Interest Period. In the event that such rate does not appear on such page of the
Telerate Screen (or otherwise on the Telerate Service), the "Eurodollar Rate" shall instead be the
interest rate per annum (rounded upwards, if necessary, to the next 1/16 of 1%) equal to the rate
at which deposits in Dollars approximately equal to $10,000,000, and for a maturity comparable
to such Interest Period, are offered by the principal London office of the Reference Lender (or, if
the Reference Lender does not at the time maintain a London office, the principal London office
of any Affiliate of the Reference Lender) for immediately available funds in the London
interbank market at approximately 11:00 a.m., London time, two Business Days prior to the
commencement of such Interest Period.

"Eurodollar Reserve Rate": with respect to each day during each Interest Period
pertaining to a Eurodollar Loan, a rate per annum determined for such day in accordance with
the following formula (rounded upward to the nearest 1/100th of 1%):

\[
\text{Eurodollar Reserve Rate} = \frac{(\text{Eurodollar Rate})}{(1.00 - \text{Eurodollar Reserve Requirements})}
\]

"Eurodollar Reserve Requirements": for any day as applied to a Eurodollar Loan,
the aggregate (without duplication) of the maximum rates (expressed as a decimal fraction) of
reserve requirements in effect on such day (including, without limitation, basic, supplemental,
marginal and emergency reserves under any regulations of the Board of Governors of the Federal
Reserve System or other Governmental Authority having jurisdiction with respect thereto)
dealing with reserve requirements prescribed for eurodollar funding (currently referred to as
"Eurocurrency liabilities" in Regulation D of such Board) maintained by a member bank of such
System.
“Event of Default”: any of the events specified in Article VII, provided that any requirement for the giving of notice, the lapse of time, or both, or any other condition, has been satisfied.

“Existing Credit Agreement”: the Amended and Restated Credit Agreement dated as of July 20, 2006, among the Borrower, General Motors of Canada Limited, Saturn Corporation, the lenders party thereto and Citicorp USA, Inc. as administrative agent, as amended, restated, supplemented, replaced or otherwise modified from time to time.

“Federal Funds Effective Rate”: for any day, the weighted average of the rates (rounded upward, if necessary, to the next 1/100 of 1%) on overnight Federal funds transactions with members of the Federal Reserve System arranged by Federal funds brokers, as published on the next succeeding Business Day by the Federal Reserve Bank of New York, or, if such rate is not so published for any day which is a Business Day, the average (rounded upward, if necessary, to the next 1/100 of 1%) of the quotations for such day of such rates on such transactions received by the Agent from three Federal funds brokers of recognized standing selected by it.

“Fee Letter”: the fee letter among the Borrower, the Arrangers and the Agent, dated the date of this Agreement.

“Financial Officer”: with respect to any Person, the chief financial officer, principal accounting officer, a financial vice president, treasurer, assistant treasurer or controller of such Person.

“Fixture”: as defined in the Collateral Agreement.

“Fixture Filing Financing Statement”: as defined in the Collateral Agreement.

“Funding Date”: a date on or before December 15, 2006, selected by the Borrower in accordance with Section 2.02 as the date on which the Loans will be made hereunder.

“GAAP”: generally accepted accounting principles in the United States of America as in effect from time to time and as applied by the Borrower in the preparation of its public financial statements.

“GMAC”: GMAC LLC (or any successor thereto) and its Subsidiaries.

“Governmental Authority”: any nation or government, any state, province, municipality or other political subdivision thereof and any entity exercising executive, legislative, judicial, regulatory, taxing or administrative functions of government including the European Central Bank.

“Guarantee Obligations”: as to any Person (the “guaranteeing Person”), if the primary purpose or intent thereof is to provide assurance that the indebtedness of another Person will be paid or discharged, any obligation of the guaranteeing Person that guarantees or in effect guarantees, or which is given to induce the creation of a separate obligation by another Person...
(including any bank under any letter of credit) that guarantees or in effect guarantees, any Indebtedness (the "primary obligations") of any other third Person (the "primary obligor") in any manner, whether directly or indirectly, including any obligation of the guaranteeing Person, whether or not contingent, (i) to advance or supply funds for the purchase or payment of any such primary obligation, (ii) to purchase property, securities or services primarily for the purpose of assuring the owner of any such primary obligation of the ability of the primary obligor to make payment of such primary obligation or (iii) otherwise to assure or hold harmless the owner of any such primary obligation against loss in respect thereof; provided, however, that the term Guarantee Obligation shall not include endorsements of instruments for deposit or collection in the ordinary course of business. The amount of any Guarantee Obligation of any guaranteeing Person shall be deemed to be the lower of (a) an amount equal to the stated or determinable amount of the primary obligation in respect of which such Guarantee Obligation is made and (b) the maximum amount for which such guaranteeing Person may be liable pursuant to the terms of the instrument embodying such Guarantee Obligation, unless such primary obligation and the maximum amount for which such guaranteeing Person may be liable are not stated or determinable, in which case the amount of such Guarantee Obligation shall be such guaranteeing Person's maximum reasonably anticipated liability in respect thereof as determined by the Borrower in good faith.

"Guarantor": Saturn Corporation and each other direct or indirect wholly-owned domestic Subsidiary of the Borrower that at the option of the Borrower becomes a party to this Agreement, the Collateral Agreement and each other relevant Loan Document, in each case by executing a joinder agreement in form and substance reasonably acceptable to the Agent.

"Hazardous Substance": (a) all chemicals, materials, contaminants, wastes and substances defined as or included in the definition of "contaminants", "wastes", "hazardous wastes", "hazardous materials", "hazardous substances", "extremely hazardous wastes", "extremely hazardous substances", "restricted hazardous waste", "toxic substances", "toxic pollutants", or "pollutants" or words of similar import under any applicable Environmental Laws and (b) all other chemicals, materials and substances, exposure to which is prohibited; limited or regulated by any Governmental Authority pursuant to any applicable Environmental Laws.

"Indebtedness": (a) for purposes of Sections 6.02(a) and 6.03 and paragraph (d) of Article VII, of any Person at any date, the amount outstanding on such date under notes, bonds, debentures or other similar evidences of indebtedness for money borrowed (including, without limitation, indebtedness for borrowed money evidenced by a loan account) and (b) for all other purposes, of any Person at any date, without duplication, (i) all indebtedness of such Person for borrowed money, (ii) all obligations of such Person evidenced by notes, bonds, debentures or other similar instruments, (iii) all Capital Lease Obligations of such Person, (iv) all obligations of such Person, contingent or otherwise, as an account party or applicant under or in respect of acceptances, letters of credit and similar arrangements, (v) all obligations of such Person in respect of securitizations of receivables, (vi) all net obligations of such Person under swap agreements, (vii) all purchase money indebtedness of such Person and (viii) all Guarantee Obligations of such Person in respect of any of the foregoing.
"Indenture": the Indenture dated as of December 7, 1995 between the Borrower and Citibank, N.A., as Trustee, all supplemental indentures related thereto and any resolutions that have added any covenants to, or modified the covenants contained in, the Indenture.

"Interest Payment Date": (a) as to any ABR Loan, the third Business Day after the last day of each March, June, September and December to occur while such Loan is outstanding and the date such Loan is paid in full, (b) as to any Eurodollar Loan, the last day of each Interest Period applicable thereto and (c) as to any Eurodollar Loan having an Interest Period longer than three months, each day which is three months after the first day of such Interest Period; provided that, in addition to the foregoing, each of (i) the date upon which the Loans have been paid in full and (ii) the Maturity Date shall be deemed to be an "Interest Payment Date" with respect to any interest which is then accrued hereunder.

"Interest Period": with respect to any Eurodollar Loan:

(a) initially, the period commencing on the borrowing or conversion date, as the case may be, with respect to such Eurodollar Loan and ending one, two, three or six months thereafter, as selected by the Borrower in its notice of borrowing or notice of conversion, as the case may be, given with respect thereto; and

(b) thereafter, each period commencing on the last day of the next preceding Interest Period applicable to such Eurodollar Loan and ending one, two, three or six months thereafter, as selected by the Borrower by irrevocable notice to the Agent not less than three Business Days prior to the last day of the then current Interest Period with respect thereto; provided that all of the foregoing provisions relating to Interest Periods are subject to the following:

(i) if any Interest Period would otherwise end on a day that is not a Business Day, such Interest Period shall be extended to the next succeeding Business Day unless, in the case of an Interest Period pertaining to a Eurodollar Loan, the result of such extension would be to carry such Interest Period into another calendar month in which event such Interest Period shall end on the immediately preceding Business Day; and

(ii) any Interest Period that begins on the last Business Day of a calendar month (or on a day for which there is no numerically corresponding day in the calendar month at the end of such Interest Period) shall end on the last Business Day of a calendar month.

Notwithstanding anything to the contrary contained in this Agreement, no Interest Period shall be selected by the Borrower which ends on a date after the Maturity Date.

"Lender": as defined in the preamble to this Agreement; collectively, the "Lenders"; provided that unless the context otherwise requires, each reference herein to the Lenders shall be deemed to include any Conduit Lender.

"Lien": any mortgage, pledge, lien, security interest, charge, statutory deemed trust, conditional sale or other title retention agreement or other similar encumbrance.
"Loan": a loan made by a Lender to the Borrower pursuant to this Agreement.

"Loan Documents": this Agreement, the Security Documents, the Notes and any amendment, waiver, supplement or other modification to any of the foregoing.

"Loan Group": a group of Loans of a single Type as to which a single Interest Period is in effect.

"Loan Parties": each of the Borrower and each Guarantor.

"Majority Lenders": (a) at any time prior to the Funding Date, Lenders holding more than 50% of the Commitments and (b) at any time following the Funding Date, Lenders holding more than 50% of the outstanding Loans at such time.

"Manufacturing Subsidiary": any Subsidiary of the Borrower (i) substantially all the property of which is located within the continental United States of America, (ii) which owns a Principal Domestic Manufacturing Property and (iii) in which the Borrower's investment, direct or indirect and whether in the form of equity, debt, advances or otherwise, is in excess of $2,500,000,000 as shown on the books of the Borrower as of the end of the fiscal year immediately preceding the date of determination; provided that "Manufacturing Subsidiary" shall not include GMAC or any other Subsidiary which is principally engaged in leasing or in financing installment receivables or otherwise providing financial or insurance services to the Borrower or others or which is principally engaged in financing the Borrower's operations outside the continental United States of America.

"Material Adverse Effect": a material adverse effect on (a) the financial condition of the Borrower and its Subsidiaries taken as a whole or (b) the validity or enforceability of this Agreement and any of the other Loan Documents or the rights or remedies of the Agent and the Lenders under the Loan Documents.

"Material Facility": as of any date, any U.S. Manufacturing Facility (as defined in the Collateral Agreement) upon which Collateral having a net book value (as determined as of the end of the most recent fiscal period of the Borrower for which a Collateral Value Certificate or Summary Collateral Value Certificate has been delivered hereunder or, prior to the delivery of the first Collateral Value Certificate or Summary Collateral Value Certificate, as of June 30, 2006) of at least $100,000,000 in the aggregate shall be installed or located.

"Maturity Date": the seventh anniversary of the Funding Date (or, if such seventh anniversary does not fall on a Business Day, the next succeeding Business Day).

"Non-US Lender": as defined in Section 2.15.

"Note": a promissory note, executed and delivered by the Borrower with respect to the Loans, substantially in the form of Exhibit B.

"Obligations": all obligations of any Loan Party in respect of any unpaid Loans and any interest thereon (including interest accruing after the maturity of any Loan and interest accruing after the filing of any petition in bankruptcy, or the commencement of any insolvency,
rreorganization or like proceeding, relating to any Loan Party, whether or not a claim for post-filing or post-petition interest is allowed in such proceeding and all other obligations and liabilities of any Loan Party to the Agent or to any Lender, whether direct or indirect, absolute or contingent, due or to become due, or now existing or hereafter incurred, which may arise under, out of, or in connection with this Agreement, any other Loan Document or any other document made, delivered or given in connection herewith or therewith, whether on account of principal, interest, reimbursement obligations, fees, indemnities, costs, expenses or otherwise.

"Participant": as defined in Section 10.06.

"Permitted Transfer": with respect to any Collateral, any sale or other transfer of such Collateral that is not prohibited by this Agreement (and would not result in a default under Section 6.04 of this Agreement) and that is made (a) to a Person other than the Borrower or an Affiliate of the Borrower or (b) to an Affiliate of the Borrower that is not a Loan Party (i) in the ordinary course of business or (ii) for a business purpose of the Borrower (as determined in good faith by the Borrower) and not primarily for the purpose of (A) reducing the security for the Obligations or (B) making such Collateral available to other creditors.

"Person": an individual, partnership, corporation, business trust, joint stock company, trust, unincorporated association, joint venture, Governmental Authority or other entity of whatever nature.

"Prime Rate": the rate of interest per annum equal to the prime rate publicly announced by the majority (or, if there is not a majority, the plurality) of the eleven largest commercial banks chartered under United States Federal or State banking laws as their prime rates (or similar base rates) in effect at their principal offices. The determination of such eleven largest commercial banks shall be based upon deposits as of the prior year-end, as reported in the American Banker or such other source as may be mutually agreed upon by the Agent and the Borrower.

"Principal Domestic Manufacturing Property": any manufacturing plant or facility owned by the Borrower or any Manufacturing Subsidiary of the Borrower which is located within the continental United States of America and, in the opinion of the Borrower’s Board of Directors, is of material importance to the total business conducted by the Borrower and its consolidated affiliates as an entity.

"Quarterly Collateral Reporting Period": a period commencing on any date on which the Collateral Value is less than 300% of the Total Exposure and continuing until the Borrower shall have delivered to the Agent Collateral Value Certificates for two successive fiscal quarters of the Borrower ending after such date showing that the Collateral Value is equal to or greater than 300% of the Total Exposure as of the end of each such fiscal quarter.

"Reference Lender": the Agent.

"Register": as defined in Section 10.06.

"Requirement of Law": as to any Person, any law, treaty, rule or regulation or determination of an arbitrator or a court or other Governmental Authority, in each case
applicable to or binding upon such Person or any of its property or to which such Person or any of its property is subject.

"Secured Parties": the collective reference to the Agent, each Lender and each other Person to which any Obligations are owed.

"Security Documents": the Collateral Agreement and all other security documents delivered to the Agent granting or purporting to grant a Lien on any property of any Person to secure the Obligations, including financing statements or financing change statements under the applicable Uniform Commercial Code.

"Significant Subsidiary": at any time, any Subsidiary of the Borrower which has at least 10% of the consolidated assets of the Borrower and its Subsidiaries at such time as reflected in the most recent annual audited consolidated financial statements of the Borrower.

"Subsidiary": as to any Person (the "parent"), any other Person of which at least a majority of the outstanding stock or other equity interests having by the terms thereof ordinary voting power to elect a majority of the board of directors or comparable governing body of such Person (irrespective of whether or not at the time stock or other equity interests of any other class or classes of such Person shall have or might have voting power by reason of the happening of any contingency) is at the time owned by the parent, or by one or more Subsidiaries, or by the parent and one or more Subsidiaries. Unless otherwise qualified, all references to a "Subsidiary" or to "Subsidiaries" in this Agreement shall refer to a Subsidiary or Subsidiaries of the Borrower. For the purposes of this Agreement (other than Sections 3.01, 5.01 and 5.02) and the other Loan Documents, GMAC shall not be deemed to be a Subsidiary or an Affiliate of the Borrower, and any references herein or therein to the subsidiaries or affiliates of the Borrower shall be to the Borrower’s Subsidiaries or Affiliates, as applicable, other than GMAC.

"Summary Collateral Value Certificate": a certificate substantially the form of Exhibit F-2 signed by a Financial Officer of the Borrower and certifying that, as of the last day of the fiscal quarter of the Borrower covered by the financial statements to which such certificate relates, (a) the Borrower is in compliance with Section 6.04 and (b) the Collateral Value is equal to or greater than 300% of the Total Exposure as of such date.

"Syndication Agent": as defined in the preamble to this Agreement.

"Total Exposure": as of any date of determination, the aggregate unpaid principal amount of the Loans.

"Transferee": as defined in Section 10.06.

"Type": as to any Loan, its nature as an ABR Loan or a Eurodollar Loan.

SECTION 1.02. Other Definitional Provisions. (a) Unless otherwise specified therein, all terms defined in this Agreement shall have the defined meanings when used in the other Loan Documents or any certificate or other document made or delivered pursuant hereto.
(b) As used herein, and any certificate or other document made or delivered pursuant hereto, accounting terms relating to the Borrower and its Subsidiaries not defined in Section 1.01 and accounting terms partly defined in Section 1.01, to the extent not defined, shall have the respective meanings given to them under GAAP.

(c) The words "hereof", "herein" and "hereunder" and words of similar import when used in this Agreement shall refer to this Agreement as a whole and not to any particular provision of this Agreement, and Article, Section, Schedule and Exhibit references are to the Articles, Sections, Schedules and Exhibits of this Agreement, unless otherwise specified.

(d) The meanings given to terms defined herein shall be equally applicable to both the singular and plural forms of such terms.

ARTICLE II

Amount and Terms of Commitments

SECTION 2.01. Commitments. (a) Subject to the terms and conditions set forth herein, each Lender agrees to make a Loan or Loans to the Borrower on the Funding Date in an aggregate principal amount not greater than its Commitment. Loans made on the Funding Date may be converted and continued as provided in Section 2.05, but no new Loans will be made after the Funding Date. Amounts repaid or prepaid in respect of Loans may not be reborrowed. All Loans shall be made and repaid or prepaid in Dollars.

(b) The Loans, together with all accrued and unpaid interest thereon, shall mature and be due and payable in full on the Maturity Date.

(c) Subject to Sections 2.11 and 2.13, the Loans may from time to time be (i) Eurodollar Loans, (ii) ABR Loans or (iii) any combination thereof, as determined by the Borrower and notified to the Agent in accordance with Sections 2.02 and 2.05. Each Lender may make or maintain its Loans for the account of the Borrower by or through such Lender’s Applicable Lending Office.

SECTION 2.02. Procedure for Borrowing Loans. The Borrower shall give the Agent an irrevocable notice (which notice must be received by the Agent prior to 1:00 p.m., New York City time, (i) three Business Days (or such shorter period as may be agreed to by the Agent) prior to the Funding Date, if all or any part of the requested Loans are to be Eurodollar Loans, or (ii) one Business Day prior to the Funding Date, otherwise, specifying (A) the amount to be borrowed, (B) the requested Funding Date, which shall be a Business Day, (C) whether the requested Loans are to be Eurodollar Loans, ABR Loans or a combination thereof and (D) if the requested Loans are to be entirely or partly comprised of Eurodollar Loans, the respective amounts of each such Type of Loan and the respective lengths of the initial Interest Periods therefor. Each Loan Group shall be in an amount equal to $50,000,000 or a whole multiple of $5,000,000 in excess thereof. Upon receipt of any such notice from the Borrower, the Agent shall promptly notify each Lender thereof. Each Lender will make its Applicable Percentage of each Loan Group available to the Agent for the account of the Borrower at the office of the
Agent specified in Section 10.02 prior to 12:00 noon, New York City time, on the Funding Date in funds immediately available to the Agent. Such Loans will then immediately be made available to the Borrower by the Agent crediting the account of the Borrower on the books of such office with the aggregate of the amounts made available to the Agent by the Lenders and in like funds as received by the Agent.

SECTION 2.03. Termination of Commitments. The Commitments shall terminate upon the making of the Loans on the Funding Date; provided, that if the Loans shall not have been made by December 15, 2006, the Commitments shall terminate at 5:00 p.m., New York City time, on such date.

SECTION 2.04. Prepayments. (a) The Borrower may, at any time and from time to time, prepay Loans, in whole or in part, without premium or penalty (except as set forth in paragraph (c) of this Section and subject to the provisions of Section 2.16), upon at least one Business Day’s irrevocable notice to the Agent (which notice must be received by the Agent prior to 12:00 Noon, New York City time, on the date upon which such notice is due), specifying (i) the date and amount of prepayment and (ii) the Loan Group or Loan Groups being prepaid. Upon receipt of any such notice, the Agent shall promptly notify each Lender. If any such notice is given, the amount specified in such notice shall be due and payable on the date specified therein, together with any amounts payable pursuant to paragraph (c) of this Section and Section 2.16, if applicable. Partial prepayments of any Loan Group shall be in an aggregate principal amount of $10,000,000 or a multiple of $5,000,000 in excess thereof.

(b) If, on any date of determination, the Borrower shall not be in compliance with the covenant set forth in Section 6.04, the Borrower shall promptly, and in any event within five Business Days of such date, prepay Loans in an amount necessary to cause the Borrower to be in compliance with such covenant.

(c) Any prepayment of Loans made in connection with any Designated Refinancing shall be subject to a 1% prepayment premium on the principal amount of the Loans so prepaid.

SECTION 2.05. Conversion and Continuation Options. (a) The Borrower may elect from time to time to convert any Eurodollar Loans to ABR Loans, by giving the Agent at least one Business Day’s prior irrevocable notice of such election; provided that any such conversion of Eurodollar Loans may only be made on the last day of an Interest Period with respect thereto. The Borrower may elect from time to time to convert ABR Loans to Eurodollar Loans by giving the Agent at least three Business Days’ prior irrevocable notice of such election. Any such notice of conversion to Eurodollar Loans shall specify the length of the initial Interest Period or Interest Periods therefor. Upon receipt of any such notice the Agent shall promptly notify each Lender. Notwithstanding the foregoing, (i) no ABR Loan may be converted into a Eurodollar Loan when any Event of Default has occurred and is continuing and the Agent has or the Majority Lenders have determined that such conversion is not appropriate and (ii) no ABR Loan may be converted into a Eurodollar Loan after the date that is one month prior to the Maturity Date.
(b) Any Eurodollar Loan may be continued as such upon the expiration of the then current Interest Period with respect thereto by the Borrower giving notice to the Agent, in accordance with the applicable provisions of the term “Interest Period” set forth in Section 1.01, specifying the length of the next Interest Period to be applicable to such Loan; provided that no Eurodollar Loan may be continued as such (i) when any Event of Default has occurred and is continuing and the Agent has or the Majority Lenders have determined that such continuation is not appropriate or (ii) after the date that is one month prior to the Maturity Date; provided, further, that (A) if such continuation is not permitted pursuant to the preceding proviso, such Eurodollar Loan shall be automatically converted to an ABR Loan on the last day of the then expiring Interest Period and (B) if the Borrower shall fail to give any notice required by this paragraph, such Eurodollar Loan shall, subject to clause (A), automatically continue as a Eurodollar Loan having a new Interest Period of the same duration as the Interest Period then expired.

SECTION 2.06. Minimum Amounts of Eurodollar Loan Groups. All conversions and continuations of Loans hereunder and all selections of Interest Periods hereunder shall be in such amounts and be made pursuant to such elections so that, after giving effect thereto, the aggregate principal amount of each Eurodollar Loan Group shall be equal to $50,000,000 or a whole multiple of $5,000,000 in excess thereof. In no event shall there be more than 10 Eurodollar Loan Groups outstanding at any time.

SECTION 2.07. Repayment of Loans; Evidence of Debt. (a) The Borrower hereby unconditionally promises to pay to the Agent for the account of each Lender the then unpaid principal amount of each Loan of such Lender as provided in Section 2.08.

(b) The Borrower hereby further agrees to pay interest in immediately available funds at the office of the Agent on the unpaid principal amount of the Loans owing by the Borrower from time to time from the date hereof until payment in full thereof at the rates per annum, and on the dates, set forth in Section 2.09.

(c) Each Lender shall maintain an account or accounts evidencing the Indebtedness of the Borrower to the Applicable Lending Office of such Lender resulting from each Loan made by such lending office of such Lender from time to time, including the amounts of principal and interest payable and paid to such lending office of such Lender from time to time under this Agreement.

(d) The Agent shall maintain the Register pursuant to Section 10.06, and a subaccount for each Lender, in which Register and subaccounts (taken together) shall be recorded (i) the amount of each Loan made hereunder, the Type of each Loan and the Interest Period applicable thereto (if such Loan shall be a Eurodollar Loan), (ii) the amount of any principal or interest due and payable or to become due and payable from the Borrower to each Lender hereunder and (iii) the amount of any sum received by the Agent hereunder from the Borrower and each Lender’s share thereof.

(e) The entries made in the Register and accounts maintained pursuant to this Section shall, to the extent permitted by applicable law, be prima facie evidence of the existence and amounts of the obligations of the Borrower therein recorded; provided, however, that the
failure of any Lender or the Agent to maintain such account, such Register or such subaccount, as applicable, or any error therein, shall not in any manner affect the obligation of the Borrower to repay (with applicable interest) the Loans made to the Borrower in accordance with the terms of this Agreement.

SECTION 2.08. Amortization of Loans. (a) Subject to adjustment pursuant to paragraph (b) of this Section, on the third Business Day following the last day of each March, June, September and December, commencing on the third Business Day following March 31, 2007, and continuing to the Maturity Date, the Borrower shall repay Loans in a principal amount equal to 0.25% of the aggregate principal amount of the Loans made on the Funding Date.

(b) Any prepayment of Loans pursuant to Section 2.04 shall be applied to reduce the subsequent scheduled repayments of the Loans to be made pursuant to this Section in the direct order of their maturity, or as otherwise directed by the Borrower.

(c) Prior to any repayment of Loans, the Borrower shall select the Loan Group or Loan Groups to be repaid and shall notify the Agent of such selection not later than 12:00 noon, New York City time, one Business Day before the scheduled date of such repayment. Each repayment of a Loan Group shall be applied ratably to the Loans included in the repaid Loan Group. Repayments of Loans shall be accompanied by accrued interest on the principal amount of Loans repaid.

SECTION 2.09. Interest Rates for Loans. (a) Each ABR Loan shall bear interest at a rate per annum equal to the ABR plus the Applicable Margin.

(b) Each Eurodollar Loan shall bear interest at a rate per annum equal to the Eurodollar Rate for the Interest Period in effect for such Loan plus the Applicable Margin.

(c) Interest on the Loans shall be payable in arrears on each Interest Payment Date and on the date of any required repayment under Section 2.08 with respect to the amounts so repaid; provided that interest accruing pursuant to paragraph (d) of this Section shall be payable from time to time on demand.

(d) If all or a portion of (i) the principal amount of any Loan, (ii) any interest payable thereon or (iii) any other amount payable hereunder shall not be paid when due (whether at the stated maturity, by acceleration or otherwise), such overdue amount shall bear interest at a rate per annum which is (x) in the case of overdue principal, the rate that would otherwise be applicable thereto pursuant to the foregoing provisions of this Section plus 2% or (y) in the case of overdue interest or other amounts, the rate described in paragraph (a) of this Section plus 2%, in each case from the date of such non-payment until such amount is paid in full (after as well as before judgment).

SECTION 2.10. Computation of Interest. (a) Interest on all Loans shall be computed on the basis of the actual number of days elapsed over a year of 360 days or, in the case of ABR Loans on any date when the ABR is determined by reference to the Prime Rate, a year of 365 or 366 days as appropriate (in each case including the first day but excluding the last day). Each determination of an interest rate by the Agent pursuant to any provision of this
Agreement shall be conclusive and binding on the Borrower and the Lenders in the absence of manifest error. The Agent shall, at any time and from time to time upon the request of the Borrower, deliver to the Borrower a statement showing the quotations used by the Agent in determining any interest rate applicable to any Loan pursuant to this Agreement.

(b) Any change in the interest rate on a Loan resulting from a change in the ABR or the Eurodollar Reserve Requirements shall become effective as of the opening of business on the day on which such change in the ABR is announced or such change in the Eurodollar Reserve Requirements becomes effective, as the case may be. The Agent shall as soon as practicable notify the Borrower and the Lenders of the effective date and the amount of each such change in interest rate.

SECTION 2.11. Inability to Determine Interest Rate. If the Eurodollar Rate cannot be determined by the Agent in the manner specified in the definition of “Eurodollar Rate” contained in Section 1.01, the Agent shall give telecopy or telephonic notice thereof to the Borrower and the Lenders as soon as practicable thereafter. Until such time as the Eurodollar Rate can be determined by the Agent in the manner specified in the definition of “Eurodollar Rate” contained in Section 1.01, no further Eurodollar Loans shall be continued as such at the end of the then current Interest Period (other than any Eurodollar Loans previously requested and with respect to which the Eurodollar Rate was previously determined), nor shall the Borrower have the right to convert ABR Loans to Eurodollar Loans, and any affected Loans shall be converted on the last day of the then current Interest Period to ABR Loans in accordance with Section 2.05.

SECTION 2.12. Pro Rata Treatment and Payments. (a) The borrowing of Loans of each Loan Group hereunder on the Funding Date, and each conversion or continuation of Loans of any Loan Group, shall be made pro rata among the Lenders.

(b) Each payment (including each prepayment) on account of principal of and interest on the Loans of any Loan Group shall be made pro rata among the Lenders according to the respective outstanding principal amounts of their Loans comprising such Loan Group and (ii) any proceeds of the Collateral shall be distributed in accordance with paragraph (c) of this Section.

(c) Any proceeds of the Collateral during the continuance of an Event of Default shall be applied in the following order:

(i) first, to pay incurred and unpaid fees and expenses of the Agent under the Loan Documents;

(ii) second, to the Agent, for application by it towards payment of interest then due and owing and remaining unpaid in respect of the Obligations, pro rata among the Secured Parties according to the amount of interest then due and owing and remaining unpaid to such Secured Parties;

(iii) third, to the Agent, for application by it towards payment of all other amounts then due and owing and remaining unpaid in respect of the Obligations, pro rata among the Secured Parties according to the amounts of the
Obligations then due and owing and remaining unpaid to such Secured Parties; and

(iv) fourth, any balance remaining after the Obligations shall have been paid in full shall be paid over to the Borrower or to whomsoever may be lawfully entitled to receive the same;

provided that, if sufficient funds are not available to fund all payments to be made in respect of any Obligations described in any of clause (i), (ii) or (iii) above, the available funds being applied with respect to any such Obligations shall be allocated to the payment of such Obligations ratably, based on the proportion of the Agent's and each other Secured Party's interest in such aggregate outstanding Obligations.

(d) All payments (including prepayments) to be made by the Borrower hereunder, whether on account of principal, interest, fees or otherwise, shall be made without set-off or counterclaim and shall be made prior to 1:00 p.m., New York City time, on the due date thereof to the Agent, for the account of the Lenders, at the Agent's office specified in Section 10.02. Payments of principal and interest on any Loan and all other amounts payable hereunder shall be made in Dollars; and all payments hereunder shall be made in immediately available funds. The Agent shall distribute such payments to the Lenders promptly upon receipt in like funds as received. If any payment hereunder (other than payments on the Eurodollar Loans) becomes due and payable on a day other than a Business Day, such payment shall be extended to the next succeeding Business Day, and, with respect to payments of principal, interest thereon shall be payable at the then applicable rate during such extension. If any payment on a Eurodollar Loan becomes due and payable on a day other than a Business Day, the maturity thereof shall be extended to the next succeeding Business Day unless the result of such extension would be to extend such payment into another calendar month, in which event such payment shall be made on the immediately preceding Business Day.

(e) Unless the Agent shall have been notified in writing by any Lender prior to the Funding Date that such Lender will not make the amount that would constitute its relevant Applicable Percentage of the Loans requested to be made on the Funding Date available to the Agent, the Agent may assume that such Lender is making such amount available to the Agent, and the Agent may, in reliance upon such assumption, make available to the Borrower a corresponding amount. If such amount is not made available to the Agent by the required time on the Funding Date, such Lenders shall pay to the Agent, on demand, such amount with interest thereon at a rate equal to the daily average Federal Funds Effective Rate for the period until such Lender makes such amount immediately available to the Agent. A certificate of the Agent submitted to any Lender with respect to any amounts owing under this Section shall be conclusive in the absence of manifest error. If such Lender's relevant Applicable Percentage of such requested Loans is not made available to the Agent by such Lender within three Business Days of the Funding Date, the Agent shall be entitled to recover such amount with interest thereon at the rate described above, on demand, from the Borrower.

(f) The Agent agrees to provide the Borrower with a written invoice of the amount of (x) any interest payable on any Interest Payment Date and (y) any expense payable by the Borrower under this Agreement or any other Loan Document. Such invoice shall be
provided (i) three Business Days in advance of any Interest Payment Date in the case of Loans bearing interest based on the Eurodollar Rate, (ii) on the Interest Payment Date in the case of Loans based on the ABR and (iii) three Business Days in advance of any date any expense is due. Failure to deliver any such invoice shall not affect the Borrower’s payment obligations hereunder; provided that, with respect to any interest payable on any Interest Payment Date or any expense payable by the Borrower on any date as provided in any Loan Document, in the event that (A) any invoice is later determined to have understated the amount of interest or expense, as applicable, due on such date or (B) the Borrower makes a good faith payment of the interest or expense, as applicable, due on such date prior to receipt of an invoice as provided above, and, in each case, the amount paid is later determined to have been less that the amount or interest or expense, as the case may be, actually due on such date pursuant to this Agreement or any other Loan Document, the failure by the Borrower to have paid the full amount of interest or expense, as the case may be, on such date shall not constitute a Default or an Event of Default unless the Borrower fails to pay the amount of such shortfall within five Business Days after written notice from the Agent of the amount thereof.

SECTION 2.13. Illegality. (a) Notwithstanding any other provision herein, if the adoption of or any change in any Requirement of Law or in the interpretation or application thereof shall make it unlawful for any Lender to make or maintain Eurodollar Loans as contemplated by this Agreement, such Lender shall give notice thereof to the Agent and the Borrower describing the relevant provisions of such Requirement of Law (and, if the Borrower shall so request, provide the Borrower with a memorandum or opinion of counsel of recognized standing (as selected by such Lender) as to such illegality), following which (a) the commitment of such Lender hereunder to make Eurodollar Loans, continue such Eurodollar Loans as such and convert ABR Loans to Eurodollar Loans shall forthwith be canceled and (b) such Lender’s outstanding Eurodollar Loans shall be converted automatically on the respective last days of the then current Interest Periods with respect to such Loans (or within such earlier period as shall be required by law) to ABR Loans.

(b) If any such conversion or prepayment of a Eurodollar Loan occurs on a day which is not the last day of the then current Interest Period with respect thereto, the Borrower shall pay to such Lender such amounts, if any, as may be required pursuant to Section 2.16.

SECTION 2.14. Increased Costs. (a) If (i) there shall be any increase in the cost to any Lender of agreeing to make or making, funding or maintaining any Loans or (ii) any reduction in any amount receivable in respect thereof, and such increased cost or reduced amount receivable is due to either (x) the introduction of or any change in or in the interpretation of any law or regulation after the date hereof or (y) the compliance with any guideline or request made after the date hereof from any central bank or other Governmental Authority (whether or not having the force of law), then (subject to the provisions of Section 2.17) the Borrower shall from time to time, upon demand by such Lender, pay such Lender additional amounts sufficient to compensate such Lender for such increased cost or reduced amount receivable; provided that no such additional amounts shall be payable by the Borrower with respect to, and this paragraph (a) shall not apply to, any increased cost or reduced amount due to the imposition or change in the rate of any tax, which shall be governed exclusively by Section 2.15.
(b) If any Lender shall have reasonably determined that (i) the applicability of any law, rule, regulation or guideline adopted after the date hereof pursuant to or arising out of the July 1988 paper of the Basle Committee on Banking Regulations and Supervisory Practices entitled “International Convergence of Capital Measurement and Capital Standards”, (ii) the adoption after the date hereof of any other law, rule, regulation or guideline regarding capital adequacy affecting such Lender, (iii) any change arising after the date hereof in the interpretation or administration of any of the foregoing by any Governmental Authority, central bank or comparable agency charged with the interpretation or administration thereof, or (iv) compliance by such Lender (or any lending office of such Lender), or any holding company for such Lender which is subject to any of the capital requirements described above, with any request or directive of general application issued after the date hereof regarding capital adequacy (whether or not having the force of law) of any such authority, central bank or comparable agency, has or would have the effect of reducing the rate of return on such Lender's capital or on the capital of any such holding company as a direct consequence of such Lender's obligations hereunder to a level below that which such Lender or any such holding company could have achieved but for such adoption, change or compliance (taking into consideration such Lender's policies and the policies of such holding company with respect to capital adequacy) by an amount deemed by such Lender to be material, then (subject to the provisions of Section 2.17) from time to time the Borrower shall pay to such Lender (at such Lender's request) such additional amounts as will compensate such Lender or any such holding company for any such reduction suffered, net of the savings (if any) which may be reasonably projected to be associated with such increased capital requirement; provided that no such additional amounts shall be payable by the Borrower with respect to, and this Section shall not apply to, any increased cost or reduced amount due to the imposition or change in the rate of any tax, which shall be governed exclusively by Section 2.15. Any certificate as to such amounts which is delivered pursuant to Section 2.17(a) shall, in addition to any items required by Section 2.17(a), include the calculation of the savings (if any) which may be reasonably projected to be associated with such increased capital requirement; provided that no event shall any Lender be obligated to pay or refund any amounts to the Borrower on account of such savings.

(c) In the event that any Governmental Authority shall impose any Eurodollar Reserve Requirements which increase the cost to any Lender of making or maintaining Eurodollar Loans, then (subject to the provisions of Section 2.17) the Borrower shall thereafter pay in respect of the Eurodollar Loans of such Lender a rate of interest based upon the Eurodollar Reserve Rate (rather than upon the Eurodollar Rate). From and after the delivery to the Borrower of the certificate required by Section 2.17(a), all references contained in this Agreement to the Eurodollar Rate shall be deemed to be references to the Eurodollar Reserve Rate with respect to each such affected Lender.

SECTION 2.15. Taxes. (a) All payments made by each Loan Party under this Agreement shall be made free and clear of, and without deduction or withholding for or on account of, any present or future income, stamp or other taxes, levies, imposts, duties, charges, fees, deductions or withholdings, now or hereafter imposed, levied, collected, withheld or assessed by any Governmental Authority, excluding, in the case of each Lender, each Affiliate of a Lender and the Agent (each a “Tax Indemnified Party”):
(i) income taxes (other than withholding taxes) and franchise

taxes, branch profits taxes and any other tax based upon net income imposed on
such Tax Indemnified Party as a result of a present or former connection between
such Tax Indemnified Party and the jurisdiction of the Governmental Authority
imposing such tax or any political subdivision or taxing authority thereof or
therein (other than any such connection arising solely from such Tax Indemnified
Party having executed, delivered or performed its obligations or received a
payment under, or enforced, this Agreement or any other Loan Document); and

(ii) any withholding taxes imposed by the United States on
payments made by any Loan Party to any Tax Indemnified Party under laws
(including for all purposes of this Section, any statute, treaty or regulation), in
effect on the Funding Date (or, in the case of (A) an Assignee, the date of the
Assignment and Acceptance, (B) a successor Agent, the date of the appointment
of such Agent or (C) a Lender that changes its Applicable Lending Office, the
date of such change) (all such taxes, levies, imposts, duties, charges, fees,
deductions and withholdings, other than those excluded under clause (i) or this
clause (ii), being referred to as “Non-Excluded Taxes”); provided, however, that
this clause (ii) shall not apply in the case of any Tax Indemnified Party that is an
Assignee, successor to the Agent or Lender that has changed its Applicable
Lending Office to the extent that the Person making such assignment, successor
appointment or change in Applicable Lending Office would have been entitled
to receive indemnity payments or additional amounts under this Section in the
absence of such assignment, successor appointment or change in Applicable
Lending Office; provided, further, however, that this clause (ii) shall not apply to
the extent that any Non-Excluded Tax is imposed on a Tax Indemnified Party in
connection with an interest in any Loan or other obligation that such Tax
Indemnified Party acquired pursuant to Section 2.17(c) or 2.18.

If any Non-Excluded Taxes are required to be withheld from any amounts payable to, or for the
account of, any Tax Indemnified Party hereunder, then such Loan Party shall make all such
deductions and pay the full amount so deducted to the relevant Governmental Authority in
accordance with applicable law and the amounts so payable to, or for the account of, the Tax
Indemnified Party shall be increased to the extent necessary to yield to the Tax Indemnified
Party (after payment of all Non-Excluded Taxes) a net amount equal to the amount it would have
received had no such deduction or withholding been made. Notwithstanding the foregoing, the
Loan Parties shall not be required to increase any such amounts payable to any Tax Indemnified
Party if such Tax Indemnified Party fails to comply with the requirements of paragraph (b) of
this Section. Whenever any Non-Excluded Taxes are payable by any Loan Party, as promptly as
possible thereafter such Loan Party shall send to the Agent for its own account or for the account
of the relevant Tax Indemnified Party, as the case may be, a certified copy of an original official
receipt, if any, received by such Loan Party showing payment thereof. If any Loan Party fails to
pay any Non-Excluded Taxes when due to the appropriate Governmental Authority or fails to
remit to the Agent or the relevant Tax Indemnified Party the required receipts or other required
documentary evidence, such Loan Party shall indemnify the Agent and the Tax Indemnified
Parties for any taxes, interest or penalties that may become payable by the Agent or any Tax
Indemnified Party solely as a result of any such failure. The agreements in this Section shall
survive the termination of this Agreement and the payment of all other amounts payable hereunder.

(b) Each Lender that is not incorporated under the laws of the United States of America or any state thereof (a "Non-US Lender") shall:

(i) (A) on or before the date such Non-US Lender becomes a Lender under this Agreement, deliver to the Borrower and the Agent two duly completed originals of United States Internal Revenue Service Form W-8BEN or Form W-8ECI, or successor applicable forms, as the case may be, certifying that such Lender is entitled to a complete exemption from deduction or withholding of United States Federal income taxes with respect to payments under this Agreement and the other Loan Documents; and

(B) thereafter, (I) deliver to the Borrower and the Agent two duly completed originals of any such form on or before the date that any such form previously provided expires or becomes obsolete, (II) after the occurrence of any event requiring a change in the most recent form previously delivered to the Borrower or the Agent, deliver to the Borrower and the Agent two duly completed originals of any such form reflecting such change (if and to the extent such Non-US Lender is then legally able to provide any such form), and (III) obtain such extensions of time for filing and completing any such form as may reasonably be requested by the Borrower or the Agent (if and to the extent such Non-US Lender is then legally able to do so); and

(ii) in the case of any such Non-US Lender that is not a "bank" within the meaning of Section 881(c)(3)(A) of the Code and cannot comply with the requirements of paragraph (b)(i) above, on or before the date such Non-US Lender becomes a Lender under this Agreement, such Non-US Lender shall:

(A) represent to the Borrower (for the benefit of the Borrower and the Agent) that it is not a bank within the meaning of Section 871(h) or Section 881(c)(3)(A) of the Code;

(B) furnish to the Borrower on or before the date of any payment by the Borrower made hereunder, with a copy to the Agent, (I) a certificate substantially in the form of Exhibit D and (II) two accurate and complete original signed copies of Internal Revenue Service Form W-8BEN, or a successor applicable form, certifying to such Lender's legal entitlement at the date of such certificate to a complete exemption from US withholding tax under the provisions of Section 871(h) or 881(c) of the Code with respect to payments to be made under this Agreement and any Notes;

(C) furnish to the Borrower, with a copy to the Agent, (I) two duly completed originals of such form W-8BEN or successor
applicable form before the date that any such form previously provided expires or becomes obsolete and (II) after the occurrence of any event requiring a change in the most recent form previously delivered to the Borrower or the Agent, two duly completed originals of such form reflecting such change (if and to the extent such Non-US Lender is then legally able to provide any such form);

(D) obtain such extensions of time for filing and completing any such form W-8BEN or successor applicable form as may reasonably be requested by the Borrower or the Agent (if and to the extent such Non-US Lender is then legally able to do so); and

(E) provide the Borrower and the Agent upon reasonable request by the Borrower or the Agent, if and to the extent such Non-US Lender is then legally entitled to do so, such other forms as may be reasonably required in order to establish the legal entitlement of such Lender to a complete exemption from withholding with respect to payments under this Agreement and any Notes.

Notwithstanding the foregoing provisions of this paragraph (b), if a change in any applicable treaty, law or regulation, or any change in the interpretation, administration or application relating thereto, has occurred prior to the date on which any delivery to the Borrower or Agent would otherwise be required by this paragraph (b), and such change (i) with respect to any prospective Lender or with respect to any Lender already a party hereto, renders all such deliveries inapplicable or (ii) with respect to any Lender already a party hereto, would prevent such Lender from duly completing and delivering any such form with respect to it, such prospective Lender or Lender shall not deliver any such forms and shall advise the Borrower and the Agent of such occurrence. Each Assignee, Participant or Conduit Lender hereunder pursuant to Section 10.06 shall, upon the effectiveness of the transfer pursuant to which it becomes an Assignee, Participant or Conduit Lender, be required to provide all of the forms, statements and documentation required pursuant to this Section; provided that in the case of a Participant such Participant shall furnish all such required forms, statements and documentation to the Lender from which the related participation shall have been purchased, and such Lender shall in turn furnish all such required forms (including Internal Revenue Service Form W-8IMY), statements and documentation to the Borrower and the Agent. Any Lender that is a "United States person" (within the meaning of Code section 7701(a)(30)) shall furnish the Borrower and the Agent with a Form W-9 or successor form thereto, certifying an exemption from backup withholding in respect of payments hereunder, if it is legally entitled to do so.

(c) If and to the extent that a Tax Indemnified Party, in its sole discretion (exercised in good faith), determines that it has received or been granted a credit against, a relief from, a refund or remission of, or a repayment of, any Non-Excluded Tax in respect of which it has received additional payments under paragraph (a) of this Section, then such Tax Indemnified Party shall return to the Borrower such additional payments (or the portion thereof) paid by the Borrower which are determined by such Tax Indemnified Party (in its sole discretion, exercised in good faith) to be attributable to the Non-Excluded Tax to which such credit, relief, refund, remission or repayment relates; provided that such Tax Indemnified Party shall not be obligated
to make any payment under this paragraph in respect of any such credit, relief, refund, remission or repayment until such Tax Indemnified Party, in its sole judgment (exercised in good faith) is satisfied that its tax affairs for the tax year in respect of which such credit, relief, remission or repayment was obtained have been finally settled.

(d) If any Lender fails to provide the Borrower or the Agent with the appropriate form, certificate or other document required by this Section (other than if such failure is due to a change in law, treaty or regulation or in the interpretation, administration, or application thereof, occurring after the date on which a form, certificate or other document originally was required to be provided), such Lender shall not be entitled to indemnification under clause (a) of this Section.

SECTION 2.16. Indemnity. Subject to the provisions of Section 2.17(a), the Borrower agrees to indemnify each Lender and to hold each Lender harmless from any actual loss or reasonable expense which such Lender sustains or incurs as a consequence of (a) a failure by the Borrower in making a borrowing of, conversion into or continuation of any Loan after the Borrower has given a notice requesting the same in accordance with the provisions of this Agreement, (b) a default by the Borrower in making any prepayment of a Loan after the Borrower has given a notice thereof in accordance with the provisions of this Agreement, (c) the making by the Borrower of a prepayment of any Eurodollar Loan on a day which is not the last day of an Interest Period with respect thereto or (d) the making by the Borrower of a prepayment of any Eurodollar Loan, or the conversion of any Eurodollar Loan to an ABR Loan, on the last day of the Interest Period with respect thereto, if the Borrower shall not have notified the Agent of its election to prepay, convert or continue such Loan at least three Business Days prior to such prepayment or conversion. In the case of an event described in any of preceding clause (a), (c) or (d) with regard to a Eurodollar Loan, such actual loss or reasonable expense shall be deemed to include an amount equal to the excess, if any, of (i) the amount of interest which would have accrued on the principal amount of such Eurodollar Loan for the period from the date of the default to borrow, convert or continue to the last day of the Interest Period that would have been the Interest Period for such Eurodollar Loan (or, in the case of a prepayment, from the date of such prepayment to the last day of the then current Interest Period for such Eurodollar Loan (or, in the case of clause (d), the newly initiated Interest Period for such Eurodollar Loan), in each case at the applicable rate of interest for such Eurodollar Loan provided for herein (excluding the Applicable Margin applicable thereto) over (ii) the amount of interest (as determined by such Lender) which would have accrued to such Lender by placing the principal amount of such Eurodollar Loan on deposit for a comparable period with leading banks in the interbank Eurodollar market. This covenant shall survive the termination of this Agreement and the payment of all other amounts payable hereunder.

SECTION 2.17. Notice of Amounts Payable: Relocation of Lending Office: Mandatory Assignment. (a) In the event that any Lender becomes aware that any amounts are or will be owed to it pursuant to Section 2.13, 2.14, 2.15(a) or 2.16, then it shall promptly notify the Borrower thereof and, as soon as possible thereafter, such Lender shall submit to the Borrower a certificate describing in reasonable detail the events or circumstances causing such amounts to be owed to such Lender, indicating the amount owing to it and the calculation thereof. The amounts set forth in such certificate shall be prima facie evidence of the obligations of the Borrower hereunder; provided, however, that the failure of the Borrower to pay any
amount owing to any Lender pursuant to Section 2.13, 2.14, 2.15(a) or 2.16 shall not be deemed to constitute a Default or an Event of Default hereunder to the extent that the Borrower is contesting in good faith its obligation to pay such amount by ongoing discussions diligently pursued with such Lender or by appropriate proceedings.

(b) If a Lender claims any additional amounts payable pursuant to Section 2.13, 2.14 or 2.15(a), it shall use its reasonable efforts (consistent with legal and regulatory restrictions) to avoid the need for paying such additional amounts, including changing the jurisdiction of its Applicable Lending Office, provided that the taking of any such action would not, in the reasonable judgment of such Lender, be disadvantageous to such Lender.

(c) In the event that any Lender delivers to the Borrower a certificate in accordance with paragraph (a) of this Section (other than a certificate as to amounts payable pursuant to Section 2.16), or the Borrower is required to pay any additional amounts or other payments in accordance with Section 2.13, 2.14 or 2.15(a), the Borrower may, at its own expense and in its sole discretion, (i) require such Lender to transfer or assign, in whole or in part, without recourse and in accordance with Section 10.06, all or part of its interests, rights and obligations under this Agreement to another Person (provided that the Borrower, with the full cooperation of such Lender, can identify a Person who is ready, willing and able to be an Assignee with respect to thereto) which shall assume such assigned obligations (which Assignee may be another Lender, if such Assignee Lender accepts such assignment) or (ii) during such time as no Default or Event of Default has occurred and is continuing, terminate the Commitment of such Lender and prepay all outstanding Loans of such Lender; provided that (x) the Borrower or the Assignee, as the case may be, shall have paid to such Lender being replaced or terminated in immediately available funds the principal of and interest accrued to the date of such payment on the Loans made by such Lender hereunder and (subject to Section 2.16) all other amounts owed to it hereunder and (y) such assignment or termination of the Commitment of such Lender and prepayment of Loans is not prohibited by any law, rule or regulation or order of any court or Governmental Authority.

SECTION 2.18. Replacement of Lenders. The Borrower shall be permitted to replace any Lender that (a) requests reimbursement for amounts owing pursuant to Section 2.13, 2.14 or 2.15(a), (b) defaults in its obligation to make Loans hereunder or (c) fails to consent to any amendment to this Agreement requested by the Borrower which requires the consent of all of the Lenders (or all of the Lenders affected thereby) and which is consented to by the Majority Lenders, in each case, subject to the following terms and conditions: (i) such replacement does not conflict with any Requirement of Law, (ii) the replacement Lender shall purchase, at par, all Loans and other amounts owing to the replaced Lender on or prior to the date of replacement, (iii) if the replacement is being made pursuant to clause (c) of this Section, the replacement Lender shall consent to the requested amendment, (iv) the Borrower shall be liable to the replaced Lender under Section 2.16 if any Eurodollar Loan owing to such replaced Lender shall be purchased other than on the last day of the Interest Period relating thereto, (v) the replacement Lender shall be reasonably satisfactory to the Agent, (vi) the replacement shall be made in accordance with the provisions of Section 10.06, (vii) until such time as such replacement shall be consummated, the Borrower shall pay all additional amounts (if any) required pursuant to Sections 2.13, 2.14 or 2.15(a), as the case may be, to the replaced Lender and (viii) upon compliance with the provisions of Section 10.06 and the payment of the amounts referred to in
clause (ii) above, the replacement Lender shall become a Lender hereunder and the replaced Lender shall cease to be a Lender hereunder and shall be released from all its obligations as a Lender, except with respect to indemnification provisions applicable to such replaced Lender under this Agreement during the period in which such replaced Lender was a Lender hereunder, which shall survive as to such replaced Lender. Each Lender agrees that, if it becomes a replaced Lender, it shall comply with Section 10.06, including by executing and delivering to the Agent an Assignment and Acceptance to evidence such sale and purchase; provided, however, that the failure of any Lender to be replaced in accordance with this Section to execute an Assignment and Acceptance shall not render such sale and purchase (and corresponding assignment) invalid and such assignment shall be recorded in the Register.

ARTICLE III

Representations and Warranties

To induce the Agent and the Lenders to enter into this Agreement and to make Loans on the Funding Date, each Loan Party hereby represents and warrants to the Agent and each Lender that:

SECTION 3.01. Financial Condition. The Borrower has heretofore furnished to each Lender a copy of its consolidated financial statements for its fiscal year ended December 31, 2005, and the Borrower has heretofore furnished to the Agent for distribution to each Lender a copy of its consolidated financial statements for its fiscal quarter and the nine-month period ended September 30, 2006, which were included in the Form 10-K or the Form 10-Q, as the case may be, of the Borrower filed with the Securities and Exchange Commission under the Securities Exchange Act of 1934, as amended. Such financial statements present fairly in all material respects the financial condition and results of operations of the Borrower and its Subsidiaries as of such date in accordance with GAAP. Between September 30, 2006 and the Funding Date, there has been no development or event which has had a Material Adverse Effect.

SECTION 3.02. Corporate Existence. Such Loan Party (a) is duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization, (b) has the corporate power and authority, and the legal right, to own and operate its property, to lease the property it operates as lessee and to conduct the business in which it is currently engaged and (c) is duly qualified as a foreign corporation and in good standing under the laws of each jurisdiction where its ownership, lease or operation of property or the conduct of its business requires such qualification, except to the extent that all failures to be duly qualified and in good standing could not, in the aggregate, have a Material Adverse Effect.

SECTION 3.03. Corporate Power: Authorization: Enforceable Obligations. Such Loan Party has the corporate power and authority, and the legal right, to make, deliver and perform the Loan Documents to which it is a party and, in the case of the Borrower, to borrow hereunder, and has taken all necessary corporate action to authorize the borrowings on the terms and conditions of this Agreement and to authorize the execution, delivery and performance of the Loan Documents. No consent or authorization of any Governmental Authority or any other
Person is required in connection with the borrowings hereunder or with the execution, delivery, performance, validity or enforceability of this Agreement or any of the other Loan Documents, except filing required to perfect the Liens created hereunder. Each Loan Document has been duly executed and delivered on behalf of each Loan Party party thereto. This Agreement constitutes, and each other Loan Document upon execution will constitute, a legal, valid and binding obligation of each Loan Party party thereto enforceable against each such Loan Party in accordance with its terms, except as enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting the enforcement of creditors’ rights generally and by general equitable principles (whether enforcement is sought by proceedings in equity or at law).

SECTION 3.04. No Legal or Contractual Bar. The execution, delivery and performance of this Agreement and the other Loan Documents, the borrowings hereunder and the use of the proceeds thereof will not violate any Requirement of Law or Contractual Obligation of such Loan Party and will not result in, or require, the creation or imposition of any Lien on any of its properties or revenues pursuant to any such Requirement of Law or Contractual Obligation (other than the Liens created by the Security Documents), except to the extent that all such violations and creation or imposition of Liens could not, in the aggregate, have a Material Adverse Effect. The available exceptions under the covenants restricting secured Indebtedness in the Indenture and the Existing Credit Agreement permit the Obligations to be secured by the Collateral as contemplated hereby without the Borrower being required to ratably secure the Indebtedness under the Indenture or the Existing Credit Agreement. Immediately following the borrowing of the Loans hereunder, the Borrower will be able to incur on the Funding Date at least $1.00 of additional Indebtedness that is secured by Liens on Principal Domestic Manufacturing Properties without being required to ratably secure the Indebtedness under the Indenture or the Existing Credit Agreement.

SECTION 3.05. No Material Litigation. Except as set forth in the Form 10-K of the Borrower for its fiscal year ended December 31, 2005, or the Form 10-Q of the Borrower for the fiscal quarter ended September 30, 2006, or in any Form 10-K/A, Form 10-Q/A or Form 8-K of the Borrower filed with the Securities and Exchange Commission not later than the third Business Day prior to the date of this Agreement, no litigation, investigation or proceeding of or before any arbitrator or Governmental Authority is pending or, to the knowledge of the Borrower, threatened by or against the Borrower or any of its Subsidiaries or against any of its or their respective properties or revenues as of the Funding Date (a) with respect to this Agreement or any other Loan Document or any of the actions contemplated hereby or thereby, or (b) which involves a probable risk of an adverse decision which would materially restrict any Loan Party’s ability to comply with its obligations under this Agreement or any other Loan Document.

SECTION 3.06. Federal Regulations. No part of the proceeds of any Loan will be used for “buying”, “purchasing” or “carrying” any “margin stock” within the meaning of Regulation U of the Board of Governors of the Federal Reserve System as now in effect or for any purpose which violates the provisions of the Regulations of such Board of Governors.

SECTION 3.07. Investment Company Act. Such Loan Party is not an “investment company”, or a company “controlled” by an “investment company”, within the meaning of the Investment Company Act of 1940, as amended.
SECTION 3.08. ERISA. The Borrower is in compliance with all material provisions of ERISA, except to the extent that all failures to be in compliance could not, in the aggregate, reasonably be expected to have a Material Adverse Effect.

SECTION 3.09. No Material Misstatements. No report, financial statement or other written information furnished by or on behalf of any Loan Party to the Agent or any Lender as described in Section 3.01 or pursuant to Section 5.01(a) of this Agreement or pursuant to any other Loan Document contains or will contain any material misstatement of fact or omits or will omit to state any material fact necessary to make the statements therein, in light of the circumstances under which they were, are or will be made, not misleading, except to the extent that such facts (whether misstated or omitted) do not result in a Material Adverse Effect.

SECTION 3.10. Purpose of Loans. The proceeds of the Loans shall be used by the Borrower for its general corporate purposes.

SECTION 3.11. Pari Passu. The claims of the Agent and the Lenders against the Borrower under this Agreement rank at least pari passu with the claims of all its unsecured creditors, save those whose claims are preferred solely by any laws of general application having effect in relation to bankruptcy, insolvency, liquidation or other similar events.

SECTION 3.12. Security Documents. The Collateral Agreement is effective to create in favor of the Agent, for the benefit of the Secured Parties, a legal, valid and enforceable security interest in the Collateral described therein and proceeds thereof. When financing statements in appropriate form are filed in the offices specified on Schedule 3.12, the Collateral Agreement will constitute a fully perfected Lien on and security interest in all right, title and interest of the Loan Parties in the Collateral described therein to the extent perfection can be obtained by filing Uniform Commercial Code financing statements, prior to the rights of any other Person, except for (a) rights secured by Liens expressly permitted by Section 6.02 and (b) in the case of any Collateral that is a Fixture that is installed or located at any real property that is not a Material Facility, rights of any holder (other than a Loan Party) of a recorded interest in such real property.

SECTION 3.13. Title to Assets. Each Loan Party has good and marketable title to, or valid leasehold interests in, all of its personal property and assets, except to the extent that failure to have good and marketable title to, or valid leasehold interests in, such property or assets could not reasonably be expected to have a Material Adverse Effect.

SECTION 3.14. Environmental Matters. (a) Each Loan Party and each real property on or at which any Collateral is installed or located and the operations thereon comply in all respects with all applicable Environmental Laws and each Loan Party does not have any liability (whether contingent or otherwise) in connection with any Environmental Activity, except in each case to the extent it would not reasonably be expected to have a Material Adverse Effect.

(b) Each Loan Party (i) has not received any written notice of any claim against or affecting it or any real property on or at which any Collateral is installed or located or the operations thereon relating to Environmental Laws, (ii) has not received any written notice of
and is not aware of any judicial or administrative proceeding pending or, to its knowledge, threatened against or affecting it or any real property on or at which any Collateral is installed or located or the operations thereon alleging any material violation of any Environmental Laws and (iii) to the best of its knowledge, is not the subject of any investigation, evaluation, audit or review by any Governmental Authority to determine whether any violation of any Environmental Laws has occurred or is occurring or whether any remediation action is needed in connection with an Environmental Activity, except, in the case of clauses (i), (ii) and (iii), to the extent such claim, proceeding, investigation, evaluation, audit or review would not reasonably be expected to have a Material Adverse Effect.

(c) Each Loan Party does not store any Hazardous Substance on any real property on or at which any Collateral is installed or located nor has it disposed of any Hazardous Substance on any real property on or at which any Collateral is installed or located, in each case, except (i) in compliance with all applicable Environmental Laws or (ii) where such storage or disposal would not reasonably be expected to have a Material Adverse Effect.

ARTICLE IV

Conditions Precedent

SECTION 4.01. Conditions to Loans. The obligation of each Lender to make the Loans requested to be made by it is subject to the satisfaction on the Funding Date of the following conditions precedent:

(a) Credit Agreement; Collateral Agreement. The Agent shall have received (i) this Agreement, executed and delivered (including by way of a teletypewriter or electronic image scan) by a duly authorized officer of each Loan Party and each Lender and (ii) the Collateral Agreement, executed and delivered (including by way of a teletypewriter or electronic image scan) by each Loan Party.

(b) Lien Searches. The Agent shall have received the results of recent lien searches (limited by such parameters relating to filing dates and amounts as the Agent and the Borrower may agree upon) in the appropriate filing or recording offices in each Loan Party's jurisdiction of organization and in the jurisdictions in which facilities containing Equipment and Fixtures accounting for at least 85% of the Collateral Value set forth in the certificate referred to in clause (f) below are located, and such searches shall reveal no Liens on any of the Collateral except for Liens permitted by Section 6.02 or those that are discharged on or prior to the Funding Date pursuant to documentation reasonably satisfactory to the Agent.

(c) Secretary's Certificates of Loan Parties. The Agent shall have received a certificate of the Secretary or Assistant Secretary of each of the Loan Parties, in form and substance satisfactory to the Agent, which certificate shall (i) certify as to the incumbency and signature of the officers of such Loan Party executing any Loan Document (with the President, any Vice President or any Financial Officer of such Loan Party attesting to the incumbency and signature of the Secretary or Assistant Secretary
providing such certificate), (ii) have attached to it a true, complete and correct copy of each of the certificate of incorporation and by-laws or equivalent constitutional documents of such Loan Party, (iii) have attached to it a true and correct copy of appropriate resolutions of such Loan Party, which resolutions shall authorize the execution, delivery and performance of this Agreement and the other Loan Documents and the incurrence of the Obligations of such Loan Party by such Loan Party and (iv) certify that, as of the date of such certificate (which shall not be earlier than the date hereof), none of such certificate of incorporation or by-laws (or equivalent constitutional documents) or resolutions shall have been amended, supplemented, modified, revoked or rescinded.

(d) Fees. The Arrangers and the Agent shall have received all fees required to be paid in accordance with the Fee Letter.

(e) Legal Opinions. The Agent shall have received, (i) the executed legal opinion of Weil, Gotshal & Manges LLP, counsel to each of the Loan Parties, substantially in the form of Exhibit E-1 and (ii) the executed legal opinion of Martin I. Darvick, Esq. substantially in the form of Exhibit E-2. Each Loan Party hereby instructs such counsel to deliver its opinion for the benefit of the Agent and each of the Lenders.

(f) Filings, Registrations and Recordings. Each document (including any Uniform Commercial Code financing statement, but excluding Fixture Filing Financing Statements, which will be filed as provided in Section 5.05(c)) required by the Security Documents or under law or reasonably requested by the Agent to be filed, registered or recorded in order to create in favor of the Agent, for the benefit of the Secured Parties, a perfected Lien on the Collateral described therein, shall have been delivered to the Agent and shall be in proper form for filing, registration or recordation.

(g) Insurance. The Agent shall have received evidence of satisfactory insurance coverage or self-insurance for the Collateral and an insurance certificate reflecting the Agent as an additional loss payee thereunder.

(h) Notice of Borrowing. The Agent shall have received a notice of borrowing executed by the Borrower in compliance with Section 2.02.

(i) Representations and Warranties. Each of the representations and warranties made by any Loan Party in or pursuant to the Loan Documents shall be true and correct in all material respects on and as of the Funding Date as if made on and as of such date, except to the extent such representations and warranties expressly relate to an earlier date, in which case such representations and warranties shall have been true and correct in all material respects as of such earlier date.

(j) No Default. No Default or Event of Default shall have occurred and be continuing on the Funding Date and after giving effect to the extensions of credit requested to be made on such date.
(k) **Officer’s Certificate**. The Agent shall have received a certificate from a Financial Officer of the Borrower dated the Funding Date confirming compliance with the conditions set forth in paragraphs (i) and (j) of this Section.

(l) **Collateral Value**. The Agent shall have received a certificate of a Financial Officer of the Borrower dated the Funding Date certifying that the Collateral Value is approximately $6,500,000,000 (subject to adjustments that may be required due to lien search results on real properties on which Collateral is installed or located for which no lien searches shall have been received as of the Funding Date), based on the net book values of the assets constituting Collateral as of June 30, 2006.

**ARTICLE V**

**Affirmative Covenants**

Each Loan Party as to itself hereby agrees that, so long as any amount is owing to any Lender or the Agent hereunder, the Borrower shall:

**SECTION 5.01. Financial Statements.** Furnish to the Agent for prompt delivery to each Lender:

(a) as soon as available, but in any event within 110 days after the end of the Borrower’s fiscal year, a copy of the consolidated balance sheet of the Borrower and its consolidated Subsidiaries as at the end of such year and the related consolidated statements of income and retained earnings and of cash flows for such year, setting forth in each case in comparative form the figures for the previous year, and reported on by Deloitte & Touche LLP or other independent public accountants of nationally recognized standing (without a “going concern” or like qualification or exception and without any qualification as to the scope of such audit) to the effect that such consolidated financial statements present fairly in all material respects the financial condition and results of operations of the Borrower and its consolidated Subsidiaries on a consolidated basis in accordance with GAAP consistently applied; and

(b) as soon as available, but in any event not later than 60 days after the end of each of the first three quarterly periods of each fiscal year of the Borrower, the unaudited consolidated balance sheet of the Borrower and its consolidated Subsidiaries as at the end of such quarter and the related unaudited consolidated statements of income and retained earnings and of cash flows of the Borrower and its consolidated Subsidiaries for such quarter and the portion of the fiscal year through the end of such quarter, setting forth in each case in comparative form the figures for the previous year, in each case prepared in accordance with GAAP applied consistently throughout the periods reflected therein and with prior periods (except as disclosed therein).

Notwithstanding the foregoing, the Borrower shall not be required to furnish or deliver to the Agent any financial statements or reports that the Borrower has filed with the Securities and Exchange Commission or any successor or analogous Governmental Authority, and any such
financial statements or reports so filed shall be deemed to have been furnished or delivered to the Agent in accordance with the terms of this Section if such financial statements or reports are filed within the time periods for delivery required by this Section.

SECTION 5.02. Certificates: Other Information. (a) Furnish to the Agent, for delivery to each Lender, concurrently with the delivery of the financial statements referred to in Section 5.01, a certificate of a Financial Officer of the Borrower stating that, to the best of such Financial Officer's knowledge, (i) such financial statements present fairly in all material respects the financial condition and results of operations of the Borrower and its Subsidiaries for the period referred to therein (subject, in the case of interim statements, to normal year-end audit adjustments) and (ii) during such period each Loan Party has performed in all material respects all of its covenants and other agreements contained in this Agreement and the other Loan Documents to be performed by it, and that no Default or Event of Default has occurred and is continuing, except as specified in such certificate.

(b) Furnish to the Agent, for delivery to each Lender, within 15 Business Days after the date on which the Borrower is required to file Form 10-K with the Securities Exchange Commission (after giving effect to any grace periods or extensions available under applicable Securities and Exchange Commission regulations, but in any event within 110 days after the end of the Borrower's fiscal year), a Collateral Value Certificate as of the last day of the fiscal year covered by the financial statements so delivered.

(c) During the continuance of any Quarterly Collateral Reporting Period, furnish to the Agent, for delivery to each Lender, within 15 Business Days after the date on which the Borrower is required to file Form 10-Q with the Securities Exchange Commission (after giving effect to any grace periods or extensions available under applicable Securities and Exchange Commission regulations, but in any event within 110 days after the end of the Borrower's applicable fiscal quarter), a Collateral Value Certificate as of the last day of the fiscal quarter covered by the financial statements so delivered.

(d) At any time when a Quarterly Collateral Reporting Period is not in effect, furnish to the Agent, for delivery to each Lender, within 15 Business Days after the date on which the Borrower is required to file Form 10-Q with the Securities Exchange Commission (after giving effect to any grace periods or extensions available under applicable Securities and Exchange Commission regulations, but in any event within 110 days after the end of the Borrower's applicable fiscal quarter), a Summary Collateral Value Certificate as of the last day of the fiscal quarter covered by the financial statements so delivered.

SECTION 5.03. Notices. Promptly give notice to the Agent for delivery to each Lender of the occurrence of any Default or Event of Default, accompanied by a statement of a Financial Officer setting forth details of the occurrence referred to therein and stating what action the Borrower proposes to take with respect thereto.

SECTION 5.04. Conduct of Business and Maintenance of Existence. Continue to engage in its principal line of business as now conducted by it and preserve, renew and keep in full force and effect its corporate existence and take all reasonable action to maintain all rights, privileges and franchises necessary or desirable in the normal conduct of its principal line of
business, except as otherwise permitted pursuant to Section 6.01 or to the extent that failure to do so would not have a Material Adverse Effect.

SECTION 5.05. Additional Collateral, Fixture Filings, etc. (a) Except as set forth in clause (b) below, with respect to any property of the types included in the description of the Collateral under any Security Document executed by such Loan Party which is acquired after the Funding Date by such Loan Party, or which is owned by a Loan Party that becomes a Loan Party after the Funding Date, promptly (i) execute and deliver to the Agent such amendments to the applicable Security Document or such other documents as the Agent reasonably deems necessary to grant to the Agent, for the benefit of the Secured Parties, a security interest in such property and (ii) take all actions necessary to grant to the Agent, for the benefit of the Secured Parties, a perfected security interest in such property with the priority specified in such Security Document (subject to the Liens permitted by Section 6.02), including the filing of Uniform Commercial Code and other financing statements in such jurisdictions as may be required by the Security Documents or by applicable law or as may be reasonably requested by the Agent (other than any Fixture Filing Financing Statement with regard to any real property that is not a Material Facility).

(b) Notwithstanding anything to the contrary in this Section, there shall be excluded from the property referred to in clause (a) to be pledged as Collateral such assets as to which the Agent shall reasonably determine that the cost of obtaining a security interest therein is excessive in relation to the value of the security to be afforded thereby.

(c) With respect to any Material Facility upon which a Fixture Filing Financing Statement shall not have been previously delivered to the Agent in proper form for filing, deliver to the Agent such a Fixture Filing Financing Statement in proper form for filing with regard to such Material Facility, (i) with respect to Material Facilities in existence on the Funding Date, no later than December 31, 2006 or such later date as may be agreed to by the Agent and (ii) with respect to Material Facilities that are acquired or determined to be Material Facilities after the Funding Date, or augmented or changed in such a fashion so that a previously delivered Fixture Filing Financing Statement with respect thereto shall no longer be in proper form, promptly (but in any event, within 45 days or such later date as may be agreed to by the Agent) after the date of such acquisition, determination, augmentation or change.

SECTION 5.06. Environmental Matters. (a) Promptly notify the Agent of any environmental matter, occurrence or other event relating to any real property on or at which any Collateral is installed or located arising after the Funding Date of which it is aware, or any breach or violation of an Environmental Law applicable to any real property on or at which any Collateral is installed or located, which would reasonably be expected to have a Material Adverse Effect, and take all necessary action required by any applicable Environmental Law to rectify such environmental matter, occurrence or event or cure the breach or violation of such Environmental Law, in each case, if failure to take such action would reasonably be expected to have a Material Adverse Effect.

(b) Promptly provide the Agent with a copy of: (i) any written notice it receives that a violation of any Environmental Law has been committed with respect to any real property on or at which any Collateral is installed or located or there is the reasonable likelihood of
liability arising from the condition of any real property on or at which any Collateral is installed or located, (ii) any written notice it receives that a demand, claim, or administrative or judicial complaint has been filed against such Loan Party alleging a violation of any Environmental Law or liability related to the condition of any real property on or at which any Collateral is installed or located or requiring such Loan Party to take any action in connection with any Environmental Activity in respect of any real property on or at which any Collateral is installed or located, (iii) any written notice it receives from a third party or Governmental Authority alleging that such Loan Party is or may be liable or responsible for matters associated with any Environmental Activity in respect of any real property on or at which any Collateral is installed or located, including all matters associated with a response to or a cleanup of the presence or discharge of a Hazardous Substance in, at, through or into the environment, and (iv) any environmental site assessment or audit report required to be submitted by such Loan Party to any Governmental Authority, in the case of each of clauses (i) through (iv), to the extent that the matters described in any such notice, assessment or report could reasonably be expected to have a Material Adverse Effect.

ARTICLE VI

Negative Covenants

Each Loan Party hereby agrees that so long as any amount is owing to any Lender or the Agent hereunder:

SECTION 6.01. Merger, Consolidation, etc. Such Loan Party agrees not to merge or consolidate with any other Person or sell or convey all or substantially all of its assets to any Person unless, in the case of mergers and consolidations, (a) such Loan Party shall be the continuing corporation, (b) immediately before and immediately after giving effect to such merger or consolidation, no Default or Event of Default shall have occurred and be continuing and (c) in the case of a merger, consolidation or conveyance involving any Guarantor, the guarantee provided in Article IX shall be in full force and effect immediately after giving effect to such merger or consolidation, except in the case of a merger of such Guarantor into the Borrower, to the extent such merger is otherwise permitted hereunder.

SECTION 6.02. Limitations on Liens. (a) The Borrower shall not permit any Manufacturing Subsidiary to issue or assume any Indebtedness secured by a Lien upon any Principal Domestic Manufacturing Property of the Borrower or any Manufacturing Subsidiary or upon any shares of stock or obligations of any Manufacturing Subsidiary (whether such Principal Domestic Manufacturing Property, shares of stock or obligations are now owned or hereafter acquired) without in any such case effectively providing concurrently with the issuance or assumption of any such Indebtedness that all principal, interest and other obligations owing hereunder (together with, if the Borrower shall so determine, any other obligations of the Borrower or such Manufacturing Subsidiary ranking equally with the amounts owing hereunder and then existing or thereafter created) shall be secured equally and ratably with such Indebtedness, unless the aggregate amount of Indebtedness issued or assumed and so secured by Liens, together with all other secured Indebtedness of the Borrower and its Manufacturing
Subsidiaries which (if originally issued or assumed at such time) would otherwise be subject to the foregoing restrictions, but not including Indebtedness permitted to be secured under clauses (i) through (vi) of the immediately following paragraph, does not at the time exceed 20% of the stockholders’ equity of the Borrower and its consolidated subsidiaries, as determined in accordance with GAAP and shown on the audited consolidated balance sheet contained in the latest published annual report to the stockholders of the Borrower.

The above restrictions shall not apply to Indebtedness secured by:

(i) Liens on property, shares of stock or Indebtedness of any corporation existing at the time such corporation becomes a Manufacturing Subsidiary;

(ii) Liens on property existing at the time of acquisition of such property by the Borrower or a Manufacturing Subsidiary, or Liens to secure the payment of all or any part of the purchase price of such property upon the acquisition of such property by the Borrower or a Manufacturing Subsidiary or to secure any Indebtedness incurred prior to, at the time of, or within 180 days after, the later of the date of acquisition of such property and the date such property is placed in service, for the purpose of financing all or any part of the purchase price thereof, or Liens to secure any Indebtedness incurred for the purpose of financing the cost to the Borrower or a Manufacturing Subsidiary of improvements to such acquired property;

(iii) Liens securing Indebtedness of a Manufacturing Subsidiary owing to the Borrower or any of its subsidiaries;

(iv) Liens on property of a corporation existing at the time such corporation is merged or consolidated with the Borrower or a Manufacturing Subsidiary or at the time of a sale, lease or other disposition of the properties of a corporation as an entirety or substantially as an entirety to the Borrower or a Manufacturing Subsidiary;

(v) Liens on property of the Borrower or a Manufacturing Subsidiary in favor of the United States of America or any state thereof, or any department, agency or instrumentality or political subdivision of the United States of America or any state thereof, or in favor of any other country, or any political subdivision thereof, to secure partial, progress, advance or other payments pursuant to any contract or statute or to secure any obligations incurred for the purpose of financing all or any part of the purchase price or the cost of construction of the property subject to such Liens; or

(vi) any extension, renewal or replacement (or successive extensions, renewals or replacements) in whole or in part of any Lien securing Indebtedness permitted to be secured by the first sentence of this Section 6.02(a) or any Lien referred to in the foregoing clauses (i) to (v): provided, however, that the principal amount of Indebtedness secured thereby shall not exceed by more
than 115% the principal amount of Indebtedness so secured at the time of such extension, renewal or replacement and that such extension, renewal or replacement shall be limited to all or a part of the property which secured the Lien so extended, renewed or replaced (plus improvements on such property).

(b) Notwithstanding the foregoing, each Loan Party agrees not to, directly or indirectly, create, incur, assume or suffer to exist any Lien upon any of the Collateral or upon any facility or other real property on or at which any Collateral is installed or located, except:

(i) Liens for taxes, assessments, governmental charges and utility charges, in each case that are not yet due or that are being contested in good faith by appropriate proceedings; provided that adequate reserves with respect thereto are maintained on the books of such Loan Party, as the case may be, in conformity with GAAP;

(ii) carriers', warehousemen's, mechanics', materialmen's, repairmen's or other like Liens arising in the ordinary course of business that are not overdue for a period of more than 30 days or that are being contested in good faith by appropriate proceedings;

(iii) permits, licenses, easements, rights-of-way, restrictions and other similar encumbrances incurred in the ordinary course of business that, in the aggregate, are not substantial in amount and that do not in any case materially detract from the value of the property subject thereto or materially interfere with the ordinary conduct of the business of either Loan Party or any of their respective Subsidiaries;

(iv) encumbrances arising under leases or subleases of real property that do not, in the aggregate, materially detract from the value of such real property or interfere with the ordinary conduct of business conducted or proposed to be conducted with respect to such real property;

(v) deposits made in the ordinary course of business in connection with worker's compensation, unemployment insurance or other types of social security benefits or to secure the performance of bids, tenders, sales or contracts (other than for the repayment of borrowed money) or surety, appeal, customs or performance bonds;

(vi) Liens arising from precautionary Uniform Commercial Code financing statement filings (or similar filings) regarding leases entered into by any Loan Party or any of their respective Subsidiaries in the ordinary course of business;

(vii) Liens on property existing at the time of acquisition of such property by any Loan Party, or Liens to secure the payment of all or any part of the purchase price of such property upon the acquisition of such property by a Loan Party or to secure any Indebtedness incurred prior to, at the time of, or within 180 days after, the later of the date of acquisition of such property and the
date such property is placed in service, for the purpose of financing all or any part of the purchase price thereof, or Liens on such acquired property to secure any Indebtedness incurred for the purpose of financing the cost to a Loan Party of improvements to such acquired property;

(viii) Liens in existence on the date hereof listed on Schedule 6.02(b); provided that no such Lien is spread to cover any additional property after the date hereof and that the amount of indebtedness secured thereby is not increased;

(ix) any Lien securing the renewal, extension, refinancing or refunding of any indebtedness secured by any Lien permitted by clause (vii) or (viii) above or this clause (ix) without any change in the assets subject to such Lien;

(x) any Lien arising out of claims under a judgment rendered or claim filed so long as (A) such judgments or claims do not constitute a Default or Event of Default under this Agreement and (B) such judgments or claims are being contested in good faith and in respect of which there shall have been adequate reserves with respect thereto maintained on the books of such Loan Party in conformity with GAAP;

(xi) any Lien consisting of rights reserved to or vested in any Governmental Authority by any statutory provision;

(xii) Liens created pursuant to the Security Documents;

(xiii) Liens in favor of lessors pursuant to sale and leaseback transactions to the extent the Disposition of the assets subject to any such sale and leaseback transaction is permitted under Section 6.03 and 10.12;

(xiv) Liens in favor of lessors to secure Capital Lease Obligations limited to the property subject to such Capital Lease Obligations; and

(xv) Liens not otherwise permitted by the foregoing clauses of this Section 6.02(b) securing obligations or other liabilities (other than Indebtedness) of any Loan Party; provided that the aggregate outstanding amount of all such obligations and liabilities shall not exceed $150,000,000 at any time.

SECTION 6.03. Limitation on Sale and Lease-Back. The Borrower will not, nor will it permit any Manufacturing Subsidiary to, enter into any arrangement with any Person providing for the leasing by the Borrower or any Manufacturing Subsidiary of any Principal Domestic Manufacturing Property owned by the Borrower or any Manufacturing Subsidiary on the date hereof (except for temporary leases for a term of not more than five years and except for leases between the Borrower and a Manufacturing Subsidiary or between Manufacturing Subsidiaries), which property has been or is to be sold or transferred by the Borrower or such Manufacturing Subsidiary to such Person, unless either:
(a) the Borrower or such Manufacturing Subsidiary would be entitled, pursuant to the provisions of Section 6.02(a), to issue, assume, extend, renew or replace Indebtedness secured by a Lien upon such property equal in amount to the Attributable Indebtedness in respect of such arrangement without equally and ratably securing the amount owing hereunder pursuant to Section 6.02(a); provided, however, that from and after the date on which such arrangement becomes effective the Attributable Indebtedness in respect of such arrangement shall be deemed for all purposes under Section 6.02(a) and this Section to be Indebtedness subject to the provisions of Section 6.02(a) (which provisions include the exceptions set forth in clauses (i) through (vi) thereof); or

(b) the Borrower shall apply an amount in cash equal to the Attributable Indebtedness in respect of such arrangement to the retirement (other than any mandatory retirement or by way of payment at maturity), within 180 days of the effective date of any such arrangement, of Indebtedness of the Borrower or any Manufacturing Subsidiary (other than Indebtedness owned by the Borrower or any Manufacturing Subsidiary) which by its terms matures at or is extendible or renewable at the option of the obligor to a date more than twelve months after the date of the creation of such Indebtedness.

SECTION 6.04. Collateral Value. The Loan Parties shall not permit the ratio of the Collateral Value to the Total Exposure at any time, including after giving effect to any Dispositions of Collateral, to be less than 2.50 to 1.00.

ARTICLE VII

Events of Default

If any of the following events shall occur and be continuing (each, an "Event of Default"):

(a) the Borrower shall (i) fail to pay any principal of any Loan when due in accordance with the terms hereof or (ii) fail to pay any interest on any Loan or any other amount which is payable hereunder or under any other Loan Document and (in the case of this clause (ii) only) such failure shall continue unremedied for more than five Business Days after written notice thereof has been given to the Borrower by the Agent or the Majority Lenders; or

(b) any representation or warranty made or deemed made by any Loan Party in Article III or in any other Loan Document or any certified statement furnished pursuant to Section 5.02(b), 5.02(c) or 5.02(d) shall prove to have been incorrect on or as of the date made or deemed made or certified, if the facts or circumstances incorrectly represented or certified result in or constitute a Material Adverse Effect; or

(c) any Loan Party shall default in the observance or performance of any other agreement contained in this Agreement or any Security Document (other than as provided in paragraphs (a) or (b) of this Article) and (i) in the case of any default in the observance or performance of the covenants in Section 6.04 of this Agreement, such default shall
continue unremedied for a period of five Business Days, and (ii) in the case of any
default in the observance or performance of any other agreement contained in this
Agreement or any other Loan Document, such default shall continue unremedied for a
period of 30 days after written notice thereof shall have been given to such Loan Party by
the Agent or the Majority Lenders; or

(d) any Loan Party shall default in any payment of $50,000,000 (or the foreign
currency equivalent thereof) or more of principal of or interest on any Indebtedness or on
account of any guarantee in respect of Indebtedness, beyond the period of grace, if any,
provided in the instrument or agreement under which such Indebtedness or guarantee was
created; or

(e) (i) the Borrower or any of its Significant Subsidiaries shall commence any
case, proceeding or other action (A) under any existing or future law of any jurisdiction,
domestic or foreign, relating to bankruptcy, insolvency, reorganization or relief of
debtors, seeking to have an order for relief entered with respect to it, or seeking to
adjudicate it bankrupt or insolvent, or seeking reorganization, arrangement, adjustment,
winding up, liquidation, dissolution, composition or other relief with respect to it or its
debts, or (B) seeking appointment of a receiver, trustee, custodian, conservator or other
similar official for it or for all or any substantial part of its assets, or the Borrower or any
of its Significant Subsidiaries shall make a general assignment for the benefit of its
creditors; or (ii) there shall be commenced against the Borrower or any of its Significant
Subsidiaries any case, proceeding or other action of a nature referred to in clause (i)
above which (A) results in the entry of an order for relief or any such adjudication or
appointment or (B) remains undismissed, undischarged or unbonded for a period of 90
days; or (iii) there shall be commenced against the Borrower or any of its Significant
Subsidiaries any case, proceeding or other action seeking issuance of a warrant of
attachment, execution, distraint or similar process against all or any substantial part of its
assets which results in the entry of an order for any such relief which shall not have been
vacated, discharged, or stayed or bonded pending appeal within 90 days from the entry
thereof; or

(f) one or more judgments or decrees shall (i) be entered against any Loan Party,
(ii) not have been vacated, discharged, satisfied, stayed or bonded pending appeal within
60 days from the entry thereof and (iii) involve a liability (not paid or fully covered by
insurance) of either $100,000,000 (or the foreign currency equivalent thereof) or more, in
the case of any single judgment or decree, or $200,000,000 (or the foreign currency
equivalent thereof) or more in the aggregate; or

(g) any of the Security Documents shall cease, for any reason, to be in full force
and effect with respect to Collateral with a book value in excess of $25,000,000 in the
aggregate, or any Loan Party or any Affiliate of any Loan Party shall so assert, or any
Lien created by any of the Security Documents shall cease to be enforceable and of the
same effect and priority purported to be created thereby; or
(h) the guarantee contained in Article IX hereof shall cease, for any reason, to be in full force and effect (other than as a result of a transaction permitted by Section 6.01) or any Loan Party or any Subsidiary of any Loan Party shall so assert;

then, (A) if such event is an Event of Default specified in clause (i) or (ii) of paragraph (e) above, all Commitments hereunder shall automatically and immediately terminate and the Loans (with accrued interest thereon) and all other amounts owing under this Agreement and the other Loan Documents shall immediately become due and payable without presentment, protest, demand or other notice of any kind, each of which is expressly waived by the Loan Parties; and (B) if such event is any Event of Default which is not described in clause (A) above, with the consent of the Majority Lenders, the Agent may, or upon the request of the Majority Lenders, the Agent shall, by notice to the Borrower declare the Loans with accrued interest thereon and all other amounts owing under this Agreement to be due and payable forthwith, whereupon the same shall immediately become due and payable. Except as expressly provided in the preceding clause (B) and in paragraphs (a) and (c) of this Article, presentment, protest, demand and all other notices of any kind are hereby expressly waived by the Loan Parties.

ARTICLE VIII

The Agent

SECTION 8.01. Appointment. Each Lender hereby irrevocably designates and appoints the Agent as the agent of such Lender and each such Lender irrevocably authorizes the Agent, as the agent for such Lender, to take such action on its behalf under the provisions of this Agreement and the other Loan Documents and to exercise such powers and perform such duties as are expressly delegated to the Agent by the terms of this Agreement and the other Loan Documents, together with such other powers as are reasonably incidental thereto. Notwithstanding any provision to the contrary elsewhere in this Agreement or in any other Loan Document, the Agent shall not have any duties or responsibilities, except those expressly set forth herein or therein, or any fiduciary relationship with any Lender or any Affiliate of such Lender, and no implied covenants, functions, responsibilities, duties, obligations or liabilities shall be read into this Agreement or any other Loan Document or otherwise exist against the Agent. Each party to this Agreement acknowledges that the Syndication Agent and the Co-Docu­mentation Agents shall not have any duties, responsibilities, obligations or authority under this Agreement in such capacity.

SECTION 8.02. Delegation of Duties. The Agent may execute any of its duties under this Agreement and any other Loan Document by or through agents or attorneys-in-fact and shall be entitled to advice of counsel concerning all matters pertaining to such duties. The Agent shall not be responsible for the negligence or misconduct of any agents or attorneys-in-fact selected by it with reasonable care.

SECTION 8.03. Exculpatory Provisions. Neither the Agent nor any of its officers, directors, employees or affiliates shall be (i) liable for any action lawfully taken or omitted to be taken by it or such Person under or in connection with this Agreement or any other
Loan Document (except for its or such Person's own gross negligence or willful misconduct) or
(ii) responsible in any manner to any of the Lenders or any Affiliates of such Lenders, for any
recitals, statements, representations or warranties made by any Loan Party or any officer thereof
contained in this Agreement or any other Loan Document or in any certificate, report, statement
or other document referred to or provided for in, or received by the Agent under or in connection
with, this Agreement or any other Loan Document or for the value, validity, effectiveness,
genuineness, enforceability or sufficiency of this Agreement or any other Loan Document or for
any failure of any Loan Party to perform its obligations hereunder. The Agent shall not be under
any obligation to any Lender or any Affiliate of such Lender to ascertain or to inquire as to the
observance or performance of any of the agreements contained in, or conditions of, this
Agreement or any other Loan Document, or to inspect the properties, books or records of any
Loan Party.

SECTION 8.04. Reliance by Agent. The Agent shall be entitled to rely, and shall
be fully protected in relying, upon any writing, resolution, notice, consent, certificate, affidavit,
letter, telecopy, electronic image scan transmission, telex or teletype message, statement, order
or other document or conversation believed by it in good faith to be genuine and correct and to
have been signed, sent or made by the proper Person or Persons and upon advice and statements
of legal counsel (including, without limitation, any counsel to the Borrower), independent
accountants and other experts selected by the Agent. The Agent may deem and treat the Lender
specified in the Register with respect to any amount owing hereunder as the owner thereof for all
purposes unless a written notice of assignment, negotiation or transfer thereof shall have been
filed with the Agent. The Agent shall be fully justified in failing or refusing to take any action
under this Agreement or any other Loan Document unless it shall first receive such advice or
concurrence of the Majority Lenders as it deems appropriate or it shall first be indemnified to its
satisfaction by the Lenders against any and all liability and expense which may be incurred by it
by reason of taking or continuing to take any such action. The Agent shall in all cases be fully
protected in acting, or in refraining from acting, under this Agreement or any other Loan
Document in accordance with a request of the Majority Lenders (or to the extent that this
Agreement expressly requires a higher percentage of Lenders, such higher percentage) and such
request and any action taken or failure to act pursuant thereto shall be binding upon all the
Lenders and all future holders of the obligations owing by the Borrower hereunder.

SECTION 8.05. Notice of Default. The Agent shall not be deemed to have
knowledge or notice of the occurrence of any Default or Event of Default hereunder (other than a
Default or Event of Default under Article VII(a)) unless the Agent has received written notice
from a Lender or the Borrower referring to this Agreement or any other Loan Document,
describing such Default or Event of Default and stating that such notice is a “notice of default”.
In the event that the Agent receives such a notice, the Agent shall promptly notify the Borrower
(if the Borrower shall not have delivered such notice to the Agent) and then give notice thereof
to the Lenders; provided that, except in the case of any notice required to be provided under
Article VII prior to the occurrence of an Event of Default, the failure to notify the Borrower shall
not impair any of the rights of the Agent and the Lenders with respect to the events and
circumstances specified in such notice. The Agent shall take such action with respect to such
Default or Event of Default as shall be reasonably directed by the Majority Lenders; provided
that unless and until the Agent shall have received such directions, the Agent may (but shall not
be obligated to) take such action, or refrain from taking such action, with respect to such Default or Event of Default as it shall deem advisable in the best interests of the Lenders.

SECTION 8.06. Non-Reliance on Agent and Other Lenders. Each Lender expressly acknowledges that neither the Agent nor any of its officers, directors, employees, agents, attorneys-in-fact or affiliates has made any representations or warranties to it and that no act by the Agent hereinafter taken, including any review of the affairs of the Borrower, shall be deemed to constitute any representation or warranty by the Agent to any Lender. Each Lender represents to the Agent that it has, independently and without reliance upon the Agent or any other Lender, and based on such documents and information as it has deemed appropriate, made its own appraisal of and investigation into the business, operations, property, financial and other condition and creditworthiness of the Borrower and made its own decision to make its Loans hereunder and enter into this Agreement. Each Lender also represents that it will, independently and without reliance upon the Agent or any other Lender, and based on such documents and information as it shall deem appropriate at the time, continue to make its own credit analysis, appraisals and decisions in taking or not taking action under this Agreement or any other Loan Document, and to make such investigation as it deems necessary to inform itself as to the business, operations, property, condition (financial or otherwise), prospects or creditworthiness of the Borrower which may come into the possession of the Agent or any of its officers, directors, employees, agents, attorneys-in-fact or affiliates.

SECTION 8.07. Indemnification. The Lenders agree to indemnify the Agent in its capacity as such (to the extent not reimbursed by the Borrower and without limiting the obligation of the Borrower to do so), ratably according to their respective relevant Applicable Percentages in effect on the date on which indemnification is sought under this Section (or, if indemnification is sought after the date upon which the Commitments shall have terminated and the Loans shall have been paid in full, ratably in accordance with their relevant Applicable Percentages immediately prior to such date of the later of termination or payment in full, but giving effect to any subsequent assignments), from and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements of any kind whatsoever which may at any time (including at any time following satisfaction of the Obligations) be imposed on, incurred by or asserted against the Agent in any way relating to or arising out of this Agreement, any other Loan Document or any documents contemplated by or referred to herein or therein or the transactions contemplated hereby or thereby or any action taken or omitted by the Agent under or in connection with any of the foregoing; provided that no Lender shall be liable for the payment of any portion of such liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements resulting from the Agent’s gross negligence or willful misconduct. The agreements in this Section shall survive the payment of the Loans and all other amounts payable hereunder.

SECTION 8.08. Agent in Its Individual Capacity. The Agent and its Affiliates may make loans to, accept deposits from and generally engage in any kind of business with the Borrower as though the Agent were not the Agent hereunder. With respect to Loans made or
renewed by it, the Agent shall have the same rights and powers under this Agreement as any Lender and may exercise the same as though it were not the Agent, and the terms "Lender" and "Lenders" shall include the Agent in its individual capacity.

SECTION 8.09. Successor Agent. The Agent may resign as Agent upon 30 days' notice to the Lenders and the Borrower and following the appointment of a successor Agent in accordance with the provisions of this Section. If the Agent shall resign as Agent under this Agreement, then the Majority Lenders shall appoint from among the Lenders willing to serve as Agent a successor agent for the Lenders, which successor agent shall be approved by the Borrower (which approval shall not be unreasonably withheld), whereupon such successor agent shall succeed to the rights, powers and duties of the Agent, and the term "Agent" shall mean such successor agent effective upon such appointment and approval, and the former Agent's rights, powers and duties as Agent shall be terminated, without any other or further act or deed on the part of such former Agent or any of the parties to this Agreement or any holders of the obligations owing hereunder. After any retiring Agent's resignation as Agent, the provisions of this Article shall inure to its benefit as to any actions taken or omitted to be taken by it while it was Agent under this Agreement and the other Loan Documents.

ARTICLE IX

The Guarantee

SECTION 9.01. Guarantee. In order to induce the Agent and the Lenders to execute and deliver this Agreement and to make and maintain the Loans:

(a) Each Guarantor hereby unconditionally and irrevocably guarantees to the Secured Parties, jointly with the other Guarantors and severally, as a primary obligation, the prompt and complete payment and performance by the Borrower when due (whether at the stated maturity, by acceleration or otherwise) of the Obligations. Each Guarantor further agrees to pay any and all reasonable expenses (including all reasonable fees and disbursements of counsel) which may be paid or incurred by the Agent or by the Secured Parties in enforcing any of their rights under the guarantee contained in this Article. The guarantee contained in this Article shall remain in full force and effect until the Obligations have been indefeasibly paid in full.

(b) Each Guarantor agrees that whenever, at any time or from time to time, it shall make any payment to the Agent or any Secured Party on account of its liability under this Article, it will notify the Agent or such Secured Party, as the case may be, in writing that such payment is made under the guarantee contained in this Article. No payment or payments made by any Guarantor or any other Person or received or collected by the Agent or any Secured Party from such Guarantor or any other Person by virtue of any action or proceeding or any set-off or appropriation or application, at any time or from time to time, in reduction of or in payment of the Obligations shall be deemed to modify, reduce, release or otherwise affect the liability of such Guarantor under this Article and such Guarantor shall, notwithstanding any such payment or payments, remain
liable for the amount of the Obligations until the Obligations have been indefeasibly paid in full.

(c) Anything herein or in any other Loan Document to the contrary notwithstanding, the maximum liability of each Guarantor hereunder and under the other Loan Documents shall in no event exceed the amount which can be guaranteed by such Guarantor under applicable Federal and state laws relating to the insolvency of debtors.

SECTION 9.02. No Subrogation. Notwithstanding any payment or payments made by any Guarantor hereunder, or any set-off or application of funds of any Guarantor by the Agent or any Secured Party, no Guarantor shall be entitled to be subrogated to any of the rights of the Agent or any Secured Party against the Borrower or against any collateral security or guarantee or right of offset held by the Agent or any Secured Party for the payment of the Obligations, nor shall any Guarantor seek or be entitled to seek any contribution or reimbursement from the Borrower in respect of payments made by such Guarantor hereunder, until all amounts owing to the Agent and the Secured Parties on account of the Obligations are indefeasibly paid in full. If any amount shall be paid to any Guarantor on account of such subrogation rights in violation of the foregoing sentence, such amount shall be held by such Guarantor in trust for the Agent and the Secured Parties, segregated from other funds of such Guarantor, and shall, forthwith upon receipt by such Guarantor, be turned over to the Agent in the exact form received by such Guarantor (duly indorsed by such Guarantor to the Agent, if required), to be applied against the Obligations, whether matured or unmatured, in such order as the Agent may determine.

SECTION 9.03. Amendments, etc. with Respect to the Obligations. Each Guarantor shall remain obligated under this Article notwithstanding that, without any reservation of rights against such Guarantor, and without notice to or further assent by such Guarantor, any demand for payment of any of the Obligations made by the Agent or any Secured Party may be rescinded by the Agent or such Secured Party, and any of such Obligations continued, and any such Obligations, or the liability of any other party upon or for any part thereof, or any collateral security or guarantee therefor or right of offset with respect thereto, may, from time to time, in whole or in part, be renewed, extended, amended, modified, accelerated, compromised, waived, surrendered or released by the Agent or the Secured Parties, and this Agreement may be amended, modified, supplemented or terminated, in whole or in part, as the Agent or the Secured Parties may deem advisable from time to time, and any collateral security, guarantee or right of offset at any time held by the Agent or the Secured Parties for the payment of any of the Obligations may be sold, exchanged, waived, surrendered or released. Subject to any applicable law, neither the Agent nor any Secured Party shall have any obligation to protect, secure, perfect or insure any Lien at any time held by it as security for any of the Obligations or for the guarantee contained in this Article or any property subject thereto.

SECTION 9.04. Guarantee Absolute and Unconditional. Each Guarantor waives any and all notice of the creation, renewal, extension or accrual of any of the Obligations and notice of or proof of reliance by the Agent or any Secured Party upon the guarantee contained in this Article or acceptance of the guarantee contained in this Article; the Obligations, and any part thereof, shall conclusively be deemed to have been created, contracted or incurred in reliance upon the guarantee contained in this Article; and all dealings between the Borrower and any
Guarantor, on the one hand, and the Agent and the Secured Parties, on the other, shall likewise be conclusively presumed to have been had or consummated in reliance upon the guarantee contained in this Article. Each Guarantor waives diligence, presentment, protest, demand for payment and notice of default or nonpayment to or upon the Borrower with respect to the Obligations, it being understood that such Guarantor shall not be required to make any payment under this Article until demand therefor shall have been made by the Agent in accordance with Section 10.02. The guarantee contained in this Article shall be construed as a continuing, absolute and unconditional guarantee of payment without regard to (a) the validity or enforceability of any other provision of this Agreement, any of the Obligations or any collateral security therefor or guarantee or right of offset with respect thereto at any time or from time to time held by the Agent or any Secured Party, (b) any defense, set-off or counterclaim (other than a defense of payment or performance) which may at any time be available to or be asserted by the Borrower against the Agent or any Secured Party, or (c) any other circumstance whatsoever (with or without notice to or knowledge of the Borrower or any Guarantor) which constitutes, or might be construed to constitute, an equitable or legal discharge of the Borrower for the Obligations, or of any Guarantor under this Article, in bankruptcy or in any other instance. When the Agent or any Secured Party is pursuing its rights and remedies under this Article against any Guarantor, the Agent or any Secured Party may, but shall be under no obligation to, pursue such rights and remedies as it may have against the Borrower or any other Person or against any collateral security or guarantee for the Obligations or any right of offset with respect thereto, and any failure by the Agent or any Secured Party to pursue such other rights or remedies or to collect any payments from the Borrower or any such other Person or to realize upon any such collateral security or guarantee or to exercise any such right of offset, or any release of the Borrower or any such other Person or of any such collateral security, guarantee or right of offset, shall not relieve such Guarantor of any liability under this Article, and shall not impair or affect the rights and remedies, whether express, implied or available as a matter of law, of the Agent and the Secured Parties against such Guarantor.

SECTION 9.05. Reinstatement. The guarantee contained in this Article shall continue to be effective, or be reinstated, as the case may be, if at any time payment, or any part thereof, of any of the Obligations is rescinded or must otherwise be restored or returned by the Agent or any Secured Party upon the insolvency, bankruptcy, dissolution, liquidation or reorganization of any Loan Party or upon or as a result of the appointment of a receiver, intervenor or conservator of, or trustee or similar officer for, any Loan Party or any substantial part of its property, or otherwise, all as though such payments had not been made.

ARTICLE X

Miscellaneous

SECTION 10.01. Amendments and Waivers. Neither this Agreement nor any other Loan Document nor any terms hereof or thereof may be amended, supplemented or modified except pursuant to an agreement in writing entered into by the Borrower and the Majority Lenders or pursuant to an agreement or agreements in writing entered into by the Agent and the Loan Party or Loan Parties party thereto, in each case, with the consent of the Majority

[[NYCORP:2649219v24]]
Lenders. The Majority Lenders may, or, with the written consent of the Majority Lenders, the
Agent may, from time to time, (a) enter into with the Loan Parties written amendments,
supplements or modifications hereto for the purpose of adding any provisions to this Agreement
or changing in any manner the rights of the Lenders or the Loan Parties hereunder or (b) waive,
on such terms and conditions as the Majority Lenders or the Agent, as the case may be, may
specify in such instrument, any of the requirements of this Agreement or any other Loan
Document or any Default or Event of Default and its consequences. Any such waiver and any
such amendment, supplement or modification shall apply equally to each of the Lenders and
shall be binding upon the Loan Parties, the Lenders, the Agent and all future holders of the
obligations owing hereunder; provided, however, that no such waiver and no such amendment,
supplement or modification shall (i) increase the Commitment of any Lender without the written
consent of such Lender, (ii) reduce the principal amount of any Loan or reduce the rate of
interest thereon without the written consent of each Lender affected thereby, (iii) postpone the
maturity of any Loan, or any scheduled date of payment of the principal amount of any Loan or
any date for the payment of any interest payable thereunder, or reduce the amount of, waive or
excuse any such payment, or postpone the scheduled date of expiration of any Commitment,
without the written consent of each Lender affected thereby, (iv) change Section 2.12 in a
manner that would alter the pro rata sharing of payments required thereby, without the written
consent of each Lender affected thereby, (v) change any of the provisions of this Section or the
percentage set forth in the definition of “Majority Lenders” or any other provision of any Loan
Document specifying the number or percentage of Lenders required to waive, amend or modify
any rights thereunder or make any determination or grant any consent thereunder, without the
written consent of each Lender affected thereby, (vi) release any Guarantor from its guarantee
hereunder (except as permitted by this Agreement), or limit its liability in respect of such
guarantee, without the written consent of each Lender, (vii) release all or substantially all of the
Collateral from the Liens of the Security Documents without the written consent of each Lender,
(viii) consent to the assignment or transfer by any Loan Party of any of its rights and obligations
under this Agreement or any other Loan Document, without the written consent of each Lender,
or (ix) amend, modify or waive any provision of Article VIII or any other provision of this
Agreement governing the rights or obligations of the Agent without the written consent of the
Agent. In the case of any waiver, the Loan Parties, the Lenders and the Agent shall be restored
to their former position and rights hereunder, and any Default or Event of Default waived shall
be deemed to be cured and not continuing, but no such waiver shall extend to any subsequent or
other Default or Event of Default, or impair any right consequent thereon. Notwithstanding
anything to the contrary herein, the Agent may, with the consent of the Borrower, amend, modify
or supplement any provision of this Agreement or any other Loan Document to cure any
ambiguity, omission, defect or inconsistency, so long as such amendment, modification, or
supplement does not adversely affect the rights of any Lender.

SECTION 10.02. Notices. All notices, requests and demands to or upon the
respective parties hereto to be effective shall be in writing (including by telecopy), and, unless
otherwise expressly provided herein, shall be deemed to have been duly given or made when
delivered by hand, or, in the case of overnight courier, facsimile or telecopy notice, when
received, or four days after being deposited in the mail, postage prepaid addressed as follows in
the case of the Borrower, any Guarantor and the Agent, and as set forth in the administrative
questionnaire of any Lender, or to such other address as may be hereafter notified by the
respective parties hereto and any future holders of the obligations owing hereunder:
The Borrower or any Guarantor:

General Motors Corporation
767 Fifth Avenue
New York, New York 10153
Attention: Treasurer
Telecopy: (212) 418-3632

with a copy to:

Office of the Secretary
General Motors Corporation
300 Renaissance Center
Detroit, Michigan 48265-3000

and with a copy to:

Weil Gotshal & Manges, LLP
767 Fifth Avenue
New York, New York 10153-0119
Attention: Soo-Jin Shim
Telecopy: 212-310-8007

The Agent:

JPMorgan Chase Bank, N.A.
Loan & Agency Services
1111 Fannin Street – 10th Floor
Houston, TX 77002
Attention: Denise Ramon
Telecopy: 713-750-2938;

provided that any notice, request or demand to or upon the Agent or the Lenders pursuant to Section 2.02, 2.04 or 2.05 shall not be effective until received.

SECTION 10.03. No Waiver; Cumulative Remedies. No failure to exercise and no delay in exercising, on the part of the Agent or any Lender, any right, remedy, power or privilege hereunder or under any other Loan Document shall operate as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege. The rights, remedies, powers and privileges herein provided are cumulative and not exclusive of any rights, remedies, powers and privileges provided by law.

SECTION 10.04. Survival of Representations and Warranties. All representations and warranties made hereunder and in any document, certificate or statement delivered pursuant hereto or in connection herewith shall survive the execution and delivery of this Agreement and the making of the Loans hereunder.
SECTION 10.05. Payment of Expenses and Taxes. The Borrower agrees (a) to pay or reimburse the Agent for all its reasonable out-of-pocket costs and expenses reasonably incurred in connection with the development, preparation and execution of, and any amendment, supplement or modification to, this Agreement and any other documents prepared in connection herewith or therewith, and the consummation and administration of the transactions contemplated hereby and thereby, including the reasonable fees and disbursements of counsel to the Agent (which fees and disbursements of counsel shall be paid on the date which is, (i) in the case of the entry into this Agreement, the later of (A) thirty days following the Funding Date and (B) ten Business Days after the delivery of any invoice related thereto and (ii) in all other cases, the date which is ten Business Days after the delivery of any invoice related thereto), (b) to pay or reimburse each Lender and the Agent for all its reasonable costs and expenses reasonably incurred in connection with the enforcement of any rights under this Agreement, including the reasonable fees and disbursements of counsel to the Agent and to the several Lenders (other than those incurred in connection with the compliance by the relevant Lender with the provisions of Section 2.17(a)), (c) to pay, indemnify, and hold each Lender and the Agent harmless from, any and all recording and filing fees and any and all liabilities with respect to, or resulting from any delay by the Borrower in paying, stamp, excise and other similar taxes (other than any Non-Excluded Taxes), if any, in each case, which may be payable or determined to be payable in connection with the execution and delivery of, or consummation or administration of any of the transactions contemplated by, or any amendment, supplement or modification of, or any waiver or consent under or in respect of, this Agreement and (d) to pay, indemnify, and hold each Lender and the Agent harmless from and against any and all other liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, reasonable expenses or disbursements of any kind or nature whatsoever with respect to the execution, delivery, enforcement, performance and administration of this Agreement (all the foregoing in this clause (d), collectively, the "indemnified liabilities"); provided that the Borrower shall not have any obligation hereunder to indemnify the Agent or any Lender with respect to indemnified liabilities arising from the gross negligence or willful misconduct of the Agent or any such Lender. The agreements in this Section shall survive repayment of the Loans and all other Obligations.

SECTION 10.06. Successors and Assigns; Participations and Assignments. (a) The provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns permitted hereby, except that (i) no Loan Party may assign or otherwise transfer any of its rights or obligations hereunder except as provided in Section 6.01 or with the consent of each Lender and (ii) no Lender may assign or otherwise transfer its rights or obligations hereunder except in accordance with this Section.

(b) (i) Subject to the conditions set forth in paragraph (b)(ii) below, any Lender may assign to one or more assignees (each, an “Assignee”) all or a portion of its rights and obligations under this Agreement (including all or a portion of its Commitments and the Loans at the time owing to it) with the prior written consent (such consent not to be unreasonably withheld or delayed) of:

(A) the Borrower; provided that no consent of the Borrower shall be required for an assignment to a Lender, an Affiliate of a Lender, an Approved Fund (as defined below) or, if an Event of Default
under Article VII(a) or (e) has occurred and is continuing, any other Person; and

(B) the Agent; provided that no consent of the Agent shall be required for an assignment to an Assignee that is a Lender immediately prior to giving effect to such assignment.

(ii) Assignments shall be subject to the following additional conditions:

(A) except in the case of an assignment to a Lender, an Affiliate of a Lender or an Approved Fund or an assignment of the entire remaining amount of the assigning Lender’s Commitments or Loans, the amount of the Commitments or Loans of the assigning Lender subject to each such assignment (determined as of the date the Assignment and Acceptance with respect to such assignment is delivered to the Agent) shall not be less than $1,000,000, unless each of the Borrower and the Agent otherwise consent; provided that (I) no such consent of the Borrower shall be required if an Event of Default under Article VII(a) or (e) has occurred and is continuing and (II) such amounts shall be aggregated in respect of each Lender and its affiliates or Approved Funds, if any;

(B) the parties to each assignment shall execute and deliver to the Agent an Assignment and Acceptance substantially in the form of Exhibit A (an “Assignment and Acceptance”), together with a processing and recordation fee of $3,500;

(C) the Assignee, if it shall not be a Lender, shall deliver to the Agent an administrative questionnaire; and

(D) in the case of an assignment by a Lender to a CLO (as defined below) administered or managed by such Lender or an Affiliate of such Lender, the assigning Lender shall retain the sole right to approve any amendment, modification or waiver of any provision of this Agreement; provided that the Assignment and Acceptance between such Lender and such CLO may provide that such Lender will not, without the consent of such CLO, agree to any amendment, modification or waiver that (I) requires the consent of each Lender directly affected thereby pursuant to the proviso to the second sentence of Section 10.01 and (II) directly affects such CLO.

For the purposes of this Section, the terms “Approved Fund” and “CLO” have the following meanings:

“Approved Fund” means (a) with respect to any Lender, a CLO administered or managed by such Lender or an Affiliate of such Lender and (b) with respect to any Lender that is a fund which invests in bank loans and similar extensions of credit, any other fund that invests in
bank loans and similar extensions of credit and is managed by the same investment advisor as such Lender or by an Affiliate of such investment advisor.

“CLO” means, as to any Lender, any entity (whether a corporation, partnership, trust or otherwise) that is engaged in making, purchasing, holding or otherwise investing in bank loans and similar extensions of credit in the ordinary course and is administered or managed by such Lender or an Affiliate of such Lender.

(iii) Subject to acceptance and recording thereof pursuant to paragraph (b)(iv) below, from and after the effective date specified in each Assignment and Acceptance, the Assignee thereunder shall be a party hereto and, to the extent of the interest assigned by such Assignment and Acceptance, have the rights and obligations of a Lender under this Agreement, and the assigning Lender thereunder shall, to the extent of the interest assigned by such Assignment and Acceptance, be released from its obligations under this Agreement (and, in the case of an Assignment and Acceptance covering all of the assigning Lender’s rights and obligations under this Agreement, such Lender shall cease to be a party hereto but shall continue to be entitled to the benefits of Sections 2.13, 2.14, 2.15 and 10.05); provided that no Assignee shall then be entitled to receive any greater amount pursuant to Section 2.13, 2.14, 2.15 or 2.16 in respect of any event or circumstance existing at the time of the assignment pursuant to which it acquired its interest hereunder than the assigning Lender would have been entitled to receive thereunder in respect of the rights and obligations assigned by such assigning Lender to such Assignee had no such assignment occurred. Any assignment or transfer by a Lender of rights or obligations under this Agreement that does not comply with this Section shall be treated for purposes of this Agreement as a sale by such Lender of a participation in such rights and obligations in accordance with paragraph (c) of this Section.

(iv) The Agent, acting for this purpose as an agent of the Borrower, shall maintain at one of its offices a copy of each Assignment and Acceptance delivered to it and a register for the recording of the names and addresses of the Lenders, and the Commitments of, and principal amount of the Loans owing to, each Lender pursuant to the terms hereof from time to time (the “Register”). The entries in the Register shall be prima facie evidence of the existence and amounts of the obligations of the Borrower therein recorded, and the Borrower, the Agent and the Lenders may treat each Person whose name is recorded in the Register pursuant to the terms hereof as a Lender hereunder for all purposes of this Agreement, notwithstanding notice to the contrary. The Register shall be available for inspection by the Borrower and any Lender, at any reasonable time and from time to time upon reasonable prior notice. The Agent shall provide a copy of the Register to the Borrower on a monthly basis.

(v) Upon its receipt of a duly completed Assignment and Acceptance executed by an assigning Lender and an Assignee, the Assignee’s completed administrative questionnaire (unless the Assignee shall already be a Lender hereunder), the processing and recordation fee referred to in paragraph (b)
13-2187

In Re: Motors Liquidation Co.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2013

(Argued: March 25, 2014
Question Answered: October 17, 2014
Question Certified: June 17, 2014
Appeal Decided: January 21, 2015)

Docket No. 13-2187

In Re: MOTORS LIQUIDATION COMPANY, et al.,

Debtor,

________________________________________

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF MOTORS LIQUIDATION COMPANY,

Plaintiff-Appellant,

-v.-

JP MORGAN CHASE BANK, N.A., individually and as Administrative Agent for various lenders party to the Term Loan Agreement described herein,

Defendant-Appellee.

________________________________________

Before:

WINTER, WESLEY, AND CARNEY, Circuit Judges.
Direct appeal pursuant to 28 U.S.C. § 158(d)(2) from an order of the United States Bankruptcy Court for the Southern District of New York (Gerber, U.S.B.J.) holding that a mistaken UCC-3 termination statement was unauthorized and therefore not effective to terminate a secured lender’s interest in a debtor’s property. We conclude that although the termination statement mistakenly identified for termination a security interest that the lender did not intend to terminate, the secured lender authorized the filing of the document, and the termination statement was effective to terminate the security interest. REVERSED and REMANDED.

ERIC B. FISHER (Barry N. Seidel, Katie L. Weinstein, Jeffrey Rhodes, on the brief), Dickstein Shapiro LLP, New York, NY, for Plaintiff-Appellant.

JOHN M. CALLAGY (Nicholas J. Panarella, Martin A. Krolewski, on the brief), Kelley Drye & Warren LLP, New York, NY, for Defendant-Appellee.

PER CURIAM:

We assume familiarity with our prior certification opinion, Official Committee of Unsecured Creditors of Motors Liquidation Co. v. JP Morgan Chase Bank, N.A. (In re Motors Liquidation Co.), 755 F.3d 78 (2d Cir. 2014), and the resulting decision of the Delaware Supreme Court, Official Committee of Unsecured Creditors
of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A., ___ A.3d ___, 2014 WL 5305937 (Del. Oct. 17, 2014). We restate the most salient facts.¹

BACKGROUND

In October 2001, General Motors entered into a synthetic lease financing transaction (the “Synthetic Lease”), by which it obtained approximately $300 million in financing from a syndicate of lenders including JPMorgan Chase Bank, N.A. (“JPMorgan”). General Motors’ obligation to repay the Synthetic Lease was secured by liens on twelve pieces of real estate. JPMorgan served as administrative agent for the Synthetic Lease and was identified on the UCC-1 financing statements as the secured party of record.

Five years later, General Motors entered into a separate term loan facility (the “Term Loan”). The Term Loan was entirely unrelated to the Synthetic Lease and provided General Motors with approximately $1.5 billion in financing from a different syndicate of lenders. To secure the loan, the lenders took security interests in a large number of General Motors’ assets, including all of General Motors’ equipment and fixtures at forty-two facilities throughout the United States.

¹ These undisputed facts are drawn from the record and from the Bankruptcy Court’s decision below, Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.), 486 B.R. 596 (Bankr. S.D.N.Y. 2013).
States. JPMorgan again served as administrative agent and secured party of record for the Term Loan and caused the filing of twenty-eight UCC-1 financing statements around the country to perfect the lenders’ security interests in the collateral. One such financing statement, the “Main Term Loan UCC-1,” was filed with the Delaware Secretary of State and bore file number “6416808 4.” It “covered, among other things, all of the equipment and fixtures at 42 GM facilities, [and] was by far the most important” of the financing statements filed in connection with the Term Loan. *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.),* 486 B.R. 596, 603 n.6 (Bankr. S.D.N.Y. 2013).

In September 2008, as the Synthetic Lease was nearing maturity, General Motors contacted Mayer Brown LLP, its counsel responsible for the Synthetic Lease, and explained that it planned to repay the amount due. General Motors requested that Mayer Brown prepare the documents necessary for JPMorgan and the lenders to be repaid and to release the interests the lenders held in General Motors’ property.

A Mayer Brown partner assigned the work to an associate and instructed him to prepare a closing checklist and drafts of the documents required to pay
off the Synthetic Lease and to terminate the lenders’ security interests in General Motors’ property relating to the Synthetic Lease. One of the steps required to unwind the Synthetic Lease was to create a list of security interests held by General Motors’ lenders that would need to be terminated. To prepare the list, the Mayer Brown associate asked a paralegal who was unfamiliar with the transaction or the purpose of the request to perform a search for UCC-1 financing statements that had been recorded against General Motors in Delaware. The paralegal’s search identified three UCC-1s, numbered 2092532 5, 2092526 7, and 6416808 4. Neither the paralegal nor the associate realized that only the first two of the UCC-1s were related to the Synthetic Lease. The third, UCC-1 number 6416808 4, related instead to the Term Loan.

When Mayer Brown prepared a Closing Checklist of the actions required to unwind the Synthetic Lease, it identified the Main Term Loan UCC-1 for termination alongside the security interests that actually did need to be terminated. And when Mayer Brown prepared draft UCC-3 statements to terminate the three security interests identified in the Closing Checklist, it prepared a UCC-3 statement to terminate the Main Term Loan UCC-1 as well as those related to the Synthetic Lease.
No one at General Motors, Mayer Brown, JPMorgan, or its counsel, Simpson Thacher & Bartlett LLP, noticed the error, even though copies of the Closing Checklist and draft UCC-3 termination statements were sent to individuals at each organization for review. On October 30, 2008, General Motors repaid the amount due on the Synthetic Lease. All three UCC-3s were filed with the Delaware Secretary of State, including the UCC-3 that erroneously identified for termination the Main Term Loan UCC-1, which was entirely unrelated to the Synthetic Lease.

A. General Motors’ Chapter 11 Bankruptcy Filing

The mistake went unnoticed until General Motors’ bankruptcy in 2009. After General Motors filed for chapter 11 reorganization, JPMorgan informed the Committee of Unsecured Creditors (the “Committee”) that a UCC-3 termination statement relating to the Term Loan had been inadvertently filed in October 2008. JPMorgan explained that it had intended to terminate only liens related to the Synthetic Lease and stated that the filing was therefore unauthorized and ineffective.

On July 31, 2009, the Committee commenced the underlying action against JPMorgan in the United States Bankruptcy Court for the Southern District of
New York. The Committee sought a determination that, despite the error, the
UCC-3 termination statement was effective to terminate the Term Loan security
interest and render JPMorgan an unsecured creditor on par with the other
General Motors unsecured creditors. JPMorgan disagreed, reasoning that the
UCC-3 termination statement was unauthorized and therefore ineffective
because no one at JPMorgan, General Motors, or their law firms had intended
that the Term Loan security interest be terminated. On cross-motions for
summary judgment, the Bankruptcy Court concluded that the UCC-3 filing was
unauthorized and therefore not effective to terminate the Term Loan security

B. *Prior Certification Opinion*

On appeal to this Court, the parties offered competing interpretations of
UCC § 9-509(d)(1), which provides that a UCC-3 termination statement is
effective only if “the secured party of record authorizes the filing.” JPMorgan
reasoned that it cannot have “authorize[d] the filing” of the UCC-3 that
identified the Main Term Loan UCC-1 for termination because JPMorgan neither
intended to terminate the security interest nor instructed anyone else to do so on
its behalf. In response, the Committee contended that focusing on the parties’
goal misses the point. It interpreted UCC § 9-509(d)(1) to require only that the secured lender authorize the act of filing a particular UCC-3 termination statement, not that the lender subjectively intend to terminate the particular security interest identified for termination on that UCC-3. The Committee further argued that even if JPMorgan never intentionally instructed anyone to terminate the Main Term Loan UCC-1, JPMorgan did literally “authorize[] the filing”—even if mistakenly—of a UCC-3 termination statement that had that effect.

In our prior certification opinion we recognized that this appeal presents two closely related questions. First, what precisely must a secured lender of record authorize for a UCC-3 termination statement to be effective: “Must the secured lender authorize the termination of the particular security interest that the UCC-3 identifies for termination, or is it enough that the secured lender authorize the act of filing a UCC-3 statement that has that effect?” In re Motors Liquidation Co., 755 F.3d at 84. Second, “[d]id JPMorgan grant to Mayer Brown the relevant authority—that is, alternatively, authority either to terminate the Main Term Loan UCC-1 or to file the UCC-3 statement that identified that interest for termination?” Id.
Recognizing that the first question—what is it that the UCC requires a secured lender to authorize—seemed likely to recur and presented a significant issue of Delaware state law, we certified to the Delaware Supreme Court the following question:

Under UCC Article 9, as adopted into Delaware law by Del. Code Ann. tit. 6, art. 9, for a UCC-3 termination statement to effectively extinguish the perfected nature of a UCC-1 financing statement, is it enough that the secured lender review and knowingly approve for filing a UCC-3 purporting to extinguish the perfected security interest, or must the secured lender intend to terminate the particular security interest that is listed on the UCC-3?

Id. at 86. The second question—whether JPMorgan granted the relevant authority—we reserved for ourselves, explaining that “[t]he Delaware Supreme Court’s clarification as to the sense in which a secured party of record must authorize a UCC-3 filing will enable us to address . . . whether JPMorgan in fact provided that authorization.” Id. at 86–87.

C. The Delaware Supreme Court’s Answer

In a speedy and thorough reply, the Delaware Supreme Court answered the certified question, explaining that if the secured party of record authorizes the filing of a UCC-3 termination statement, then that filing is effective regardless of whether the secured party subjectively intends or understands the effect of that filing:
[F]or a termination statement to become effective under § 9-509 and thus to have the effect specified in § 9-513 of the Delaware UCC, it is enough that the secured party authorizes the filing to be made, which is all that § 9-510 requires. The Delaware UCC contains no requirement that a secured party that authorizes a filing subjectively intends or otherwise understands the effect of the plain terms of its own filing.

*Official Comm. of Unsecured Creditors of Motors Liquidation Co.*, 2014 WL 5305937, at *5. That conclusion, explained the court, follows both from the unambiguous terms of the UCC and from sound policy considerations:

JPMorgan’s argument that a filing is only effective if the authorizing party understands the filing’s substantive terms and intends their effect is contrary to § 9-509, which only requires that “the secured party of record authorize[ ] the filing.”

... Even if the statute were ambiguous, we would be reluctant to embrace JPMorgan’s proposition. Before a secured party authorizes the filing of a termination statement, it ought to review the statement carefully and understand which security interests it is releasing and why... If parties could be relieved from the legal consequences of their mistaken filings, they would have little incentive to ensure the accuracy of the information contained in their UCC filings.

*Id.* at *3–4* (first alteration in original) (footnote omitted).

**DISCUSSION**

The Delaware Supreme Court has explained the sense in which a secured party must “authorize[] the filing” of a UCC-3 termination statement. What
remains is to answer the question we reserved for ourselves in our prior certification opinion: Did JPMorgan authorize the filing of the UCC-3 termination statement that mistakenly identified for termination the Main Term Loan UCC-1?

In JPMorgan’s view, it never instructed anyone to file the UCC-3 in question, and the termination statement was therefore unauthorized and ineffective. JPMorgan reasons that it authorized General Motors only to terminate security interests related to the Synthetic Lease; that it instructed Simpson Thacher and Mayer Brown only to take actions to accomplish that objective; and that therefore Mayer Brown must have exceeded the scope of its authority when it filed the UCC-3 purporting to terminate the Main Term Loan UCC-1.

JPMorgan’s and General Motors’ aims throughout the Synthetic Lease transaction were clear: General Motors would repay the Synthetic Lease, and JPMorgan would terminate its related UCC-1 security interests in General Motors’ properties. The Synthetic Lease Termination Agreement provided that, upon General Motors’ repayment of the amount due under the Synthetic Lease, General Motors would be authorized “to file a termination of any existing
Financing Statement relating to the Properties [of the Synthetic Lease].” J.A. 2151. And, to represent its interests in the transaction, JPMorgan relied on Simpson Thacher, its counsel for matters related to the Synthetic Lease. No one at JPMorgan, Simpson Thacher, General Motors, or Mayer Brown took action intending to affect the Term Loan.

What JPMorgan intended to accomplish, however, is a distinct question from what actions it authorized to be taken on its behalf. Mayer Brown prepared a Closing Checklist, draft UCC-3 termination statements, and an Escrow Agreement, all aimed at unwinding the Synthetic Lease but tainted by one crucial error: The documents included a UCC-3 termination statement that erroneously identified for termination a security interest related not to the Synthetic Lease but to the Term Loan. The critical question in this case is whether JPMorgan “authorize[d] [Mayer Brown] to file” that termination statement.

After Mayer Brown prepared the Closing Checklist and draft UCC-3 termination statements, copies were sent for review to a Managing Director at JPMorgan who supervised the Synthetic Lease payoff and who had signed the Term Loan documents on JPMorgan’s behalf. Mayer Brown also sent copies of
the Closing Checklist and draft UCC-3 termination statements to JPMorgan’s
counsel, Simpson Thacher, to ensure that the parties to the transaction agreed as
to the documents required to complete the Synthetic Lease payoff transaction.
Neither directly nor through its counsel did JPMorgan express any concerns
about the draft UCC-3 termination statements or about the Closing Checklist. A
Simpson Thacher attorney responded simply as follows: “Nice job on the
documents. My only comment, unless I am missing something, is that all
references to JPMorgan Chase Bank, as Administrative Agent for the Investors
should not include the reference ‘for the Investors.’” J.A. 921.

After preparing the closing documents and circulating them for review,
Mayer Brown drafted an Escrow Agreement that instructed the parties’ escrow
agent how to proceed with the closing. Among other things, the Escrow
Agreement specified that the parties would deliver to the escrow agent the set of
three UCC-3 termination statements (individually identified by UCC-1 financing
statement file number) that would be filed to terminate the security interests that
General Motors’ Synthetic Lease lenders held in its properties. The Escrow
Agreement provided that once General Motors repaid the amount due on the
Synthetic Lease, the escrow agent would forward copies of the UCC-3
termination statements to General Motors’ counsel for filing. When Mayer Brown e-mailed a draft of the Escrow Agreement to JPMorgan’s counsel for review, the same Simpson Thacher attorney responded that “it was fine” and signed the agreement.

From these facts it is clear that although JPMorgan never intended to terminate the Main Term Loan UCC-1, it authorized the filing of a UCC-3 termination statement that had that effect. “Actual authority . . . is created by a principal’s manifestation to an agent that, as reasonably understood by the agent, expresses the principal’s assent that the agent take action on the principal’s behalf.” Restatement (Third) of Agency § 3.01 (2006); accord Demarco v. Edens, 390 F.2d 836, 844 (2d Cir. 1968). JPMorgan and Simpson Thacher’s repeated manifestations to Mayer Brown show that JPMorgan and its counsel knew that, upon the closing of the Synthetic Lease transaction, Mayer Brown was going to file the termination statement that identified the Main Term Loan UCC-1 for termination and that JPMorgan reviewed and assented to the filing of that statement. Nothing more is needed.
CONCLUSION

For the foregoing reasons, we REVERSE the Bankruptcy Court’s grant of summary judgment for the Defendant and REMAND with instructions to the Bankruptcy Court to enter partial summary judgment for the Plaintiff as to the termination of the Main Term Loan UCC-1.
IN THE SUPREME COURT OF THE STATE OF DELAWARE

OFFICIAL COMMITTEE OF
UNSECURED CREDITORS OF MOTORS LIQUIDATION COMPANY,
Plaintiff-Appellant,
v.
JPMORGAN CHASE BANK, N.A., Individually and as Administrative Agent for various lenders party to the Term Loan Agreement described herein,
Defendant-Appellee.

No. 325, 2014

Certification of Question of Law from the United States Court of Appeals for the Second Circuit

C.A. No. 13-2187-bk

Submitted: October 8, 2014
Decided: October 17, 2014

Before STRINE, Chief Justice; HOLLAND and RIDGELY, Justices; LASTER, Vice Chancellor;* and COONIN, Judge,* constituting the Court en Banc.

Upon Certification of Question of Law from the United States Court of Appeals for the Second Circuit. CERTIFIED QUESTION ANSWERED.


* Sitting by designation under Del. Const. art. IV, § 12.

STRINE, Chief Justice:
I. INTRODUCTION

The United States Court of Appeals for the Second Circuit (“Second Circuit”) has certified the following question of law important to a dispute pending before it:

Under UCC Article 9, as adopted into Delaware law by Del. Code Ann. tit. 6, art. 9, for a UCC-3 termination statement to effectively extinguish the perfected nature of a UCC-1 financing statement, is it enough that the secured lender review and knowingly approve for filing a UCC-3 purporting to extinguish the perfected security interest, or must the secured lender intend to terminate the particular security interest that is listed on the UCC-3?¹

We more precisely answer by assuming that by the term “effectively extinguish,” the Second Circuit asks whether reviewing the termination statement and knowingly approving it for filing has the effect specified in § 9-513 of the Delaware’s version of the Uniform Commercial Code (“UCC”), which is that “the financing statement to which the termination statement relates ceases to be effective.”² Based on that understanding and for reasons we explain more fully, the unambiguous provisions of Delaware’s UCC dictate that the answer is that “it [is] enough that the secured lender review and knowingly approve for filing a UCC-3 purporting to extinguish the perfected security interest.”³ Under the Delaware UCC, parties in commerce are entitled to rely upon a filing authorized by a secured lender and assume that the secured lender intends the plain consequences of its filing.

¹ In re: Motors Liquidation Co., 755 F.3d 78, 86 (2d Cir. 2014).
² 6 Del. C. § 9-513(d).
³ Id.
II. THE EVENTS LEADING TO THE CERTIFIED QUESTION

The dispute pending before the Second Circuit turns on the effect of a UCC termination statement – a “UCC-3 termination statement” – filed with the Delaware Secretary of State on behalf of General Motors Corporation. That termination statement, by its plain terms, purported to extinguish a security interest on the assets of General Motors (“term loan security interest”) held by a syndicate of lenders, including JPMorgan Chase Bank, N.A. (“JPMorgan”). But neither JPMorgan nor General Motors subjectively intended to terminate the term loan security interest when General Motors filed the termination statement. General Motors’ counsel for a separate “synthetic lease” financing transaction, Mayer Brown LLP, had inadvertently included the term loan security interest on the termination statement that it filed in the process of unwinding the synthetic lease. According to JPMorgan, no one at General Motors, Mayer Brown, or Simpson Thatcher Bartlett LLP (JPMorgan’s counsel for the synthetic lease transaction) noticed this error, even though individuals at each organization reviewed the filing statement before the termination statement was filed on October 30, 2008. Under the stipulated question, we are also to assume that JPMorgan itself reviewed the termination statement and knowingly approved its filing.

After General Motors filed for reorganization under Chapter 11 of the Bankruptcy Code, JPMorgan informed the unofficial committee of unsecured creditors (“Creditors Committee”) that a UCC-3 termination statement relating to the term loan had been filed.

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4 These factual details are taken from the Second Circuit’s opinion certifying the question of law to this Court and from the appendices submitted by the parties.
inadvertently filed. On July 31, 2009, the Creditors Committee commenced a proceeding against JPMorgan in the United States Bankruptcy Court for the Southern District of New York (the “Bankruptcy Court”), seeking, among other things, a determination that the filing of the UCC-3 termination statement was effective to terminate the term loan security interest and thus render JPMorgan an unsecured creditor on par with the other General Motors unsecured creditors. JPMorgan contested that argument, asserting that it had not authorized the termination statement releasing the term loan security interest, and that the statement was erroneously filed because no one at General Motors, JPMorgan, or the law firms working on the synthetic lease transaction recognized that the unrelated term loan security interest had been included on the statement.

On cross-motions for summary judgment, the Bankruptcy Court found for JPMorgan on various grounds, including that JPMorgan had not empowered Mayer Brown to act as its agent in releasing the term loan security interest in the sense that it had only authorized Mayer Brown to file an accurate termination statement that released security interests properly related to the synthetic lease transaction.  

Because neither JPMorgan nor General Motors intended the legal consequences of the UCC-3 termination statement, the Bankruptcy Court found that the UCC-3 filing was not authorized and therefore was not effective to terminate the term loan security interest.

The Creditors Committee appealed to the Second Circuit, arguing, among other things, that Mayer Brown was authorized as JPMorgan’s agent to file the UCC-3

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6 Id.
termination statement. Most pertinent for present purposes, the Creditors Committee argued that the only issue is whether JPMorgan had authorized the filing of the UCC-3 termination statement. So long as JPMorgan had authorized the statement to be filed, the termination of all identified security interests, including the term loan security interest, would be effective.

The Creditors Committee also contended that JPMorgan’s argument that a party can authorize a filing and then later claim that it had not authorized the filing because it failed to catch an error in the statement is inconsistent with the plain language of § 9-513 of Delaware’s UCC. That language states in pertinent part that “upon the filing of a termination statement with the filing office, the financing statement to which the termination statement relates ceases to be effective.”

By contrast, JPMorgan took the position that a party may authorize a specific document to be filed on its behalf, but that such authorization does not cause the termination statement to be effective if errors in the statement resulted in the release of a security interest that the party did not subjectively intend to release.

The Second Circuit has indicated that it would be helpful to have an answer from this Court regarding this aspect of the parties’ dispute. That answer may avoid any need for the Second Circuit to address the parties’ disagreement as to whether Mayer Brown was authorized to act as JPMorgan’s agent to file the UCC-3 termination statement, or provide some useful clarity if the agency issue must be addressed. Accordingly, the Second Circuit has certified the following question:

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7 6 Del. C. § 9-513(d).
Under UCC Article 9, as adopted into Delaware law by Del. Code Ann. tit. 6, art. 9, for a UCC-3 termination statement to effectively extinguish the perfected nature of a UCC-1 financing statement, is it enough that the secured lender review and knowingly approve for filing a UCC-3 purporting to extinguish the perfected security interest, or must the secured lender intend to terminate the particular security interest that is listed on the UCC-3?\(^8\)

The question is precise, and we read it as asking us to assume what it literally says, which is that the secured party of record has itself reviewed and knowingly approved the termination statement for filing. In its briefs and at oral argument, JPMorgan attempted to reframe the certified question by asking us to consider the issues of agency law that come into play whenever an entity, such as JPMorgan, acts through agents, be they employees, outside lawyers, or UCC-filing-service representatives. JPMorgan argued about whether a filing would be authorized if a secured party granted authority to an agent to file a termination statement for one security interest but not another, but the agent mistakenly filed a termination statement for both. That is not the question we have been asked to address, and the Second Circuit has said it will consider the fact-based question of whether Mayer Brown had authority as JPMorgan’s agent to file the termination statement after it receives our answer to its more precise question. The question certified to us assumes that the secured party of record “review[d] and knowingly approve[d] [the termination statement] for filing.” We will answer the question as our judicial colleagues have framed it.

\(^8\) In re: Motors Liquidation Co., 755 F.3d 78, 86 (2d Cir. 2014).
III. ANALYSIS

“The most important consideration for a court in interpreting a statute is the words the General Assembly used in writing it.”⁹ The provisions of Delaware’s UCC that are relevant to and support our conclusion are succinct. Section 9-513 of the UCC states:

(d) Effect of filing termination statement. Except as otherwise provided in Section 9-510, upon the filing of a termination statement with the filing office, the financing statement to which the termination statement relates ceases to be effective.¹⁰

In turn, § 9-510 makes plain that a termination statement is effective only if the statement was filed by a person who is entitled to do so under § 9-509:

(a) Filed record effective if authorized. A filed record is effective only to the extent that it was filed by a person that may file it under Section 9-509.¹¹

The final step in the relevant statutory chain is § 9-509(d)(1), which addresses who may file amendments, which include termination statements:¹²

(d) Person entitled to file certain amendments. A person may file an amendment other than an amendment that adds collateral covered by a financing statement or an amendment that adds a debtor to a financing statement only if:

(1) the secured party of record authorizes the filing; or
(2) [circumstances inapplicable to the facts of this case].¹³

“[U]nambiguous statutes are not subject to judicial interpretation.”¹⁴ The unambiguous terms of these UCC provisions make clear that if a “secured party of record

¹⁰ 6 Del. C. § 9-513(d).
¹¹ 6 Del. C. § 9-509(a).
¹³ 6 Del. C. § 9-509(d)(1).
authorizes the filing [of a termination statement].”\textsuperscript{15} then the filing is “effective”\textsuperscript{16} “upon the filing of a termination statement with the filing office.”\textsuperscript{17} At that time, “the statement to which the termination statement relates ceases to be effective.”\textsuperscript{18} In other words, for a termination statement to have the effect specified under § 9-513 of the Delaware UCC, it is enough that the secured party authorizes the filing. JPMorgan’s argument that a filing is only effective if the authorizing party understands the filing’s substantive terms and intends their effect is contrary to § 9-509, which only requires that “the secured party of record authorize[] the filing.”\textsuperscript{19}

This unambiguous language promotes sound policy. It is fair for sophisticated transacting parties to bear the burden of ensuring that a termination statement is accurate when filed.\textsuperscript{20} It would be strange and inefficient for the UCC to make the effectiveness of a termination statement depend on whether the secured party subjectively understood

\textsuperscript{14} Leatherbury v. Greenspun, D.O., 939 A.2d 1284, 1288 (Del. 2007).
\textsuperscript{15} \textit{6} Del. C. § 9-509(d)(1).
\textsuperscript{16} \textit{6} Del. C. § 9-510(a).
\textsuperscript{17} \textit{6} Del. C. § 9-513(d).
\textsuperscript{18} \textit{Id}.
\textsuperscript{19} See also U.C.C. § 9-518 cmt. (“If the person that filed the record was not entitled to do so, the filed record is ineffective, regardless of whether the secured party of record files an information statement. Likewise, if the person that filed the record was entitled to do so, the filed record is effective, even if the secured party of record files an information statement.”).
\textsuperscript{20} See, e.g., Graham v. State Farm Mut. Auto. Ins. Co., 1989 WL 12233, at *2 (Del. Super. Jan. 26, 1989) (“[F]ailure to read a contract in the absence of fraud is an unavailing excuse or defense and cannot justify an avoidance, modification or nullification of the contract or any provision thereof.”) (internal citation omitted); Hicks v. Soroka, 188 A.2d 133, 140–41 (Del. Super. 1963) (“If one voluntarily shuts his eyes when to open them is to see, such a one is guilty of an act of folly (in dealing at arm’s length with another) to his own injury; and the affairs of men could not go on if courts were being called upon to rip up transactions of that sort.”) (internal citation omitted).
the terms of its own filing and the effect that the filing would have on the security
interests the filing’s own words address.21

As a matter of ordinary course, parties who sign contracts and other binding
documents, or authorize someone else to execute those documents on their behalf, are
bound by the obligations that those documents contain.22 Certainly, there are doctrines
that allow parties who sign documents they do not understand to escape the consequences

(“Although strict adherence to the [UCC] requirements may at times lead to harsh results, efforts
by courts to fashion equitable solutions for mitigation of hardships experienced by creditors in
the literal application of statutory filing requirements may have the undesirable effect of
reducing the degree of reliance the market place should be able to place on the [UCC]
provisions. The inevitable harm doubtless would be more serious to commerce than the
occasional harshness from strict obedience.”) (citation omitted), aff’d, 557 F. App’x 747 (10th
Cir. 2014); In re Silvernail Mirror & Glass, Inc., 142 B.R. 987, 989 (M.D. Florida 2013) (“The
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 . . . [E]ven if [a] Termination Statement did not reflect the
parties’ true intent, it would be materially misleading to a potential creditor relying on the public
records [to ignore the statement] and therefore [it] should not be set aside.”).
22 See 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS
§ 31.5 (4th ed. 2003) (“As a general principle, all adults are presumed to be capable of managing
their own affairs, and the question whether a bargain is smart or foolish, or economically
efficient or disastrous, is not ordinarily a legitimate subject of judicial inquiry. If freedom of
contract means anything, it means that parties may make even foolish bargains and should be
held to the terms of their agreements. A contract is not a non-binding statement of the parties’
preferences; rather, it is an attempt by market participants to allocate risks and opportunities.
[The court’s role] is not to redistribute these risks and opportunities as [it sees] fit, but to enforce
the allocation the parties have agreed upon. While the parties to a contract often request the
courts, under the guise of interpretation or construction, to give their agreement a meaning which
cannot be found in their written understanding, based entirely on direct evidence of intention,
and often on hindsight, the courts properly and steadfastly reiterate the well-established principle
that it is not the function of the judiciary to change the obligations of a contract which the parties
have seen fit to make. . . . Unless the contract is voidable due to mistake, fraud,
unconscionability, or another invalidating cause, or invalid in whole or in part due to illegality or
another violation of public policy, the court must enforce it as drafted by the parties, according to
the terms employed. . . .”)
in certain circumstances, such as mutual mistake or reformation. But as the Creditors Committee points out, had the General Assembly wished to give secured parties who authorize filings a safety valve against their own failure to comprehend the terms of their filings, it could have written § 9-509(d)(1) to state, for example, that “a person may file [a termination statement] . . . only if . . . the secured party of record authorizes the filing and intends to terminate the security interests identified in that filing.” Or the General Assembly could have provided that the secured party must “authorize and understand the filing.” The General Assembly did not write the statute in either way, and it would be improper for us to engraft such a condition on § 9-509, especially when the statutory language is unambiguous.

Even if the statute were ambiguous, we would be reluctant to embrace JPMorgan’s proposition. Before a secured party authorizes the filing of a termination statement, it ought to review the statement carefully and understand which security interests it is releasing and why. A secured party is the master of its own termination statement; it works no unfairness to expect the secured party to review a termination statement carefully and only file the statement once it is sure that the statement is correct. If

23 See e.g., id. § 70.106 (4th ed. 2003) (“A contract may be rescinded where there is a clear, bona fide, mutual mistake regarding a material fact or law.”); id. § 70.20-21 (“Reformation of a written instrument is available where, because of a mutual mistake of fact, the instrument fails to express the real agreement between the parties.”).
24 See Stifel Fin. Corp. v. Cochran, 809 A.2d 555, 560 (Del. 2002) (“[T]his court should be chary about reading words into a statute that the General Assembly could have easily added itself.”) (quoting HMG/Courtland Props., Inc. v. Gray, 729 A.2d 300, 306 (Del. Ch. 1999)).
25 If a party files a termination statement that is inaccurate, it may follow the procedure established by the UCC to correct the record. Section 9-518 of Delaware’s UCC authorizes a person to file an “information statement” (or a “correction statement” under the UCC) if the person believes that the existing record is inaccurate or a statement has been wrongly filed.
parties could be relieved from the legal consequences of their mistaken filings, they would have little incentive to ensure the accuracy of the information contained in their UCC filings.

We recognize that the UCC is a system of notice filing and that such a system contemplates that later lenders may need to conduct diligence to determine that a filing was authorized by the secured party of record. But consistent with the purpose of setting up a notice system, one of the most important roles the UCC plays is facilitating the efficient procession of commerce by permitting parties to rely in good faith on the plain terms of authorized public filings. The UCC thus enables the crafting of contractual arrangements that generate wealth and the investment of capital in commercial enterprise because parties are able to rely on a clear and predicable set of rules to govern their transactions.

To hold that parties cannot rely upon authorized filings unless the secured party subjectively understood the effect of its own action would disrupt and undermine the


26 See, e.g., West’s ALR Digest Secured Transactions § 82.1 (2014) (“The purpose of the filing requirements for perfection of security interests is to guarantee that third parties will have notice of existing security interests in collateral, thus protecting credit transactions.”); U.S. v. Lincoln Sav. Bank (In re Commercial Millwright), 245 B.R. 597, 601 (Bankr. N. D. Iowa 1999) (“Perfection is intended to protect outside parties by providing clear notice.”).

27 See, e.g., In re Hickory Printing Group, Inc., 479 B.R. 388, 397 (Bankr. W.D.N.C. 2012) (“Lenders are bound by the effects of UCC termination statements, even when such termination statements are filed in error, because the entire purpose of the UCC system is to provide public notice of secured interests without requiring the parties to look behind or beyond the four corners of the public filing.”).
secured lending markets. It is not clear to us how an inquiring party would find out whether a secured party understood and intended the consequences of its own filing. In the normal course of business, which is what the Delaware UCC embraces as appropriate policy, a party who causes a document to be executed and filed on its behalf is expected to understand what the filing says, the effect the filing will have, and that its own act of causing the document to be executed and filed will signal to others that the filing party subjectively intends for the filing to have the effect resulting from plain terms. ²⁸ If we were to embrace JPMorgan’s theory, no creditor could ever be sure that a UCC-3 filing is truly effective, even where the secured party itself authorized the filing, unless a court determined after costly litigation that the filing was in fact subjectively intended.

It therefore may not be coincidental that JPMorgan did not confront the language of the UCC directly, but instead devoted most of its answering brief and the bulk of its presentation during oral argument to addressing a question that is not before us. In its brief, JPMorgan dilated mostly on whether General Motors (and its counsel Mayer Brown) was authorized to act as JPMorgan’s agent in filing the UCC-3 Termination Statement. ²⁹ But the Second Circuit has asked us to assume that the secured party itself—JPMorgan—“review[ed] and knowingly approved for filing a UCC-3 purporting

²⁸ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 157 (1981) (“Generally, one who assents to a writing is presumed to know its contents and cannot escape being bound by its terms merely by contending that he did not read them; his assent is deemed to cover unknown as well as known terms.”); see also In re Lortz, 344 B.R. 579, 585 (Bankr. C.D. Ill. 2006) (“As with all perfection laws, which focus on third party perceptions and clarity and certainty of notice, the intent of the secured party is not relevant to questions of perfection and errors can be fatal.”); In re Clean Burn Fuels, LLC, 492 B.R. 445, 465 (Bankr. M.D.N.C. 2013) (“The [UCC] permits third parties to rely on the record to determine whether a perfected security interest exists.”).
²⁹ See Answering Br. at 18-24.
to extinguish the perfected security interest.” We accept that assumption and refuse JPMorgan’s invitation to answer a separate, fact-laden question that is not properly before us. As the Second Circuit made clear, it will address that issue itself after it receives the answer to the narrow question put to us.

Thus, for the reasons we have articulated, for a termination statement to become effective under § 9-509 and thus to have the effect specified in § 9-513 of the Delaware UCC, it is enough that the secured party authorizes the filing to be made, which is all that § 9-510 requires. The Delaware UCC contains no requirement that a secured party that authorizes a filing subjectively intends or otherwise understands the effect of the plain terms of its own filing. The Clerk is directed to transmit this opinion to the Second Circuit.
UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:
MOTORS LIQUIDATION COMPANY, f/k/a GENERAL MOTORS CORPORATION, et al.,
Debtors.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF MOTORS LIQUIDATION COMPANY,
Plaintiff,
against
JPMORGAN CHASE BANK, N.A., et al.,
Defendants.

DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

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In this adversary proceeding under the umbrella of the chapter 11 case of Motors Liquidation Company, formerly known as General Motors Corporation (“GM”), plaintiff Official Committee of Unsecured Creditors (the “Committee”)

 seeks a determination that the principal lien securing a syndicated $1.5 billion term loan (the “Term Loan”) that had been made to GM in November 2006 was terminated in October 2008, before the filing of GM’s chapter 11 case—thereby making most of the $1.5 billion in indebtedness under the Term Loan unsecured. The defendants are the syndicate members who together made the Term Loan (the “Lenders”) and JPMorgan Chase Bank, N.A. (“JPMorgan”), the agent under the facility.

The action presents issues as to Uniform Commercial Code (“UCC”) filings that are commonly used in secured financings: a UCC-1 initial financing statement (“UCC-1”), with which a security interest can be perfected, and a UCC-3 financing statement amendment (“UCC-3”), with which, among other things, the effectiveness of an earlier UCC-1 may be

1 When GM’s Plan of Reorganization (the “Plan”) was confirmed, after this adversary proceeding was commenced, the Committee’s right to pursue this litigation devolved to one of several trusts created under the Plan—the “Avoidance Action Trust.” For simplicity, the Court continues to refer to the plaintiff here as the Committee.

While the Committee continues as plaintiff, there is a controversy, not yet resolved, as to the rights to any proceeds of this litigation. Although the United States Treasury (“Treasury”) disclaimed a lien on the litigation proceeds when it extended its DIP financing, Treasury later contended that it could nevertheless reach those proceeds ahead of GM’s unsecured creditors by reason of Treasury’s rights to a “superpriority” claim. This Court’s determination in favor of the Committee as to that contention, on cross-motions for summary judgment in a separate adversary proceeding (brought by the Committee to address unsecured creditors’ tax needs at the time, and to avoid prosecuting an action that if successful but benefitting someone else would be contrary to unsecured creditor interests), was later vacated on ripeness grounds by a judge of the district court. See Official Comm. of Unsecured Creditors v. U.S. Dept. of the Treasury (In re Motors Liquidation Co.), 460 B.R. 603 (Bankr. S.D.N.Y. 2011), vacated on ripeness grounds, 475 B.R. 347 (S.D.N.Y. 2012). But unless this Court’s determinations with respect to the present controversy, discussed below, are later reversed, neither Treasury nor GM’s unsecured creditors will have litigation proceeds to claim, and that controversy will now turn out to be moot.

2 Appearances by the Lenders in this adversary proceeding were deferred while threshold issues, addressed in this decision, were addressed.

3 Other things can include the continuation of an earlier initial financing statement, the assignment of a security interest, or the deletion of identified collateral. But one of the boxes that can be checked on a
brought to an end. Here, in connection with the payoff of a GM “synthetic lease” (the “Synthetic Lease”), which was one-tenth of the size of the Term Loan and wholly unrelated to it, the batch of several UCC-3s to be filed to terminate liens on Synthetic Lease collateral (and which thereafter were filed) mistakenly included one UCC-3 (the “Unrelated UCC-3”) which would terminate a UCC-1—referenced only by its 8-digit filing number—that did not have any connection to the Synthetic Lease. The UCC-1 was instead the principal UCC-1 securing the Term Loan (the “Main Term Loan UCC-1”).

Without dispute, all of GM and its counsel (who drafted and caused to be filed the Unrelated UCC-3) and JPMorgan and its counsel (who were provided draft documents before the Unrelated UCC-3 was filed) were aware of the UCC-1 filing numbers shown on the various draft UCC-3s in connection with the Synthetic Lease payoff (including the Unrelated UCC-3). But none were aware of their potential significance. None of the counsel on the Synthetic Lease

UCC-3 (Box 2, “Termination”) can provide for the effectiveness of an initial financing statement to be wholly brought to an end. When UCC-3 filings so provide, they are normally referred to as “termination statements.” See n.72 below.

Neither the terms of the Synthetic Lease, nor the nature of synthetic leases generally, is relevant to the controversy here—except insofar as it is important to recognize, and agreed by the parties, that the Synthetic Lease financing was wholly unrelated to the Term Loan, and that the only thing they had in common was that UCC-1s were filed with respect to each.

By way of background only, a synthetic lease is a financing transaction under which an asset (most commonly real property) is acquired not by its user but by a separate entity (often a special purpose vehicle) which then leases the asset to the ultimate user. A synthetic lease has been described as:

A lease which is arranged so that it is not shown as a liability on a company's balance sheet but as an expense on the income statement.

The item or asset being leased is owned by a special purpose vehicle (SPV) which then leases it to the company. The SPV is usually owned by the company.


An image of the Unrelated UCC-3 is attached to this decision as Appendix A.

The Main Term Loan UCC-1 was not the only initial financing statement that had been filed when the Term Loan was put in place. The Term Loan documentation also included UCC-1 filings relating to fixtures, and one relating to assets of one-time GM subsidiary, Saturn. But the Main Term Loan UCC-1, which covered, among other things, all of the equipment and fixtures at 42 GM facilities, was by far the most important of them.
financing, or the counsel on the Term Loan (which at least for JPMorgan was different), or their respective clients, knew that the UCC-1 filing number shown on the Unrelated UCC-3 was actually that of a UCC-1 for the Term Loan. And without dispute, neither the borrower nor the lenders on the Synthetic Lease financing, nor the borrower nor the Lenders on the Term Loan, intended to affect the Term Loan in any way.

But because the UCC-1 whose filing number was referenced in the Unrelated UCC-3 related to the Term Loan, and not the Synthetic Lease, the Court must decide, notwithstanding the absence of anyone’s intention to affect the Term Loan, whether the perfection of the principal lien securing the Term Loan nevertheless came to an end.

Both sides move for summary judgment, in whole or in part. Arguing that UCC filings are effective even when mistaken (and that a secured party’s acquiescence in the filing of a UCC-3 making reference to a specified initial financing statement by file number alone, irrespective of intent, is sufficient to constitute any necessary authority), the Committee moves for summary judgment in part, seeking a ruling that the Unrelated UCC-3, notwithstanding the parties’ intentions, brought the Main Term Loan UCC-1 to an end. JPMorgan moves for summary judgment in full, seeking a ruling to the opposite effect—that JPMorgan’s authorization to terminate the Main Term Loan UCC-1 was required under the UCC; that JPMorgan did not provide the required authorization; and thus that the Main Term Loan UCC-1, and JPMorgan’s resulting lien, remained in place.

References to the briefs on the Committee’s motion appear here as Comm. Partial SJ Br.__; JPMorgan Partial SJ Opp.__; and Comm. Partial SJ Reply__(ECF ##26, 48, and 55, respectively). References to the briefs on JPMorgan’s motion appear here as JPMorgan SJ Br.__; Comm. SJ Opp.__; and JPMorgan SJ Reply__(ECF ##29, 45, and 56, respectively).

The Committee moves for partial summary judgment only, recognizing that other UCC-1s with respect to the Term Loan remained in place, covering some other collateral as to which JPMorgan and the Lenders would remain secured. But while the value of the other collateral would need to be determined at a later time, the consequences of invalidation of the Main Term Loan UCC-1 are enormous, and the Committee’s desire to secure even partial summary judgment under the present circumstances is understandable.
It is initially tempting to regard the consequences of all UCC filings the same and as absolute (or, as one court put it, though under an earlier statutory regime, “dramatic and final”), or to speak, in general terms, of parties living with their mistakes—with the result that JPMorgan and the Lenders would suffer the consequences of this extraordinary set of events. But having focused on the changes in UCC Article 9 that were put in place in 2001, and the more thoughtful caselaw and commentary, the Court believes that it cannot view the matter in such simplistic terms. The issues instead turn on the UCC’s express requirement for authorization to terminate an initial financing statement, and on what is required to constitute the requisite authorization. Under the present Article 9, a UCC termination statement is not necessarily “dramatic and final.” And all mistakes are not the same. That a termination statement filing was made is only the start—and not the end—of the judicial inquiry.

Under Article 9 of the UCC as it was amended in 2001, the termination of a UCC-1 is ineffective unless it has been authorized. The issue here presented—which the UCC then leaves to caselaw—is what is required to constitute “authorization” for the filing of a termination statement when someone other than the secured party files the termination statement on the secured party’s behalf.10

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9 Crestar Bank v. Neal (In re Kitchin Equip. Co. of Virginia, Inc.), 960 F.2d 1242, 1247 (4th Cir. 1992) (“Kitchin Equipment”). While the holding in Kitchin Equipment (a 2-1 decision) was not necessarily incorrect (since Kitchin Equipment involved action by the secured creditor itself, and did not involve a secured creditor’s authorization of acts by another), Kitchin Equipment’s very general statements can no longer be regarded as applicable to situations requiring secured creditor authorization after the 2001 amendments to UCC Article 9. Similarly, statements in later caselaw that quoted Kitchin Equipment without considering the effect of the 2001 amendments are of questionable reliability. See discussion beginning at page 60 below.

10 In much of its argument, the Committee states the issue differently—speaking in terms of the effects of mistakes and contending that UCC filings that mistakenly terminate security interests are legally effective. See Comm. Partial SJ Br. 11-14; Comm. SJ Opp. 4; Comm. Partial SJ Reply 15-16. For reasons addressed below, the Court believes that under the UCC as amended in 2001, that misstates the issue.
As principles underlying the determination of the motions here, the Court concludes, for reasons set forth below:

(1) When an agent acts on behalf of a secured lender principal to terminate an initial financing statement with respect to a financing, to be effective the termination must be *authorized* by the secured lender principal; and

(2) to determine whether authorization has been granted, the court must consider indicia identified in non-UCC agency law—including (importantly here) that to be so authorized, the agent must believe (and though the distinction does not matter under the facts here, *reasonably* believe) that the principal intended for the agent to terminate the initial financing statement for that particular financing.

A matching of file numbers by itself is not enough when other indicia lead to a contrary conclusion. And when the agent *knows* that the secured creditor principal does not intend to bring an initial financing statement to an end (by reason of one or more of the documents that embody the authorization, or by other means), and the agent itself believes that it was not so authorized, the requisite authorization cannot be found.

Applying those principles to the undisputed facts here, the lack of the requisite belief on the part of GM that it was authorized to terminate the Main Term Loan UCC-1 is ultimately conclusive—though the remaining indicia lead to the same conclusion. The undisputed facts here (including, most significantly, the statements in the document the parties used to embody the nature and scope of JPMorgan’s authorization, and the consistent testimony of all of the personnel acting for JPMorgan and GM) conclusively establish that JPMorgan intended to grant, and granted, authority to GM to terminate UCC-1s only with respect to the Synthetic Lease. As importantly or more so, this was GM’s belief as well. While it is undisputed that JPMorgan
knew in advance of GM’s counsel’s intent to file a UCC-3 which showed the “Initial Financing Statement File #” of a UCC-1 that in fact was the initial financing statement on the Term Loan (and JPMorgan at least arguably consented to the filing), in the absence of belief by GM that actions to terminate the Main Term Loan UCC-1 were authorized, the Court cannot find that JPMorgan authorized the termination of the initial financing statement for that unrelated facility.

Accordingly, JPMorgan’s motion for summary judgment must be granted, and the Committee’s motion for partial summary judgment must be denied. The bases for the Court’s decision follow.

Facts

Though the parties advance diametrically opposed legal conclusions, the material facts are not in dispute.12

A. Synthetic Lease Origination

In October 2001, GM entered into the Synthetic Lease, by which GM obtained up to approximately $300 million in financing from a syndicate of financial institutions. The proceeds were used for the acquisition of (and construction on) several pieces of real estate. The Synthetic Lease was documented by, among other things, a Participation Agreement dated as of October 31, 2001 (the “Participation Agreement”).13

11 To avoid further lengthening this decision, record citations are limited to quotations and the most significant matters. The parties’ very detailed and often very technical presentations of the facts in their affidavits and Rule 7056-1 Statements have been compressed and restated to more clearly tell the story.

12 Being mindful of the Second Circuit’s admonitions that summary judgment should be awarded sparingly when matters involving state of mind are involved, see, e.g., Patrick v. LeFevre, 745 F.2d 153, 159 (2d Cir. 1984), the Court considered whether it should deny summary judgment in favor of each side for that reason. Neither side contended that such was necessary or even appropriate here, and ultimately the Court agrees. Here, there is no issue as to the principal’s and agent’s states of mind. The beliefs of all of the participants involved on behalf of both sides to the transaction at the time—each of JPMorgan and GM—were confirmed by affidavit, deposition testimony, or both. There was nothing in the record to support a contrary conclusion.

13 Parties to the Participation Agreement were GM, as Lessee (and Construction Agent); Auto Facilities Real Estate Trust 2001-1 (the “Trust”), as Lessor; Wilmington Trust Company (“Wilmington Trust”), as
GM’s obligations under the Synthetic Lease were secured by liens on an original 12 pieces of real estate (the “Properties”) identified in the Synthetic Lease documentation. To perfect security interests in the Properties, UCC-1s were filed in the counties in which such Properties were located. UCC-1s were also filed with the Delaware Secretary of State.

JPMorgan was one of the backup facility banks, and, as noted (and more importantly for the purposes of this controversy), the administrative agent for the Synthetic Lease. JPMorgan’s Richard W. Duker (“Duker”) acted on behalf of JPMorgan with respect to it.

In connection with the Synthetic Lease, GM was represented by the law firm of Mayer Brown LLP (“Mayer Brown”), and JPMorgan was represented by the law firm of Simpson Thacher & Bartlett LLP (“Simpson Thacher”).

B. Term Loan Origination

About five years later, in November 2006, GM and its then-subsidiary Saturn Corporation (“Saturn”) entered into a 7-year senior secured term loan facility—the Term Loan—from a different syndicate of financial institutions. Once more, JPMorgan was administrative agent.

The Term Loan provided GM with approximately $1.5 billion in financing. It was a transaction wholly unrelated to the Synthetic Lease.

In connection with the Term Loan, JPMorgan was represented by law firms different from that which had acted for JPMorgan in connection with the Synthetic Lease. This time, JPMorgan was represented by Cravath Swaine & Moore and, later, Morgan, Lewis & Bockius (“Morgan Lewis”).

Trustee; certain named entities, as “Investors”; other named entities, as “Backup Facility Banks”; an entity called “Relationship Funding Company, LLC”; and Chase Manhattan Bank (to which JPMorgan was successor), as Administrative Agent.
Documents executed in connection with the Term Loan included a “Term Loan Agreement” and a “Collateral Agreement.” Duker, who was also involved in the Synthetic Lease transaction, was a signatory to the Term Loan Agreement on behalf of JPMorgan as administrative agent.

Under the Collateral Agreement, the Lenders took security interests in a massive amount of collateral (“Term Loan Collateral”)—including, among other things, all of GM’s equipment and fixtures at 42 facilities throughout the United States. Upon the closing of the Term Loan, JPMorgan caused the filing of a total of 28 UCC-1 initial financing statements to perfect the Lenders’ security interests in the Term Loan Collateral—two of which (one for GM and one for Saturn) were filed with the Delaware Secretary of State. The one filed in Delaware for GM—i.e., the Main Term Loan UCC-1—bore filing number “6416808 4.”

C. Synthetic Lease Termination

The Synthetic Lease would mature on October 31, 2008, approximately seven years after it was put in place.

In an email dated September 30, 2008, a GM representative informed Robert Gordon (“Gordon”), a real estate partner at Mayer Brown, GM’s counsel, who was then responsible for the Synthetic Lease, that GM planned to repay the amount due under the Synthetic Lease. GM requested that Mayer Brown “prepare the documents necessary for [JPMorgan and the Lenders] to be paid off for the obligations on that synthetic lease and to release their interest in those properties.” Gordon assigned this work to Ryan Green (“Green”), a Mayer Brown real estate associate. Green was to draft the documents necessary for “the termination and payoff of the

14 The other 26 were localized fixture filings, in the various counties in the United States where fixture collateral was located.
15 Gordon Dep. 6 (Callagy Decl. Exh. 4); 9/30/08 Sundaram Email (Callagy Decl. Exh. 12).
synthetic lease.”¹⁶ Gordon also asked Green to “put together [a] checklist draft”—referring to a checklist of the required documents for the release and transfer of the Synthetic Lease Properties, including “an initial draft of a brief checklist of required documents for the release and transfer.”¹⁷

The documents prepared by Green included three documents and one batch of UCC-3s:

1. an agreement with respect to the termination of Synthetic Lease obligations and related documentation (the “Synthetic Lease Termination Agreement”);

2. a closing checklist (the “Synthetic Lease Closing Checklist”);

3. UCC-3s, and

4. a letter agreement embodying instructions to an escrow agent with respect to the Synthetic Lease termination (the “Synthetic Lease Escrow Agreement”).

The next day, October 1, GM likewise informed JPMorgan’s Duker of GM’s intent to pay off the amounts due under the Synthetic Lease. As of that time, the balance to be repaid on the Synthetic Lease was about $150 million.

1. The Synthetic Lease Termination Agreement

Two weeks later, on October 15, 2008, Green circulated the Synthetic Lease Termination Agreement to Simpson Thacher, among others, in draft form.

The Synthetic Lease Termination Agreement stated, among other things (as circulated on October 15, and also in its final form), that the Administrative Agent (JPMorgan) and Lessor (the Trust) were thereby releasing all of their liens against the “Properties” that had been created by

¹⁶ Gordon Dep. 12.
¹⁷ 10/1/08 Gordon Email (Callagy Decl. Exh. 12).
the operative agreements which were coming to an end, and that they acknowledged that such
liens were released. The Synthetic Lease Termination Agreement then went on to provide, as
relevant here:

(ii) [T]he Administrative Agent and the Lessor do hereby …

(x) [sic.; seemingly should be z] authorize
Lessee to file a termination of any existing
Financing Statement relating to the Properties.18

Importantly, the words “Financing Statement” and “Properties” as used in the quoted
language were capitalized defined terms. The next paragraph of the Synthetic Lease Termination
Agreement told the reader where to look for definitions of capitalized terms that did not
otherwise appear. It referred the reader to an earlier document, defined as the “Participation
Agreement,” that had been entered into back in October 2001 when the Synthetic Lease was put
into place.

The Participation Agreement, in turn, listed the 12 particular pieces of real property that
originally were collateral under the Synthetic Lease.19 Annex A to the Participation Agreement

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18 Synthetic Lease Termination Agreement (Duker Aff. Exh. L) (reformatted for readability). The second
paragraph of the Synthetic Lease Termination Agreement, which was paraphrased in the preceding
paragraph, and from which the quoted language was taken, stated in full:

In consideration of ONE DOLLAR ($1.00) and other good and
valuable consideration, the receipt and sufficiency of which is hereby
confessed and acknowledged, the undersigned, each of which is a party
to one or more of the agreements identified as the Operative
Agreements, hereby agree that (i) each of such Operative Agreements
and any Commitment thereunder is hereby terminated and is discharged
and of no further force or effect as of the date hereof, and (ii) the
Administrative Agent and the Lessor do hereby (x) release all of their
Liens and Lessor Liens against the Properties created by the Operative
Agreements, (y) acknowledge that such Liens and Lessor Liens are
forever released, satisfied and discharged and (x) [sic.; seemingly
should be z] authorize Lessee to file a termination of any existing
Financing Statements relating to the Properties.

Id. (emphasis added).

19 See 1/6/2003 Participation Agreement First Amendment (Duker Aff. Exh. E) at JPMCB-STB-00000918-920 exh. A (six warehouses in Bolingbrook, IL; Reno, NV; Denver, CO; Ontario, CA; Brandon, MS; and
(captioned “Rules of Usage and Definitions”) provided definitions for the key words “Financing Statements”\(^{20}\) and “Properties”\(^{21}\)—later referred to as the “Financing Statements” and “Properties” in the Synthetic Lease Termination Agreement’s second subparagraph (x).

Charlotte, NC, respectively; a transmission parts distribution center in Indianapolis, IN; two parking decks in Detroit, MI; an engine plant in Flint, MI; an office building in Grand Blanc, MI; and a vacant parcel of land in Detroit, MI).

Annex A provided:

“Financing Statements” means, collectively, the Lessor Financing Statements and the Lessee Financing Statements.

Participation Agreement Annex A (Duker Aff. Exh. B) at 17 (emphasis by italics added; underlining, to signify defined terms that would thereafter be used, in original). It additionally provided definitions for the two terms used there:

“Lessor Financing Statements” means UCC financing statements made by Lessor, as debtor, and Administrative Agent, as secured party, appropriately completed and executed for filing in the appropriate state and county offices in the State where the applicable Property is located and the State of Delaware.

Id. at 26 (underlining, to signify defined terms that would thereafter be used, in original).

“Lessee Financing Statements” means UCC financing statements made by Lessee, as debtor, and Lessor, as secured party, appropriately completed and executed for filing in the appropriate state and county offices in the State in which each Property is located and the State of Delaware, as the same shall be assigned to the Administrative Agent on behalf of the Secured Parties pursuant to such Lessee Financing Statements.

Id. (underlining, to signify defined terms that would thereafter be used, in original). It should be recalled that as used in the Participation Agreement, the “Lessor” was Auto Facilities Real Estate Trust 2001-1; the “Lessee” was GM, and the Administrative Agent was Chase, the predecessor to JPMorgan. Id. at 3, 26.

Annex A provided:

“Property” or “Properties” means either individually or collectively, as the case may be, each parcel of Land (including all Appurtenant Rights attached thereto) or, in the case of Land subject to a Ground Lease, the ground leasehold estate to be acquired by the Lessor pursuant to the provisions of the Participation Agreement, as more particularly described in the Requisition and the Memorandum of Lease and Supplement with respect to such Land, together with all of the Improvements at any time located on or under such Land, or multiple parcels of Land with Improvements, as the context may require.

Id. at 35 (emphasis by italics added; underlining, to signify defined terms that would thereafter be used, in original).
The Synthetic Lease Termination Agreement was later executed by GM, JPMorgan and the other parties to the Synthetic Lease termination on or about October 30, 2008, the effective date of the closing of the payoff.

2. The Synthetic Lease Closing Checklist

With assistance from his colleagues at Mayer Brown, Green drafted a closing checklist. It was entitled:

CLOSING CHECKLIST
General Motors: Release of Properties from JPMorgan Chase Synthetic Lease
CLOSING DATE: October 31, 2008.22

The word “Properties” as used in the Closing Checklist title was capitalized, but because it was part of a title, it is unclear whether “Properties” as used there was intended to be as defined in the Participation Agreement, which was the underlying source for definitions in the Synthetic Lease Termination Agreement. But whether or not it was so intended, it still specified what “Properties” were covered: properties from “JPMorgan Chase Synthetic Lease,” as contrasted to any others.

In order to determine what types of documents should be included on the Synthetic Lease Closing Checklist, Green “looked through a copy of the participation agreement. That’s the main document for the [Synthetic Lease] and it contained a description of how to unwind and the relevant documents.”23 The record indicates, without dispute, that Green’s intent—and only intent—was to list the documents that would release Synthetic Lease facility collateral.

22 Synthetic Lease Closing Checklist, 10/15/08 Green Email Attachment (Callagy Decl. Exh. 15).
23 Green Dep. 8 (Callagy Decl. Exh. 2).
The Synthetic Lease Closing Checklist listed several dozen closing documents relating to the Properties, including various UCC-1s that needed to be terminated for each property.\footnote{Synthetic Lease Closing Checklist.} Under Section 5 of the Synthetic Lease Closing Checklist, entitled “General Documentation,” three UCC-1s that had been filed in Delaware were listed for termination:

Termination of UCCs (central, DE filings) Blanket-type financing statements as to real Property and related collateral located in Marion County, Indiana (file number 2092532 5, file date 4/12/02 and file number 2092526 7, file date 4/12/02)) financing statement as to equipment, fixtures and related collateral located at certain U.S. manufacturing facilities (file number 6416808 4, file date 11/30/06).\footnote{Id. at 4.}

The three UCC-1 filing numbers listed on the Synthetic Lease Closing Checklist were derived from a UCC search Green had requested that a Mayer Brown paralegal, Michael Perlowski, perform. Working from a prior search for UCC-1 financing statements recorded against GM (and without knowledge of the underlying transactions that had involved those filings, or, for that matter, the purpose of his undertaking),\footnote{Perlowski Dep. 10-11, 40-41 (Callagy Decl. Exh. 1).} Perlowski identified several UCC-1 financing statements in response to Green’s request. Perlowski was not aware of the specific transaction on which Green was working.\footnote{Id.} Two of the UCC-1 financing statements Green listed on the Synthetic Lease Closing Checklist had been filed in connection with the Synthetic Lease. But the third UCC-1 financing statement he listed, with filing number 6416808 4, did not relate to the Synthetic Lease transaction. Instead, this third UCC-1 financing statement, bearing file number 6416808 4, was the Main Term Loan UCC-1.
Green circulated a draft of the Synthetic Lease Closing Checklist to GM as well as Simpson Thacher, counsel for JPMorgan, on October 15, 2008. That same day, Duker of JPMorgan received drafts of the Synthetic Lease Closing Checklist from GM and Simpson Thacher. Green circulated updated, but largely similar, drafts of the Synthetic Lease Closing Checklist to Simpson Thacher, among others, later on October 15, and again on October 21, 2008. The subject lines for each of Green’s e-mails attaching the drafts of the Synthetic Lease Closing Checklist stated that they related to the “GM/JPMorgan Chase - Synthetic Lease.”

The drafts of the Synthetic Lease Closing Checklist identified the Main Term Loan UCC-1 as a “financing statement as to equipment, fixtures and related collateral located at certain U.S. manufacturing facilities (file number 6416808 4, file date 11/30/06).” They made no mention of the words “Term Loan.” The “file date 11/30/06” appearing adjacent to “file number 6416808 4” on the Synthetic Lease Closing Checklist substantially corresponds to the November 29, 2006 date of the Term Loan Agreement, though no one involved recognized that at the time, because everyone believed they were working on the Synthetic Lease transaction. No one at Mayer Brown involved in drafting the Synthetic Lease Closing Checklist and no one at Simpson Thacher or JPMorgan who reviewed and/or received the Synthetic Lease Closing Checklist recognized that “file number 6416808 4, file date 11/30/06” was unrelated to the Synthetic Lease.

3. The Unrelated UCC-3

Another Mayer Brown paralegal, Stewart Gonshorek (“Gonshorek”), was tasked with drafting the UCC-3 termination statements for the unwinding of the Synthetic Lease. One of the UCC-3s that he drafted was the Unrelated UCC-3.

28 10/15/2008 Sundaram Email (Callagy Decl. Exh. 13); 10/15/2008 Merjian Email (Callagy Decl. Exh. 15); 10/15/2008 Merjian Ledyard Email (Callagy Decl. Exh. 16); 10/21/2008 Merjian Ledyard Email (Callagy Decl. Exh. 17).
Under section 10 of a draft of the Unrelated UCC-3, a section entitled “OPTIONAL FILER REFERENCE DATA”, Gonshorek typed in “Matter No. 00652500.”\(^{29}\) “Matter No. 00652500” was an internal Mayer Brown client-matter number, relating exclusively to Mayer Brown’s representation of GM in connection with the Synthetic Lease and its repayment.

Gonshorek prepared the Unrelated UCC-3 to “terminate the UCC in connection with the synthetic lease becoming unwound.”\(^{30}\) But the Unrelated UCC-3 showed, on its Line 1a, under “INITIAL FINANCING STATEMENT FILE #,” “6416808 4 on 11.30.06.”\(^{31}\) The “Initial Financing Statement File #” was that of the Main Term Loan UCC-1.

But the Unrelated UCC-3 never used the words “Term Loan,” or any synonym for such.

Further down on the Unrelated UCC-3, it had a Line 9, “NAME OF SECURED PARTY OF RECORD AUTHORIZING THIS AMENDMENT,”\(^{32}\) on which “JPMORGAN CHASE BANK, AS ADMINISTRATIVE AGENT,” was typed in. But the Unrelated UCC-3 did not have a granting clause—\(i.e.,\) a clause by which authorization was granted—nor did it have a place for signature by JPMorgan, the party said to have authorized the amendment.

While the UCC-3 Gonshorek prepared referenced the Main Term Loan UCC-1 by its filing number and date (6416808 4 on 11.30.06), Gonshorek intended to terminate only a UCC financing statement related to the Synthetic Lease.\(^{33}\) The Committee does not contend (nor did it introduce evidence) to the contrary.

\(^{29}\) Draft Unrelated UCC-3 Email Attachment (Callagy Decl. Exh. 16) at JPMCB-STB-00000206.

\(^{30}\) Gonshorek Dep. 20.

\(^{31}\) Unrelated UCC-3 (Fisher Decl. Exh. X).

\(^{32}\) Id. The remainder of Line 9 continued: “(name of assignor, if this is an Assignment). If this is an Amendment authorized by a Debtor which adds collateral or adds the authorizing Debtor, or if this is a Termination authorized by a Debtor, check here [ ] and enter name of DEBTOR authorizing this Amendment.”

\(^{33}\) Gonshorek Dep. 20.
On Wednesday, October 15, 2008, Green circulated by email to Simpson Thacher’s Merjian and counsel for Wilmington Trust, among others (and along with an updated checklist and drafts of most of the other closing documents), the draft UCC-3 termination statements that had been prepared by Gonshorek—including the draft Unrelated UCC-3.

The subject line of Green’s e-mail enclosing the draft documents was “GM/JPMorgan Chase - Synthetic Lease (Auto Facilities Real Estate Trust 2001-1)”; the documents attached to Green’s email included nearly a hundred pages of draft documents, including ten draft UCC-3 termination statements. But Green did not attach copies of any of the UCC-1 initial financing statements whose file numbers corresponded to the file numbers referenced on the ten draft UCC-3s that were circulated. Nor, once again, did anything in Green’s email or enclosures mention the words “Term Loan.”

Green had concluded his October 15 email with a line “Please contact me with any questions or comments you may have.” On Friday, October 17, 2008, Simpson Thacher’s Merjian responded, also by email, stating “Nice job on the documents” before continuing with “[m]y only comment,” and going on to state what that comment (which did not relate to the UCC-3s) was.

4. The Synthetic Lease Escrow Agreement

Incident to the Synthetic Lease repayment, the parties utilized LandAmerica (the “Title Company”) to serve as an escrow agent, recording agent and title insurance issuer. As a general matter, the Title Company would receive payment from GM and documents executed by the various parties, after which the Title Company would act in accordance with written instructions

34 10/15/2008 Merjian Ledyard Email.
(executed by counsel for GM, JPMorgan, and the Trust) calling for the Title Company to close the transaction, cause the documents it had received to be recorded and delivered, and disburse the funds in accordance with the instructions it had received.

The instructions were embodied in the Synthetic Lease Escrow Agreement, which in each of its draft and final form was an 8-page letter agreement addressed to LandAmerica, which was likewise referred to as “the Title Company,” as a defined term, in the Synthetic Lease Escrow Agreement.

On October 24, 2008, by email addressed to the Title Company’s William Wineman; Simpson Thacher’s Mardi Merjian, and counsel for Wilmington Trust (the trustee for the Trust), Green circulated a draft of the Synthetic Lease Escrow Agreement, seeking review and any comments. The subject line of that email stated: “RE: GM/JPMorgan Chase - Synthetic Lease (Auto Facilities Real Estate Trust 2001-1).” As Mayer Brown’s Gordon testified, the purpose of the Synthetic Lease Escrow Agreement was to arrange for the payoff of the Synthetic Lease.

Again as a general matter, the Synthetic Lease Escrow Agreement listed 47 different documents that would be delivered to the Title Company (defined in that letter as “Escrow Documents”), which, after conditions precedent to closing were satisfied, would be delivered,
recorded or otherwise handled by the Title Company in accordance with the instructions set forth in the Synthetic Lease Escrow Agreement.

The “Re” line of the Synthetic Lease Escrow Agreement was very lengthy, running on for 15 lines. It described the Synthetic Lease Escrow Agreement’s subject as:

Termination of that certain Participation Agreement dated as of October 31, 2001, among General Motors Corporation (“GM”), as Lessee and Construction Agent, Auto Facilities Real Estate Trust 2001-1 (“Trust”), as Lessor, Wilmington Trust Company (“Trustee”), as Trustee, the Persons named therein as Investors, the Persons named therein as Backup Facility Banks, Relationship Funding Company, LLC, and JPMorgan Chase Bank (“Agent”), as Administrative Agent, as amended (the “Participation Agreement”) and release of all liens related thereto including liens relating to the following properties: (i) the SPO Headquarters Building located in Grand Blanc, Michigan (the “Grand Blanc Property”); (ii) the GM Powertrain L6 Engine Plant in Flint, Michigan (the “Flint Property”); (iii) the Franklin Deck in Detroit, Michigan (the “Franklin Deck”); (iv) the River East Parking Deck in Detroit, Michigan (the “River East Deck”); and (v) Parcel 6/C in Detroit, Michigan (“Parcel 6/C”) (the Grand Blanc Property, the Flint Property, the Franklin Deck, the River East Deck and Parcel 6/C herein are each a “Property” and, collectively, the “Properties”).

Specifically, it provided that its undersigned attorneys represented GM, the Agent, JPMorgan, and the Trustee in connection with that transaction, and that the Title Company had agreed to issue title insurance policies with respect to the Properties. It further stated that “[t]his letter constitutes escrow and recording instructions in connection with the Transaction.”

It then listed the 47 documents or categories of documents that were being delivered to the Title Company, of which the second was “Termination of UCC Financing Statements (File

41 Synthetic Lease Escrow Agreement at 1 (bold face, for defined terms, in original; emphasis by italics added).

42 Id.
Numbers 2092532 5, 2092526 7, and 6416808 4) (the “**General UCC Terminations**”). The Synthetic Lease Escrow Agreement then continued:

When all of the conditions precedent to closing set forth in Section A below have been met, you are instructed to close this transaction and disburse the Funds (as defined below) as directed in Section B below and to release from escrow and deliver, record or to otherwise handle the Escrow Documents in accordance with Section C below.  

The third of the General UCC Terminations (relating to UCC financing statement 6416808 4) was the Unrelated UCC-3, which referenced the Main Term Loan UCC-1. But while the Unrelated UCC-3 was listed as one of the documents to be *delivered* to the Title Company, it was not listed as one of the documents to be *recorded*. Rather, the Title Company was instructed to deliver it (along with others) to GM’s counsel, Mayer Brown.

When asked if he had any comments to the draft Synthetic Lease Escrow Agreement circulated on October 24, 2008, Simpson Thacher’s Merjian replied “it was fine.”

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43. *Id.* (bold face, for defined term, in original).
44. *Id.* at 4.
45. *See id.* at 5-6. Section C began:

> As soon as possible after the release of the Funds pursuant to Section B above, you are instructed to record (or file, as applicable) the documents below (the “**Recording Documents**”) with the appropriate recording office in the applicable state in the following order as to each Property:

46. *Id.* at 5 (bold face, for defined term, in original). It then listed the Recording Documents, which were 23 of the 47 documents that were to be delivered to the Title Company. Neither the Unrelated UCC-3, nor any of the other General UCC Terminations, was one of those Recording Documents.

47. 10/27/2008 Merjian Email (Fisher Decl. Exh. V).
5. The Synthetic Lease Transaction Payoff

GM repaid the amount due on the Synthetic Lease transaction on October 30, 2008. Thereafter, but on the same day, Mayer Brown transmitted the Unrelated UCC-3 to a third-party vendor to cause the filing of the Unrelated UCC-3 with the Delaware Secretary of State. The Unrelated UCC-3 had no place for a signature by JPMorgan, and it was not signed by JPMorgan.48

6. GM’s Understanding

Each of the participants on the GM side understood that he was acting only with respect to the Synthetic Lease. None had the understanding that he or she was acting with respect to the Term Loan, or was authorized to do so. Gordon stated, in a declaration, that “GM was not authorized by the Termination Agreement to terminate any financing statement related to the Term Loan Agreement,”49 and testified to the same effect at his deposition.50 Gordon’s more junior colleague at Mayer Brown, Green, had the same belief.51

Similarly, GM’s Debra Homic Hoge (the GM business person with responsibility for the Synthetic Lease), stated that GM was not authorized by the Synthetic Lease Termination Agreement, nor did GM believe it had any authority, to terminate any UCC-1 related to the Term Loan. She further stated that GM had not granted Mayer Brown authority to do so.52

Every deponent in this adversary proceeding (on the JPMorgan side or the GM side) first learned that the Unrelated UCC-3 actually related to the Term Loan only in June 2009, after GM

48 See Appendix A.
49 Gordon Aff., 6/19/09 Email Attachment (Callagy Decl. Exh. 11).
50 See Gordon Dep. 66.
51 See Green Dep. 99.
52 Hoge Aff. ¶ 11.
had filed its chapter 11 petition. Before that time, none of them even realized that they had a
filed a UCC-3 relating to the Term Loan.53

D. Subsequent Events

GM filed its chapter 11 case on June 1, 2009. Approximately two weeks later, Morgan
Lewis (which by this time was acting for JPMorgan in connection with the Term Loan and the
GM bankruptcy) discovered that Mayer Brown had caused a UCC-3 termination statement to be
filed in October 2008 related to the Term Loan.

About three weeks after GM’s chapter 11 case was filed, this Court gave final approval to
GM’s preliminarily approved postpetition financing, commonly referred to in the bankruptcy
community as “DIP Financing.” The approval was documented in a lengthy order, dated June
25, 2009 (the “DIP Financing Order”). Among many other things, the DIP Financing Order
authorized the repayment of the Term Loan.

On June 30, 2009, as authorized under the DIP Financing Order, the amount then
outstanding under the Term Loan (just under $1.5 billion, viz., $1,481,656,507.70) was repaid
out of the proceeds of the $33 billion in DIP financing.54 After the repayment, JPMorgan
authorized the filing of UCC-3s with respect to the Term Loan, including one with respect to the
Main Term Loan UCC-1.

One month later, the Committee filed its complaint in this adversary proceeding.

53 See Green Dep. 88-89; Perlowski Dep. 40-41; Gonshorek Dep. 47-48; Hoge Aff. ¶ 12.
54 To the extent that the Committee might be successful in this adversary proceeding, the amount paid to
JPMorgan and the Lenders would be subject to recapture, as provided in the final DIP Financing Order
when the payoff of the Term Loan was authorized. In that event, after the return of the amount previously
paid on what was thought to be a duly secured claim, the Lenders would still have a claim for the Term
Loan debt, but would have only an unsecured claim, sharing pari passu with the many billions of dollars of
other unsecured claims in GM’s chapter 11 case.
Discussion

I.

Summary Judgment Standards

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”55 The moving party bears the initial burden of showing that the undisputed facts entitle it to judgment as a matter of law.56 Then, if the movant carries this initial burden, the non-moving party must set forth specific facts to show that there are triable issues of fact, and cannot rely on pleadings containing mere allegations or denials.57

In determining a summary judgment motion, it is well settled that the court should not weigh the evidence or determine the truth of any matter, and must resolve all ambiguities and draw all reasonable inferences against the moving party.58 A fact is material if it “might affect the outcome of the suit under the governing law.”59 An issue of fact is genuine if “the evidence

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55 Fed. R. Civ. P. 56(a), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7056; see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). The Court notes that Rule 56 was amended in December 2010. By order of the Supreme Court, the amendment governs “insofar as just and practicable, [in] all proceedings . . . pending.” Supreme Court Order of April 28, 2010. The amended Rule applies to this motion, but the Court also notes that the substantive standard for summary judgment has not been altered. Advisory Committee Notes to December 2010 Amendment to Rule 56 (“The standard for granting summary judgment remains unchanged.”).


58 See Matsushita, 475 U.S. at 587 (summary judgment is appropriate “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party”); Virgin Atlantic Airways Ltd. v. British Airways PLC, 257 F.3d 256, 262 (2d Cir. 2001); Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 212 (2d Cir. 2001) (“We . . . constru[e] the evidence in the light most favorable to the non-moving party.”).

59 See Anderson, 477 U.S. at 248, 1 S.Ct. 2505.
is such that a reasonable jury could return a verdict for the nonmoving party.”

The standards for determining a summary judgment motion apply equally to cases, like the instant one, in which each side moves for summary judgment.

II.

Choice of Law

Choice of law is not a material concern here.

The issues here are governed, at least in the first instance, by the Uniform Commercial Code, which does not differ in its content as between Delaware and New York—the two states whose law JPMorgan and the Committee have principally addressed. Under UCC § 1-102(2)(c) (as enacted in each state), one of the “[u]nderlying purposes” of the UCC is to “make uniform the law among the various jurisdictions.” Thus both sides agree, as does the Court, that while strictly speaking, it is the Delaware version of the UCC that applies here, the Court can (and should) look to decisions from any state or federal courts considering comparable provisions, without regard to the jurisdictions in which those courts sit.

Id.


The Main Term Loan UCC-1 and the Unrelated UCC-3 were each filed in Delaware, as was required because GM was a Delaware corporation, which thus was deemed to be “located” in Delaware by reason of its organization there under UCC §§ 9-301 and 9-307. Thus, strictly speaking, Delaware law governs the perfection of JPMorgan’ security interest, the effect of perfection or nonperfection, and the priority of JPMorgan’s security interest in collateral. See UCC § 9-301(1).

The Term Loan documentation had a New York choice of law provision. But while it would govern matters of enforcement or interpretation of that agreement as between JPMorgan and GM, it would not govern the matters just described.

6 Del. C. § 9-101 et seq. It became effective in Delaware on July 1, 2001, the day that had been recommended as the effective date by the National Conference of Commissioners on Uniform State Laws, which was also the day (presumably for that reason) that the revised Article 9 became effective in New York.
Similarly, as intended by the UCC’s drafters, law other than UCC Article 9—here, principles of agency—must be applied interstitially to fill gaps in the statute. Once again, the Court believes that strictly speaking, the law of Delaware is the most appropriate to use to fill gaps in the Delaware UCC—particularly since the purpose of that use is to determine the effectiveness of termination statements, and continuing validity of initial financing statements, filed in Delaware. But the two sides here have relied principally on cases decided under New York law and on discussion of generally accepted legal principles, such as those in various versions of the Restatement of Agency. More importantly, they have not identified any respects in which the Delaware law of agency differs from that of any other jurisdiction in which a court considered similar issues. Thus the Court considers whatever caselaw is available—from a variety of jurisdictions around the country—from any courts that have addressed similar issues, or are asserted to have done so.

III.

Effectiveness of the Unrelated UCC-3

It is undisputed that JPMorgan, on behalf of its lending syndicate, at least initially had a duly perfected security interest with respect to its collateral—including, as relevant here, all of the equipment and fixtures at the 42 GM properties covered under the Main Term Loan UCC-1. Thus, if that duly perfected security interest did not come to an end, JPMorgan and the Lenders continued to have a security interest in all of those assets as of the time GM filed its chapter 11 case—the time at which the Lenders’ continued rights to their secured status is measured. The Committee properly notes (Comm. Partial SJ Br. 10) that if a security interest is unperfected as of the time of the petition, it will be trumped by the statutory lien of a trustee or debtor in possession under section 544 of the Bankruptcy Code. But that is not debated by JPMorgan. The issue here is rather whether or not the Lenders’ previously perfected lien remained so.
Court here must decide whether the perfection of JPMorgan’s Term Loan security interest came to an end before that time.

In that connection, JPMorgan does not dispute that a termination statement that referred to the Main Term Loan UCC-1 by number was filed. JPMorgan also recognizes that each of GM and JPMorgan knew or was on notice of the initial financing statement filing number to which the Unrelated UCC-3 referred, though neither was aware that it actually related to the Main Term Loan UCC-1.

But conversely, the Committee does not dispute that neither of the counsel for GM or JPMorgan, nor either of their respective clients, intended to terminate the Main Term Loan UCC-1, or would have filed (or permitted to be filed) the Unrelated UCC-3 if they had known that the filing of that document would have any effect on the Main Term Loan UCC-1. The Committee effectively bases its argument on the contention (one of law) that JPMorgan’s and GM’s undisputed intent does not matter.

Determination of the issues here starts with interpretation of the Uniform Commercial Code, whose Article 9 governs security interests. Article 9 was amended in 2001, in respects highly relevant here. Since its 2001 amendment, Article 9 no longer requires the execution of a UCC-3 termination statement by the secured party. Instead, such a filing may be made without any signature, and by anyone, provided that the filing has been authorized by the secured party. Importantly, there now is no automatic consequence by reason of the filing of a termination statement. The fact that a termination statement has been filed does not by itself mean that the initial statement came to an end. It all depends on whether the termination of the underlying

See Comm. SJ Opp. 12 (“Of course, if JPMorgan had analyzed and appreciated the consequences of the UCC filing, it never would have permitted Old GM’s counsel to cause the Term Loan Termination Statement to be filed.”).
initial financing statement was authorized. If the requisite authorization was lacking, the termination was ineffective.

Since the termination statement here was filed not by JPMorgan, but by GM on JPMorgan’s behalf, the resolution of this controversy turns on whether GM was authorized, as part of the payoff of the Synthetic Lease, to terminate JPMorgan’s security interest on the unrelated Term Loan. On the undisputed facts, the Court concludes that GM’s authority to terminate initial financing statements was limited to the measures that related to the paid off Synthetic Lease, and that JPMorgan did not authorize the release of its security interest on the wholly unrelated Term Loan.

A. The Requirement for Authorization

After the 2001 amendments to the Uniform Commercial Code, three sections of UCC Article 9, which came into being in 2001, are particularly relevant. The first, UCC § 9-509(d), provides, in relevant part:

(d) Person entitled to file certain amendments. — A person may file an amendment other than an amendment that adds collateral covered by a financing statement or an amendment that adds a debtor to a financing statement only if:

(1) the secured party of record authorizes the filing; or

(2) [inapplicable under the facts here].

The second, UCC § 9-510(a), provides:

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68 6 Del. C. § 9-509(d).
69 6 Del. C. § 9-510(a).
(a) Filed record effective if authorized. — A filed record is effective only to the extent that it was filed by a person that may file it under Section 9-509.

The third, UCC § 9-513(d), provides in relevant part:

\[
(d) \text{ Effect of filing termination statement. — Except as otherwise provided in Section 9-510, upon the filing of a termination statement with the filing office, the financing statement to which the termination statement relates ceases to be effective.} \]

Thus, under UCC § 9-513(d), the filing of a termination statement generally causes the initial financing statement to which the termination statement relates to no longer be effective.

But because UCC § 9-513’s effect is “except as otherwise provided in [UCC §] 9-510,” one must then look to UCC § 9-510, which requires one to look to § 9-509 to ascertain whether there has been authorization.

A termination statement (filed by means of a UCC-3) is one kind of financing statement—one that is an amendment to an initial financing statement (filed by UCC-1).  

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70 6 Del. C. § 9-513(d).
71 (emphasis added).
72 UCC § 9-102(39) (6 Del. C. § 9-102(39)), one of UCC Article 9’s many definitions, defines a “financing statement.” That section provides:

“Financing statement” means a record or records composed of an initial financing statement and any filed record relating to the initial financing statement.

(emphasis added). Similarly, UCC § 9-102(79) (6 Del. C. § 9-102(79)), another of UCC Article 9’s definitions, defines a “termination statement.” That section provides:

“Termination statement” means an amendment of a financing statement which:

(A) identifies, by its file number, the initial financing statement to which it relates; and

(B) indicates either that it is a termination statement or that the identified financing statement is no longer effective.

Failures to focus on the distinction between an “initial financing statement” and a “financing statement,” and on the fact that a “termination statement” is one kind of a “financing statement,” have introduced error into the caselaw, most significantly in one of the cases relied upon by the Committee, Roswell Capital Partners LLC v. Alternative Construction Technologies, 2010 U.S. Dist. LEXIS 90695, 2010 WL 3452378
UCC §§ 9-509(d), 9-510(a) and 9-513(d) thus collectively provide that a termination statement is effective only to the extent that the secured party of record authorizes it—and that if the termination statement has not been duly authorized, it is ineffective. And that is so irrespective of the extent to which the public records tell the world that the initial financing statement is no longer in effect.

As Harry Sigman, one of the members of the drafting committee for Revised Article 9, explained:

Revised Article 9 makes explicit another concept that is implicit under current law—the fact that a filing is on the public record doesn’t guarantee that it is effective. For example, … a termination statement that bears a forged

(S.D.N.Y. Sep. 1, 2010), aff’d by summary order on other grounds, 436 Fed. Appx. 34 (2d Cir. 2011) ("Roswell"). See discussion at page 69 below.

See, in addition to UCC §§ 9-509 and 9-510, Official Comment 3 to UCC § 9-502, as enacted in Delaware and elsewhere. It provides, in relevant part:

The fact that this Article does not require that an authenticating symbol be contained in the public record does not mean that all filings are authorized. Rather, Section 9-509(a) entitles a person to file an initial financing statement, an amendment that adds collateral, or an amendment that adds a debtor only if the debtor authorizes the filing, and Section 9-509(d) entitles a person other than the debtor [sic.; query whether it should say “secured party of record”] to file a termination statement only if the secured party of record authorizes the filing. Of course, a filing has legal effect only to the extent it is authorized. See Section 9-510.

6 Del. C. § 9-502 cmt 3 (emphasis added).

In its opening brief on its motion for partial summary judgment, the Committee argues that “the filing of a termination statement renders ineffective the financing statement to which the termination relates and causes the subject lien to become unperfected.” Comm. Partial SJ Br. 9. For its failure to address the critical requirement of authorization, and the exception expressly articulated in UCC § 9-513(d), that statement is an overly general, and consequentially inaccurate, statement of the present law. See discussion at page 60 below.

Pre-2001 caselaw that the Committee argues supports such a generalization, see, e.g., In re Silvernail Mirror & Glass, Inc., 142 B.R. 987 (Bankr. M.D. Fla. 1992) ("Silvernail"), analyzed the issues under a different statutory scheme, and cannot be relied on in instances where the changes in the UCC matter. Language in other post-2001 decisions upon which the Committee relies, Peoples Bank of Kentucky, Inc. v. U.S. Bank, N.A. (In re S.J.; Cox Enterprises, Inc.), 2009 Bankr. LEXIS 4573, 2009 WL 939573 (Bankr. E.D. Ky. Mar. 4, 2009) ("S.J. Cox"), and Roswell, each of which quoted or cited the pre-2001 decisions while failing to consider their continuing vitality in light of the 2001 changes in the UCC, suffer from the same deficiency. For further discussion of the Court’s belief that it should not rely on these cases, see page 60 et seq. below.
secured party signature is not effective simply because it gets onto the public record. Revised Article 9 states that a filed record is “effective” only to the extent that its filing is authorized.\(^75\)

Similarly, as stated in a treatise on the UCC:

A filed record, whether it is an initial financing statement or an amendment, is effective only if it is filed by a person who may file it under the rules of revised Section 9-509 [Rev]. Except in the case of agricultural liens, only a filer who is authorized by the right party may file a record. In the case of an initial financing statement or an amendment adding collateral or adding a debtor, the authorization (actual or deemed) must come from the debtor. In the case of other amendments, authorization must come from the secured party of record.

*The fate of a record filed by someone other than a person given the power to do so under revised Section 9-509 [Rev] is quite clear. Such a filing is ineffective. Thus, if a secured party files an initial financing statement without actual or deemed authorization of the debtor, that financing statement is ineffective. The same is true for a termination statement not authorized by the secured party of record.*\(^76\)

After the Uniform Law Commissioners and the American Law Institute (“ALI”) promulgated the revised Article 9 of the UCC that was enacted in 2001, they formed a review committee in 2008 to consider whether further changes or clarifications should be made.\(^77\) In connection with proposed further amendments to UCC Article 9 (one of which, by means of amendment to UCC § 9-518, would allow secured parties to file an optional, and non-binding, “information statement” providing notice that one who filed a termination statement or other financing statement lacked authority to do so), the Uniform Law Commissioners and ALI noted,

\(^{75}\) Sigman, n.67 above, 73 Am. Bankr. L.J. at 71.


Roswell has language, arguably dictum, to the contrary. For a discussion of this Court’s inability to agree with Roswell in this and other respects, see the discussion beginning at page 64 below.

\(^{77}\) See their report, reprinted in Hawkland Art. 9 [Rev.] App. C.
in a proposed addition to the Official Comment to UCC § 9-518, that it would have “no legal
effect.” “Its sole purpose [was] to provide some limited public notice that the efficacy of a filed
record is disputed.” They observed that because it would have “no legal effect, a secured party
of record—even one who is aware of the unauthorized filing of a record—[had] no duty to file
one.” They went on to say:

> If the person that filed the record was not entitled to do so, the filed record is ineffective, regardless of whether the secured party of record files an information statement. Likewise, if the person that filed the record was entitled to do so, the filed record is effective, even if the secured party of record files an information statement.

And they concluded:

> Just as searchers bear the burden of determining whether the filing of [an] initial financing statement was authorized, searchers bear the burden of determining whether the filing of every subsequent record was authorized.

**B. Was Authorization Granted?**

It is clear, then, that a filed record is effective only to the extent its filing is authorized. But the critical term “authorizes” is not defined in the UCC—in the “Definitions and Index of Definitions” section of Article 9 (UCC § 9-102), the “General Definitions” at the beginning of the UCC (UCC § 1-201) which generally apply to all of the UCC’s Articles, or anywhere else. That was not inadvertent. The drafters were aware that the Revised Article 9 would be silent with respect to what constitutes the required authorization (and any standards for determining

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78 *Id.*

79 *Id.* (italics in original, used to indicate an addition, deleted).

80 *Id.* (italics in original, used to indicate an addition, deleted; apparent omitted text added in brackets).

81 6 Del. C. § 9-102.

82 6 Del. C. § 1-201.
that issue), and contemplated that law outside UCC Article 9 would decide it. Thus textual analysis, with which the Court normally begins any matter of statutory construction, is of limited utility here.

With “authorizes” not having been statutorily defined, the Court turns, as the drafters of the UCC contemplated, to the principal area of the law addressing situations where one is authorized to act on behalf of another—the law of agency. Analysis of authority to act in agency law has traditionally involved consideration of “actual” authority; “apparent” authority, and “ratification” of the agent’s acts. Though under the facts here, the latter two of those doctrines are inapplicable, the Court considers them in turn.

1. Actual Authority

As articulated in caselaw, “[a]ctual authority exists when an agent has the power ‘to do an act or to conduct a transaction on account of the principal which, with respect to the principal,

83 See Official Comment 3 to UCC § 9-509 (6 Del. C. § 9-509 cmt 3) (“Law other than this Article, including the law with respect to ratification of past acts, generally determines whether a person has the requisite authority to file a record under this section.”); accord UCC § 9-502 cmt 3 (6 Del. C. § 9-502 cmt 3) (same).

In that connection, a third provision of the UCC—one of its “General Provisions,” which did not come into place in 2001, but rather has been in place since its inception—is consistent with the consideration of agency law to decide when appropriate authority has been granted. That provision, UCC § 1-103(b) (6 Del. C. § 1-103(b)) provides, in relevant part:

Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause supplement its provisions.

(emphasis added).

84 Neither the Committee nor JPMorgan suggests that there is any relevant statutory law in this regard. The principles emerge from caselaw, and caselaw-driven authorities such as the Restatement of Agency.

85 Another type, “implied” authority, which is a species of actual authority, is discussed at page 58 below.
he is privileged to do because of the principal’s manifestation to him.”

Likewise, as set forth in the current *Restatement*:

An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act.

Actual authority is created by “direct manifestations” of that grant of authority which come from the principal to the agent. “[T]he extent of the agent's actual authority is interpreted in the light of all the circumstances attending these manifestations, including the customs of business, the subject matter, any formal agreement between the parties, and the facts of which both parties are aware.”

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87 Restatement (Third) of Agency (“Restatement”) § 2.01 (2006); see also id. § 3.01 (“Actual authority, as defined in § 2.01, is created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent take action on the principal's behalf.”).

88 Demarco v. Edens, 390 F.2d 836, 844 (2d Cir. 1968) (“Demarco”); Peltz v. SHB Commodities, Inc., 115 F.3d 1082, 1088 (2d Cir. 1997) (“Peltz”) (quoting Demarco); Highland Capital Management LP v. Schneider, 607 F.3d 322, 327 (2d Cir. 2010) (“Highland Capital Management”) (quoting Peltz). Though Demarco and the approximately ten other decisions with identical language all appear to have been decided under New York law, the Court has no reason to believe that Delaware law would be any different in this respect.

See also Restatement Second § 7 (cited by Demarco court) (“Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal’s manifestations of consent to him.”) (emphasis added); Restatement § 1.03 (“A person manifests assent or intention through written or spoken words or other conduct.”); id. cmt a (“Actual authority as defined in § 2.01 requires a manifestation from the principal to the agent. The scope of actual authority, addressed in § 2.02, is based upon, although not wholly defined by, the principal’s manifestation to the agent. A manifestation of assent by the principal is requisite to creating actual authority under § 3.01.”).

89 Demarco, 390 F.2d at 844; Peltz, 115 F.3d at 1088 (quoting Demarco); Highland Capital Management, 607 F.3d at 327 (quoting Peltz).
Importantly for reasons that follow, “[t]he focal point for determining whether an agent acted with actual authority is the agent’s reasonable understanding at the time the agent takes action.” As stated in the current Restatement:

An agent does not have actual authority to do an act if the agent does not reasonably believe that the principal has consented to its commission. … Lack of actual authority is established by showing either that the agent did not believe, or could not reasonably have believed, that the principal's grant of actual authority encompassed the act in question. This standard requires that the agent's belief be reasonable, an objective standard, and that the agent actually hold the belief, a subjective standard.

Thus (presumably because of the requirement that the agent actually hold the belief, a subjective standard), testimony of the alleged agent concerning the agent’s belief as to his or her authority is a common means to prove or disprove the existence and scope of authority. Cases in this district and elsewhere have repeatedly considered the agent’s testimony as to his understanding of his authority in determining whether actual authority existed.

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90 Restatement, § 2.01 cmt c.
91 Id.
92 Id.
93 See Merex A.G. v. Fairchild Weston Systems, Inc., 810 F.Supp. 1356, 1369 (S.D.N.Y. 1993), aff’d by summary order, 54 F.3d 765 (2d Cir.), cert. denied, 516 U.S. 915 (1995) (court relied on testimony of alleged agent, a market manager, when he stated that he informed the plaintiff Merex that he had no authority to bind the defendant Fairchild); Playboy Enterprises, Inc. v. Dumas, 960 F.Supp. 710, 721 (S.D.N.Y. 1997) (“There is no evidence suggesting that any of the [accountant agents alleged to have been authorized in the transaction in question] believed that it had the authority to bind Nagel to a work for hire agreement. In fact, what evidence there is shows that the agents believed that such action was outside of the limited scope of their agency.”); Yolton v. El Paso Tennessee Pipeline Co., 668 F.Supp.2d 1023, 1041 (E.D. Mich. 2009) (relying on testimony by union representative that he knew that the union lacked the authority to modify employees’ vested retirement benefits); Big Bear Import Brokers, Inc. v. LAI Games Sales, Inc., 2010 U.S. Dist. LEXIS 18604, at *12, 2010 WL 729208, at *4 (D. Ariz. Mar. 2, 2010) (defendant LAI introduced undisputed evidence that agent Hughes did not have authority to enter into purchase agreement, and that at the time he signed it, he knew he did not have such authority, based on Hughes’ admission that “he had a feeling that he was not allowed to enter the purchase agreement”); Lone Star Heat Treating Co. v. Liberty Mutual Fire Insurance Co., 233 S.W.3d 524, 531 (Tex. Civ. App. 14th Dist. 2007) (on summary judgment motion, relying on uncontroverted affidavit of employee when he swore that nobody had told him that he was authorized to take actions in question).

In another case, Opp v. Wheaton Van Lines, Inc., 231 F.3d 1060 (7th Cir. 2000), where there was an issue as to whether one Richard Opp had authority to act as an agent, the Seventh Circuit found significant the
Here the Committee argues that JPMorgan (through its counsel, Simpson Thacher) granted actual authority to GM (through GM’s counsel, Mayer Brown) to terminate the Main Term Loan UCC-1, as a consequence of JPMorgan’s alleged authorization to file the Unrelated UCC-3. The Committee bases its actual authority arguments, in substance, on the communications between JPMorgan and its counsel, on the one hand, and GM and its counsel, on the other, that took place before the Unrelated UCC-3 was filed. Upon consideration of those communications, however—with a focus on the manifestations of the authority JPMorgan granted to GM (and, in particular, “the customs of business, the subject matter, any formal agreement between the parties, and the facts of which both parties are aware”), and, to a lesser extent, on the caselaw—the Court concludes that JPMorgan did not grant actual authority to terminate the Main Term Loan UCC-1.

(a) The Authority Indicia

The underlying facts—as contrasted to conclusions that flow from them—are not in dispute. The parties agree, as does the Court, that the documents that are most significant in analyzing JPMorgan’s manifestations of the authority it gave to GM are four particular documents:

*absence* of any testimony from Mr. Opp. *See id.* at 1064-65 (“And the record contains no testimony from Mr. Opp. Because the record provides no counter-affidavits that establish an explicit agency relationship between Ms. and Mr. Opp, we must accept Ms. Opp’s affidavit as true and conclude that she never explicitly granted Mr. Opp the authority to limit the carriers’ liability.”).

Thus the Court must overrule the Committee’s objection to the statements in affidavits and deposition testimony of Mayer Brown and GM personnel that they were not authorized to terminate the Main Term Loan UCC-1. The Committee’s objection, premised on the contention that each was expressing an impermissible legal conclusion, mischaracterizes the statements’ substance. Though the Mayer Brown and GM personnel sometimes spoke in conclusory terms, each was in substance expressing his or her *understanding or belief* that Mayer Brown and GM personnel had not been so authorized. That is exactly what the *Restatement* says should be the factual predicate for the “subjective standard” prong of the legal conclusion. *See page 33 & n.91 above* (“Lack of actual authority is established by showing … that the agent did not believe … that the principal's grant of actual authority encompassed the act in question. This standard requires that … the agent actually hold the belief, a subjective standard.”). With the witnesses providing their understandings and beliefs, the Court can draw its own legal conclusions.

*See page 32 & nn. 88-89 above.*
(1) the Synthetic Lease Termination Agreement;

(2) the Synthetic Lease Closing Checklist;

(3) the Unrelated UCC-3; and

(4) the Synthetic Lease Escrow Agreement.

With respect to each of these documents, the Court considers it appropriate to ask two questions: was it an authorization, and, if so, an authorization of what? With respect to the first and fourth of those documents (the Synthetic Lease Termination Agreement and the Synthetic Lease Escrow Agreement), the Court finds a grant of authorization to do something.95 But with respect to each of the four documents (including the first and the fourth), the Court finds no grant of authority to terminate the Main Term Loan UCC-1 (nor does it find a failure to object to any such document to be an authorization), and the Court finds the lack of the requisite authority to be particularly clear when the totality of the surrounding circumstances is considered.

(1) The Synthetic Lease Termination Agreement

Of the four key documents, the Synthetic Lease Termination Agreement was by far the most specific in defining the nature of GM’s authority to file termination statements. That agreement, which is quoted in full above,96 stated, in its most significant part:

the Administrative Agent and the Lessor do hereby . . . authorize Lessee to file a termination of any existing Financing Statements relating to the Properties.

That plainly is an authorization. It also tells the reader exactly what has been authorized.

The key words “Financing Statements” and “Properties” in the preceding quoted language were capitalized and defined terms. They took their meaning from the Participation

95 With respect to the other two documents (the Synthetic Lease Closing Checklist and the Unrelated UCC-3), the Court cannot even find that.

96 See n.18 above.
Agreement, entered into back in October 2001, which had listed the particular pieces of real property that originally were collateral under the Synthetic Lease.

“Properties” as there used thus meant the Properties (as defined in the Participation Agreement) that were still collateral under the Synthetic Lease. “Properties” as there used did not include the very different collateral for the Term Loan. Similarly, “Financing Statements,” by reason of the defined terms in the Participation Agreement, referred to the “Lessor Financing Statements” and “Lessee Financing Statements” that had been filed in connection with the Synthetic Lease, which had been executed by the “Lessor” (the Auto Facilities Real Estate Trust 2001-1); the “Lessee” (GM); and the “Administrative Agent” (JPMorgan). Once again, they did not include unrelated initial financing statements (most significantly, the Main Term Loan UCC-1) with respect to the Term Loan, nor any that had been filed with respect to any other financing.

The Synthetic Lease Termination Agreement can be read in only one way: that Administrative Agent JPMorgan authorized Lessee GM to file terminations of existing financing statements only with respect to the specific properties that were the subject of the Synthetic Lease. The Synthetic Lease Termination Agreement plainly was an authorization to terminate initial financing statements—but only those that it specified. It was not an authorization to bring the Main Term Loan UCC-1 to an end.

(2) The Synthetic Lease Closing Checklist

The second of the four potentially relevant documents is the Synthetic Lease Closing Checklist—a six-page listing of several dozen documents, prepared by GM’s counsel Mayer Brown, that would be executed in connection with the payoff of the Synthetic Lease, some of

97 See n.21 above.
98 See n.20 above, quoting the original definitions.
which would also be filed. The Court is satisfied that personnel from Simpson Thacher and JPMorgan received and reviewed the Synthetic Lease Closing Checklist, and voiced no objection to it. But the Court cannot find an authorization on the part of JPMorgan, by reason of that receipt, review, or failure to protest, to file or terminate anything, and especially cannot find an authorization to terminate the Main Term Loan UCC-1.

Preliminarily, the Synthetic Lease Closing Checklist did not say that it was, nor was it, an authorization to do anything. It did not by its terms invite or call for (or even mention) an authorization from JPMorgan with respect to the documents that were listed upon it, and JPMorgan did not execute it. In each of these respects, it was quite different than the Synthetic Lease Termination Agreement discussed above. Plainly, the Synthetic Lease Closing Checklist was sent to Simpson Thacher and JPMorgan for comment. And one can infer that if Simpson Thacher or JPMorgan had any objection or protest (or even comments), Mayer Brown would refrain from action, at least pending further discussion. But the Synthetic Lease Closing Checklist did not purport to be, nor was it, an authorization of any kind.

Because the Court cannot find the Synthetic Lease Closing Checklist to be an authorization at all, the Court need not address the second question that must be asked: “an authorization of what?” If the Court were required to answer that question, however, it would answer it in the same way that it answered that question for the Synthetic Lease Termination Agreement, as discussed above.

The Synthetic Lease Closing Checklist identified itself as relating to the “Release of Properties from JPMorgan Chase Synthetic Lease.” It made no mention of the Term Loan, nor of any financing other than the Synthetic Lease. Assuming, arguendo, that failure to protest to
the filing of the listed documents could be deemed to be an authorization, it could only be read as an authorization for what it described—the properties remaining under the Synthetic Lease.

For those same reasons, the Court is unpersuaded that Simpson Thacher’s Merjian’s statement, “Nice job on the documents,” preceding the one comment he had relating to Synthetic Lease matters, should be deemed to be an authorization of any kind, or, if one reaches the issue, an authorization to terminate the Main Term Loan UCC-1.

It is true, of course, that embodied in the Synthetic Lease Closing Checklist was the number of a UCC-1 which those involved with this case now know to be the Main Term Loan UCC-1. But nobody knew that at the time. Nobody knew that the Main Term Loan UCC-1 would be affected in any way—or more importantly, intended by the Synthetic Lease Closing Checklist to achieve such an end.

It also is true, of course, that by reference to each UCC-1 filing number that was mentioned in the Synthetic Lease Closing Checklist, one could find the original UCC-1 to which the checklist referred; then discern to what the UCC-1 related; and then decide whether or not to authorize the termination of that UCC-1, even if it related to a wholly unrelated transaction. But the failure to have engaged in such an exercise cannot be found to be an authorization.

(3) The Unrelated UCC-3 Itself

The third of the four documents potentially relevant to this inquiry is the draft of the UCC-3 itself. Based on the content of the draft Unrelated UCC-3; its delivery to Simpson Thacher and JPMorgan before its filing; and Simpson Thacher’s asserted approval of it (or at least Simpson Thacher’s failure to object to its filing), the Committee contends that the
Unrelated UCC-3 itself constitutes authorization for the termination of the Main Term Loan UCC-1. 99

Once again, however, the Court cannot find an authorization here, or conclude, assuming arguendo that the draft UCC-3 was an authorization, that it was an authorization to terminate the Main Term Loan UCC-1. With respect to the first of those issues, the UCC-3 did not call for the signature of the secured party principal. Nor did it have a granting clause or use granting language—such as the “hereby … authorize” which appears in the Synthetic Lease Termination Agreement. GM’s filling in of a box listing JPMorgan as “Secured Party of Record Authorizing this Amendment” could not reasonably be regarded as a substitute for this. Nor could the UCC-3, executed solely by GM, reasonably be deemed to be a grant of authority by JPMorgan.

Then, assuming arguendo that the draft UCC-3 could be deemed to be an authorization of something, it cannot be found to be an authorization to terminate the Main Term Loan UCC-1. The Unrelated UCC-3 did not, as the Committee argues, “indicate[] that the effectiveness of the Term Loan Financing Statement is terminated…” 100 It made no reference to the Term Loan other than as might be ascertained by looking at the number listed under “Initial Financing Statement File #” and then following through on an inquiry to discern the file number’s significance. 101

99 See Comm. Partial SJ Br. 14 (“The draft of the Term Loan Termination Statement [i.e., the Unrelated UCC-3] indicated that the effectiveness of the Term Loan Financing Statement is terminated and identified JPMorgan as the secured party of record authorizing the termination.”).

100 See n.99 above.

101 Addressing one of the important premises for its arguments here, the Committee argues that:

In this case, the Term Loan Termination Statement [i.e., the Unrelated UCC-3] stated unambiguously that the Term Loan Financing Statement was terminated with respect to the security interest of JPMorgan, the secured party of record authorizing its filing.

See Comm. Partial SJ Br. 13. But that is not quite correct. The words “Term Loan Financing Statement” or “Term Loan” never appeared on the Unrelated UCC-3. The Committee’s argument rests on what might
Since a draft of the Unrelated UCC-3 was included amongst the documents that were sent to Simpson Thacher, the Court is inclined to agree with the Committee that when Simpson Thacher’s Merjian stated, “Nice job on the documents,” just preceding the one comment he had relating to Synthetic Lease matters, the Unrelated UCC-3 was covered under that remark to no lesser degree than the other documents in the pile. But for the reasons above, that generalized remark still cannot be deemed to be an authorization of any kind, or, if one reaches the issue, an authorization to terminate the Main Term Loan UCC-1. In the absence of an indication that Merjian knew that there was a document that could affect the Main Term Loan UCC-1 in the batch he received, or that Merjian intended that a UCC-3 in that batch terminate the Main Term Loan UCC-1—and, of course, when neither JPMorgan nor GM had the belief that the Main Term Loan UCC-1 would be affected in any way—the Court cannot find Merjian’s comment to constitute an authorization to terminate that wholly unrelated document.

(4) The Synthetic Lease Escrow Agreement

The fourth and last of the documents that are asserted to have potential relevance is the Synthetic Lease Escrow Agreement. As with the Synthetic Lease Termination Agreement, the Synthetic Lease Closing Checklist, and the Unrelated UCC-3, the Court considers this document at two levels: again, whether was it an authorization at all, and, if so, an authorization of what.

At the first level, the Court concludes that the Synthetic Lease Escrow Agreement was indeed an authorization—to authorize the Title Company to act to implement the letter’s joint directions. But the Synthetic Lease Escrow Agreement was not a grant of an authorization to file UCC-3s. The Court so concludes because (1) the UCC-3s were not amongst the documents that were to be recorded or filed under that agreement, and (2) it was the intention of JPMorgan, GM,
and the other parties to the Synthetic Lease Termination Agreement to embody any authorization JPMorgan might grant within that document instead.

At the second level, the Court concludes, once again, that assuming, arguendo, that the Synthetic Lease Escrow Agreement was intended to constitute a second (and seemingly redundant) basis for authority to terminate UCC-1s, the Synthetic Lease Escrow Agreement was an authorization to terminate UCC-1s only with respect to the Synthetic Lease. It still could not be regarded as an authorization to terminate the Main Term Loan UCC-1.

Here, with respect to whether the Synthetic Lease Escrow Agreement was an authorization at all, the Court concludes that it was—though to the Title Company, not to GM or Mayer Brown. In fact, Mayer Brown, on behalf of GM, was one of the three entities granting the authorization—not the entity being authorized.

With respect to what the Synthetic Lease Escrow Agreement authorized, it authorized the Title Company to record or file specified documents (i.e., the 23 Recording Documents), but not all of the 47 Escrow Documents. The remainder (which included the Unrelated UCC-3) were simply to be returned to Mayer Brown.

Significantly, the Synthetic Lease Escrow Agreement, which by its terms gave instructions to the Title Company, did not give Mayer Brown instructions or authority to do anything. Nor, especially, did it give Mayer Brown any instructions concerning what Mayer Brown should do with the Escrow Documents that the Title Company would not file, but instead would only forward to Mayer Brown—including, as relevant here, the Unrelated UCC-3.

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102 See n.45 above.
103 See page 19 above.
104 See n.46 above.
105 In its briefing and at oral argument on these motions, see Comm. SJ Opp. 6 n.6, Comm. Partial SJ Reply 11, and Arg. Tr. at 31-32 (ECF #63), the Committee asked rhetorically, in substance, if the remainder of the
Finally, the Synthetic Lease Escrow Agreement described itself as relating to the Participation Agreement, *i.e.*, to the Synthetic Lease.\textsuperscript{106} It made no mention of the Term Loan.

For all of these reasons, the Court cannot find the Synthetic Lease Escrow Agreement to be a source of authority for GM or Mayer Brown to have filed anything, including, especially, anything affecting the Term Loan.

(5) “All Circumstances Attending [Principal’s] Manifestations” to Agent

As noted above,\textsuperscript{107} actual authority is created by “direct manifestations” coming from the principal to the agent. “[T]he extent of the agent’s actual authority is interpreted in the light of all the circumstances attending these manifestations, including the customs of business, the subject matter, any formal agreement between the parties, and the facts of which both parties are aware.”\textsuperscript{108} The direct manifestations, and all of the circumstances attending them, likewise cause this Court to conclude that termination of the Main Term Loan UCC-1 was not authorized.

When the Unrelated UCC-3 was filed, there was one, and only one, “direct manifestation[ ]” of the authority granted to GM by JPMorgan here. That was the Synthetic Lease Termination Agreement, the only document embodying a grant of authority to GM. The “direct manifestation[ ]” of GM’s authority to terminate initial financing statements (which granted authority with respect to the “Financing Statements” relating to the “Properties,” each of which was a defined term in the Synthetic Lease Termination Agreement), came from the

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\textsuperscript{106} See nn. 38 and 39 above.

\textsuperscript{107} See page 32, above.

\textsuperscript{108} Demarco, 390 F.2d at 844; accord Peltz, 115 F.3d at 1088; Highland Capital Management, 607 F.3d at 327.
Synthetic Lease Termination Agreement, and nowhere else. Having provided the necessary grant of authority in one place (in very express terms), there was no need to express it again, and the Court can find no evidence of an intent to say it again, either in the same terms or different ones. The other asserted manifestations of authority to GM, as argued by the Committee, were not at all “direct,” if they could be regarded as manifestations at all.

The Court then considers “the customs of business, the subject matter, any formal agreement between the parties, and the facts of which both parties were aware.” No expert testimony, or other evidence, was offered as to the “customs of business,” so the Court lacks evidence of that character upon which to rely. But there is a fair amount of evidence in the record as to the remaining factors, as to which there are no disputed issues of fact, and it all points the same way.

The “subject matter” of the transaction was, as nearly every relevant document expressly stated, the termination of the Synthetic Lease. In all of the emails and underlying documents, there was no mention, before the filing of the Unrelated UCC-3, of the Term Loan or of any intent to affect the Term Loan in any way. The affidavits and deposition testimony were wholly consistent. Nobody at GM, JPMorgan, Mayer Brown or Simpson Thacher ever regarded the subject matter of the transaction as anything other than the Synthetic Lease. The Committee effectively asks the Court to conclude that JPMorgan granted authorization to GM to take action with respect to a wholly different subject matter—a wholly unrelated $1.5 billion loan—without any of the participants in the Synthetic Lease payoff ever mentioning that along the way.

Looking at any “formal agreement between the parties,” the Court comes to the same conclusion. The only formal agreement between the parties with respect to authority to file the Unrelated UCC-3, as discussed above in the Court’s discussion of direct manifestations from
principal to agent, was the Synthetic Lease Termination Agreement—with respect to which the grant of authority was explicit, and equally explicit with respect to what it covered. Other documents relied upon by the Committee as sources of authorization here were not agreements. They provide no basis for the Court to conclude that JPMorgan and GM agreed to trump or supplement the one formal agreement between the parties that expressly addressed the matter of authority.109

Other, earlier, formal agreements between the parties reinforce that conclusion. When the Term Loan was put into place in 2006, its documentation had provisions to protect the liens securing the Term Loan. Under one such provision, the Term Loan Collateral could not be eliminated unless the Term Loan was fully paid off:110 Under another, GM covenanted to maintain the perfection of the security interests in the Term Loan Collateral.111 And under another, the Term Loan Lenders’ perfected security interests could not be released “without the written consent of each Lender.”112 These too were elements of formal agreements between the parties that must be considered when determining whether JPMorgan authorized the termination

109 The Committee asserts that the Synthetic Lease Termination Agreement does not say that it is the sole source of authority to GM, and that it lacked an integration clause—and thus that the Committee is not foreclosed from relying on other documents as sources of authority. Comm. SJ Opp. 9 n.9; Comm. Partial SJ Reply 14-15. The Court agrees with the Committee that it is not so foreclosed, and has assumed, consistent with Demarco, Peltz and similar cases, that if there were any other formal agreements likewise speaking to a grant of authority, the Court should consider them as well. For these reasons, the Court has reviewed, with some care, what the Synthetic Lease Closing Checklist, the Unrelated UCC-3, and the Synthetic Lease Escrow Agreement said (even though not all of them were agreements between JPMorgan and GM), along with earlier formal agreements between JPMorgan and GM. Ultimately, however, the documents that the Committee wishes the Court to consider fall considerably short of granting additional or different authority, especially when two of the three of them are not agreements at all. Also, when considering the circumstances in the aggregate, it is appropriate to give the most specific document the greatest weight.


111 Collateral Agreement § 4.03.

112 Term Loan Agreement § 10.01 (Duker Aff. Exh. G).
of the Lenders’ Term Loan liens as a consequence of the inferences the Committee asks the Court to draw here.

Consideration of “the facts of which both parties are aware” likewise supports JPMorgan’s contention that it did not grant authority to terminate the Main Term Loan UCC-1. Here neither principal (JPMorgan) nor agent (GM) believed or understood that JPMorgan authorized GM to terminate the Main Term Loan UCC-1. Their understandings were to the contrary. Nor were they even aware that a UCC-3 referencing an initial financing statement for the Term Loan had been filed until long after the Unrelated UCC-3’s filing, or of any extrinsic facts that would cause either to believe that GM should be terminating the Main Term Loan UCC-1. As an additional one of the factors to be considered under Demarco, Peltz, and similar cases, “the facts of which both parties were aware” require the Court to conclude that no authorization was given.

Finally consideration of all of the circumstances in the aggregate compels a finding that authority to terminate the Main Term Loan UCC-1 was not granted. Stepping back from the more detailed analysis above, the Court sees the transaction as the payoff of a real estate financing under which the parties intended to bring the real estate financing liens to an end, without any intention to affect anything else. Neither GM nor JPMorgan intended, or believed, that their documents would affect anything else—and, more to the point, thought JPMorgan had authorized GM to affect anything else. A document now known to have related to the unrelated Term Loan was mistakenly filed by Mayer Brown. Even with delivery of a draft of that document to Simpson Thacher in advance, and Simpson Thacher’s failure to protest, the mistaken filing by Mayer Brown of that document—in the absence of recognition by either Mayer Brown or Simpson Thacher that the initial financing statement filing number appearing
on it would, upon further investigation, lead to a reference to the Term Loan—does not equate to an authorization by JPMorgan or Simpson Thacher for the termination of JPMorgan’s Term Loan liens. This too compels a ruling by this Court that when authorizing termination of UCC-1s with respect to the Synthetic Lease, JPMorgan did not give actual authority to GM to terminate the Main Term Loan UCC-1.

(6) Understanding of the Agent

There is, in addition, one more reason why the Court cannot find termination of the Main Term Loan UCC-1 to have been authorized. That is the understanding of the agent.

As discussed above, an agent does not have actual authority to do an act if the agent does not reasonably believe that the principal has consented to its commission. Here no one on the GM side had any belief, reasonable or otherwise, that GM had been authorized to terminate JPMorgan’s security interests with respect to the Term Loan.

If Mayer Brown or GM had actually believed that either had been authorized by JPMorgan to terminate a wholly unrelated $1.5 billion financing, this would be a different case, requiring the Court to then consider whether such a belief was reasonable. But that is not an issue here, because every individual on the GM side unequivocally expressed his or her belief that GM had not been so authorized. And because, as the Restatement makes clear, a belief (and indeed, a reasonable belief) by the agent that he or she has been authorized is essential to a finding of actual authority—and that is lacking here—the Court cannot find that GM or Mayer

113 See page 33 & n.91 above.

114 See Restatement § 2.02 cmt e. Though under the facts here, any such belief, if it existed, would be absurd, the Court is uncertain whether the absurdity of the agent’s belief can be decided on a summary judgment motion when reasonableness is at issue. That issue need not be decided here, of course, because those on the GM side did not have a belief that JPMorgan had authorized the termination of its security interest on the unrelated Term Loan, reasonable or otherwise.
Brown had actual authorization. Quite apart from the conclusion that flows from the multi-
indicia analysis dictated by Demarco, Peltz and similar cases, that is ultimately conclusive.115

* * *

For all of these reasons, the Court concludes that GM and Mayer Brown lacked actual
authority to cause JPMorgan’s Main Term Loan UCC-1 to come to an end.116

(b) Helpful Caselaw

Because the consideration of indicia of a grant of authority is fact-driven, caselaw dealing
with grants of authority in connection with the filing of other UCC-3s is not as helpful as it
otherwise might be. But there are a few cases worthy of consideration.

In the Negus-Sons bankruptcy case,117 the bankruptcy court held that secured party
authorization was required to file a UCC-3, and that this authorization had been provided. The
Eight Circuit Bankruptcy Appellate Panel, and then the Eighth Circuit, affirmed—finding that
the bankruptcy court’s decision was “supported by the record,” though “the strongest basis for
affirming” was an alternate one, that the secured party was paid off with respect to the remainder
of its collateral.

115 Here the “actual authority” that the Committee asks the Court to find is ultimately based on the results of an
investigative process that never happened. It is not based on anything JPMorgan said or signed, or that GM
believed. It rather is the result of a logical syllogism resulting from Simpson Thacher’s failure to protest
when it saw GM’s draft UCC-3 listing a particular initial financing statement filing number, when if
Simpson Thacher, Mayer Brown, or either of their clients had investigated and tracked down the referenced
UCC-1, and then investigated further to ascertain the financing to which that UCC-1 related, they would
have discovered that the UCC-1 in question related not to the Synthetic Lease but rather to the Term Loan.
That is not a proxy for actual authority, which requires the reasonable belief by the agent that it has been
authorized to act in the respect at issue.

116 The Committee also relies on “implied authority,” which is a species of actual authority. Because the
Committee asserts this as a separate contention, the Court considers it as such, and deals with it below. See
page 58 below.

2011) (“Negus-Sons-BAP”), aff’d on opinion of BAP, 701 F.3d 534 (8th Cir. 2012) (per curiam).
There a secured party, Mutual of Omaha Bank (the “Bank”), had liens on a variety of collateral, some of which the Bank intended to keep and some of which it intended to release. But a Bank employee carelessly placed language in a loan payoff letter provided to a new lender, Wells Fargo Equipment Finance, stating that “[u]pon receipt of payoff all liens will be released.” Based on this language, and its earlier request for authorization for a release of the security interest “in all the collateral,” Wells Fargo Equipment Finance filed a termination statement on the Bank’s behalf. While the Bank claimed that it intended only to release its security interest in the collateral for which payment was received, the bankruptcy court ruled that the broad language in the Bank’s responding letter authorized the filing of the termination statement.

The bankruptcy court’s decision in *Negus-Sons-Bankruptcy*, which the BAP implicitly found not to be clearly erroneous, is in any event easily distinguishable. The bankruptcy court

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119 The Bank contended that its authorization was more limited, referring only to its equipment collateral and not its entire security interest. *See* 2011 Bankr. LEXIS 2378, at *9-10, 2011 WL 2470478, at *4. The *Negus-Sons-Bankruptcy* court found that contention inconsistent with the request from Wells Fargo Finance to which the Bank was responding. The request provided, in relevant part:

> This letter is to confirm that upon receipt of funds from Wells Fargo Equipment Finance, Inc. for the entire payoff of all accounts that you agree to terminate your security interest in all the collateral with all the companies listed above and forward all titles to the following address:

> ...

> We have prepared an amendment to your UCC filing(s) to effectuate these terminations. Please indicate your consent to the filing of these amendments, and your authorization for us to file them on your behalf, by signing in the space provided below....

_Id._ (emphasis added).

120 The BAP stated that “[t]he record supports the bankruptcy court’s determination that Wells Fargo had the authority to terminate [the] financing statements.” *Negus-Sons-BAP*, 460 B.R. at 757. But it went on to say that it could affirm on the basis that the termination of the financing statements was unnecessary, because of payment in full of the remaining indebtedness before the bankruptcy, taking pains to say “we can affirm on any ground supported by the record.” _Id._ at 757 n.9. And it later found that the alternative ground was “the strongest basis for affirming the bankruptcy court’s determination that Mutual of Omaha no longer has a security interest in the Property.” _Id._ at 758. It is fair to infer that the B.A.P. found the
found that authorization to terminate the liens with respect “to all of the collateral with all the companies listed above” was sought, and that authorization for the release of “all liens” was expressly granted by the Bank. The Bank did not limit its release of liens to those on particular assets.121

But while not fully on point as a factual matter (and while they engage in a factual analysis somewhat less structured than the one this Court has undertaken, pursuant to Demarco, Peltz and similar cases) the decisions by the bankruptcy and district courts in the A.F. Evans bankruptcy122 are nevertheless instructive. The bankruptcy court in A.F. Evans-Bankruptcy understandably started with the statutory scheme of UCC §§ 9-509(d), 9-510 and 9-513. It then engaged in a fact-driven analysis to ascertain whether the requisite authority had been granted—ultimately concluding that authority to terminate the liens on two items of collateral did not extend to a third, even though a termination statement that covered the third as well had been filed. The A.F. Evans-District court affirmed.

The A.F. Evans cases involved a situation, like this one, in which a creditors’ committee, on behalf of the debtor’s unsecured creditor community, was jousting with a secured lender over the validity of the secured lender’s lien. As here, the secured creditor City National Bank ("City

bankruptcy court’s factual finding of authority not to be clearly erroneous, but not to have been strongly supported. The BAP also stated that in light of its rulings, it did “not need to address the more general question of whether unauthorized termination statements are effective,” id. at 757, though it went on to say that it was hesitant to endorse the holding in Roswell, which “appears to be contrary to the plain language of the Uniform Commercial Code.” Id. at 757 n.10; see also this Court’s discussion of Roswell, beginning at page 64 below.

121 Other cases involving termination of UCC-1s by entities acting (albeit without authority) on behalf of secured lenders, S.J. Cox and Roswell, are in this Court’s view erroneously decided, and thus are inappropriate for discussion in this context. The Court addresses them below, in the context in which the Committee relies upon them, beginning at pages 61 and 64, respectively.

Bank”) originally had a lien on the debtor’s interests in three partnerships. When interests in two of the partnerships were sold, the debtor had asked City Bank to release its liens on those two partnership interests (in exchange for a cash payment to City Bank), leaving only the third under City Bank’s original lien. City Bank agreed. To facilitate the closing of the sale of those two partnerships, the debtor there (analogous to GM here) sent City Bank (analogous to JPMorgan here) proposed escrow instructions directed to the debtor and to a title company, First American Title Insurance Co. (“First American”), along with two proposed UCC-3s checking the box for deletion of collateral (the two partnerships being sold) but not the box for termination. The proposed instructions (analogous in many respects to the Synthetic Lease Termination Agreement here) included an exhibit containing a description of the collateral to be released upon payment to City Bank. The descriptions were limited to the two partnerships being sold, and did not include any reference to the third.123

City Bank then caused the instructions to be sent to First American, accompanied by those two UCC-3s, which, again, would release collateral from the scope of the original UCC-1 but not terminate it. But thereafter, someone (presumably at First American, though no finding was made as to who the “someone” was) mistakenly checked an additional box on the UCC-3s, this time the box providing for termination,124 and caused the UCC-3s to be filed. The A.F. Evans creditors’ committee then argued, as here, that the filing of the UCC-3s with their “termination” box checked caused City Bank to lose its priority as a secured lender.

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The *A.F. Evans-Bankruptcy* court rejected that contention. After going through California’s versions of UCC §§ 9-509(d), 9-510(a) and 9-513(d),\(^{125}\) it recognized that the termination of City Bank’s security interest would be effective only to the extent such had been authorized. It then recognized, as this Court has, that in “determining what a secured party did or did not authorize” within the meaning of UCC 9-509(d), “law other than the Commercial Code may determine the issue.”\(^{126}\) And it did not quarrel with the general agency principle that principals are bound by the acts of their agents acting within the scope of their authority, and that First American had the authority to act with respect to the two partnerships with respect to which City Bank had agreed to release its liens. But the *A.F. Evans-Bankruptcy* court found that terminating City Bank’s lien on the third partnership was beyond the scope of the authority City Bank had granted. It followed from this that City Bank “was not bound by First American’s unauthorized modification to the UCC-3, if indeed the modification was by First American.”\(^{127}\)

As the Committee here correctly observes, *A.F. Evans-Bankruptcy* is not the same as this case in the respect that the documents City Bank reviewed and approved in that case showed nothing wrong, and were changed thereafter. But in a key respect, it is highly relevant to what we have here. The *A.F. Evans-Bankruptcy* court did not equate the authority City Bank had granted to file UCC-3s with respect to identified collateral (two of the three partnerships) to authority to make filings generally. Rather, it measured the agent First American’s authority by looking at the exact authority that City Bank had granted, and found authority to that extent and...

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\(^{125}\) See 2009 Bankr. LEXIS 2473, at *6, 2009 WL 2821510, at *3. The California versions of those provisions, Cal. Comm. Code §§ 9509(d), 9510(a), and 9513(d), were the standard uniform provisions, identical except in numbering to those in Delaware.

\(^{126}\) 2009 Bankr. LEXIS 2473, at *8, 2009 WL 2821510, at *3, citing the Official Comment to UCC § 9-509, quoted above at n.83.

nothing more. As the *A.F. Evans-Bankruptcy* court explained (referring to City Bank by the acronym “CNB”):

> Therefore, First American was not CNB’s agent, except for the limited purpose of handling the closing of the escrow for the debtor’s sale to the buyer of the Westgate and Greenery partnership interests. And First American was not acting within the scope of its very limited authority from CNB when it recorded a UCC–3 Amendment statement in a form other than that which CNB had authorized.\(^{128}\)

The decision in *A.F. Evans-District*, which expressly dealt with this contention on appeal, and affirmed the bankruptcy court with respect to it, was to the same effect. On appeal, the *A.F. Evans* creditors’ committee argued that City Bank gave First American broad authorization to file any ‘appropriate amendments’ to City Bank’s UCC-1, and that First American was acting as City Bank’s agent in all matters relating to City Bank’s security interest in the debtor’s property.\(^{129}\) But the *A.F. Evans-District* court looked at the context in which the grant of authority had been given, and in particular, City Bank’s release with respect to those two particular partnerships.\(^{130}\) It concluded that “[t]he bankruptcy court reasonably construed such instruction to mean that the only “appropriate amendments” authorized by CNB were amendments that relinquished CNB’s interest in the two properties identified therein.”\(^{131}\)

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\(^{128}\) *Id.* (emphasis added).


\(^{130}\) *Id.* (“City National Bank hereby releases all of its right, title and interest in [Westgate and Greenery] and authorizes the filing of appropriate amendments to [the] UCC Financing Statement….”).

\(^{131}\) *Id.* (emphasis added).
As applied to this case, each of \textit{A.F. Evans-Bankruptcy} and \textit{A.F. Evans-District} support finding authority for GM to terminate UCC-1s with respect to the “Properties” — \textit{i.e.} the “Properties” that were the subject of the Synthetic Lease — but not for anything else.\footnote{132}{\textit{A.F. Evans-Bankruptcy} is also noteworthy for its view that it should not rely on two decisions upon which the Committee relies here, by the Ninth Circuit BAP and Ninth Circuit, respectively, in \textit{Koehring Co. v. Nolden (In re Pacific Trencher & Equipment, Inc.)}, 27 B.R. 167 (B.A.P. 9th Cir. 1983) (\textit{Pacific Trencher}), aff’d 735 F.2d 362 (9th Cir. 1984). While the \textit{A.F. Evans-Bankruptcy} court found the \textit{Pacific Trencher} decisions distinguishable because in \textit{A.F. Evans}, boxes that had been checked on the UCC-3s sent mixed signals, the \textit{A.F. Evans-Bankruptcy} court also found the \textit{Pacific Trencher} decisions distinguishable (consistent with this Court’s views as to those cases, see page 61 below) that the mistake in \textit{Pacific Trencher} was made by the secured party itself (and did not involve an unauthorized act by an agent), and that the \textit{Pacific Trencher} cases were decided prior to the 2001 UCC amendments’ enactment of UCC §§ 9-509 and 9-510, which specifically address the effect of an unauthorized filing. See \textit{A.F. Evans-Bankruptcy}, 2009 Bankr. LEXIS 2473, at *11-13, 2009 WL 2821510, at *5.}

2. Apparent Authority

Apparent authority is different from actual authority. Apparent authority arises from the written or spoken words or other conduct which, reasonably interpreted, cause a \textit{third party} to believe that the principal consents to have an act done on the principal’s behalf by the person purporting to act for him.\footnote{133}{\textit{Hidden Brook Air}, 241 F. Supp. 2d. at 261.} As stated in the \textit{Restatement}:

\begin{quote}
Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.\footnote{134}{\textit{Restatement} § 2.03.}
\end{quote}

Apparent authority does not in itself carry the consequences of actual authority with respect to the rights and duties that apply to the relationship between agent and principal.\footnote{135}{\textit{Id.} cmt a.}

Unlike actual authority, which considers manifestations from the principal to the agent from the perspective of the agent, apparent authority considers the conduct of the \textit{principal}, and
as the principal’s conduct is interpreted by a third party.136 “Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction.”137 The agent cannot by his own acts imbue himself with apparent authority.138

As with manifestations of actual authority made to agents,139 a principal’s manifestations of apparent authority made to third parties must be understood in context.140 Apparent authority may result under any set of circumstances under which it is reasonable for a third party to believe that an agent has authority, so long as the belief is traceable to manifestations of the principal.141

Importantly, the inquiry requires the belief of an actual third party, who has acted in reasonable reliance on the principal’s representations as to the agent’s authority.142

Here the Court finds the doctrine of apparent authority simply to be inapplicable. There here were no statements to third parties with respect to the Term Loan upon which a finding of apparent authority could be made.

136 Minskoff v. American Exp. Travel Related Services Co., Inc., 98 F.3d 703, 708 (2d Cir. 1996) (“Apparent authority, then, is normally created through the words and conduct of the principal as they are interpreted by a third party, and cannot be established by the actions or representations of the agent.”).


138 Hallock, 64 N.Y.2d at 231.

139 See page 32 & n.89 above.

140 Restatement § 2.03 cmt c (“A principal’s conduct does not occur in a vacuum. A third party’s reasonable understanding of the principal’s conduct will reflect general business custom as well as usage that is particular to the principal’s industry and prior dealings between the parties.”).

141 Restatement § 2.03 cmt c.

142 See Providence College, 115 F.3d at 140 (“The inquiry therefore centers on the ‘words or conduct of the principal … communicated to a third party … that give rise to the appearance and belief that the agent … possesses authority to enter into a transaction …’”) (quoting Hallock); In re Kollel Mateh Efraim, LLC, 334 B.R. 554, 560 (Bankr. S.D.N.Y. 2005) (“Apparent authority consists of two elements: (1) a manifestation by the principal that the agent has authority and (2) reasonable reliance on that manifestation by the person dealing with the agent.”).

Though the distinction ultimately does not matter here, it also is the case that the third party must rely on manifestations as to the existence of authority from the principal—not the agent. See Hallock, 64 N.Y.2d at 230 (“The agent cannot by his own acts imbue himself with apparent authority.”).
3. Ratification

The Committee further contends that the filing of the Unrelated UCC-3 was ratified by JPMorgan, and hence that the termination of the Main Term Loan UCC-1 should be held to have been valid under the agency doctrine of ratification. Once more, however, the Court is unable to agree.

As set forth in the Restatement, “ratification is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority.” A person ratifies an act by (a) manifesting assent that the act shall affect the person's legal relations, or (b) conduct that justifies a reasonable assumption that the person so consents. While silence may, in some circumstances, act as the ratification of a prior act, “[t]he intent required for ratification ‘must be clearly established and may not be inferred from doubtful or equivocal acts or language.’”

Additionally, an important prerequisite to a finding of ratification is full knowledge by the principal of the facts relevant to whether the transaction should be ratified. As stated in the Restatement, “[a] person is not bound by a ratification made without knowledge of material facts involved in the original act when the person was unaware of such lack of knowledge.” Ratification requires that the principal have actual knowledge of material facts. As stated by

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144 Restatement § 4.01(1); see also Holm v. C.M.P. Sheet Metal, Inc., 89 A.D.2d 229, 232, 455 N.Y.S.2d 429, 432 (4th Dept. 1982) (“Holm”) (“Ratification is the express or implied adoption of the acts of another by one for whom the other assumes to be acting, but without authority.”).
145 Restatement § 4.01(2).
147 Restatement § 4.06
148 Id. cmt b. This actual knowledge is in contrast to “notice” as used in the Restatement, which includes not just knowledge of a fact, but also reason to know the fact, having received an effective notification of the
New York’s Appellate Division, Fourth Department, “[t]he act of ratification, whether express or implied, must be performed with full knowledge of the material facts relating to the transaction, and the assent must be clearly established and may not be inferred from doubtful or equivocal acts or language.” 149 Many federal court decisions in this circuit and district, some applying New York law and others applying general principles of common law, similarly note the knowledge requirement, with some affirmatively emphasizing it. 150

Then, the Second Circuit has required the acceptance of the benefits of a transaction as an additional element beyond the requisite knowledge. 151

Here three elements necessary to establish a ratification by JPMorgan are missing. First, since ratification requires affirmance of a “prior act,” 152 no facts here establish that JPMorgan did anything to affirm any of the key prior acts (most significantly, the filing of the Unrelated UCC-3, and any termination of the Main Term Loan UCC-1) after such acts took place.

fact, or there existing circumstances under which a person “should know” the fact to fulfill a duty owed to another person. See Restatement § 1.04(4).

149 Holm, 89 A.D.2d at 233, 455 N.Y.S.2d at 432.

150 See, e.g., Rodonich v. House Wreckers Union Local 95, 817 F.2d 967, 973 (2d Cir. 1987) (“Under general principles of common law, “ratification can only occur when the principal, having knowledge of the material facts involved in a transaction, evidences an intention to ratify it.”) (emphasis added); Banque Arabe Et Internationale D’Investissement v. Maryland Nat. Bank, 850 F.Supp. 1199, 1213 (S.D.N.Y. 1994) (“To ratify the unauthorized act of an agent, a principal must have full and complete knowledge of all the material facts of the transaction.”) (emphasis added); Prisco v. State of New York, 804 F.Supp. 518, 523 (S.D.N.Y. 1992) (“Ratification of the acts of an agent only occurs where the principal has full knowledge of all material facts and takes some action to affirm the agent's actions.”) (emphasis added); Cooperative Agricole Groupement De Producteurs Bovins De L'ouest v. Banesto Banking Corp., 1989 U.S. Dist. LEXIS 8368, at *50, 1989 WL 82454, at *16 (S.D.N.Y. July 19, 1989) (“Cooperative Agricole”) (“Ratification requires knowledge by the principal of the material facts of a transaction, coupled with the retention of benefits. … In other words, ratification requires acceptance by the principal of the benefits of an agent's acts, with full knowledge of the facts, in circumstances indicating an intention to adopt the unauthorized arrangement.”) (emphasis added), aff'd without opinion, 904 F.2d 35 (2d Cir. 1990); Orix Credit Alliance v. Phillips-Mahnen, Inc., 1993 U.S. Dist. LEXIS 7071, at *73, 1993 WL 183766, at *4 (S.D.N.Y. May 26, 1993) (“Orix”) (“[R]atification occurs when a principal, having knowledge of the material facts in a transaction, evidences an intention to affirm or adopt the transaction of his agent through his acts or words.”) (emphasis added).

151 See Monarch Insurance Co. of Ohio v. Insurance Corp. of Ireland Ltd., 835 F.2d 32, 36 (2d Cir. 1987); see also Cooperative Agricole, 1989 U.S. Dist. LEXIS, at * 50, 1989 WL 82454, at *16.

152 Restatement § 4.01(1).
Secondly, the knowledge requirement here has not been satisfied. Assuming, *arguendo*, that JPMorgan engaged in the necessary affirmance, it did so without knowledge of what it had done, and even without knowledge that it “was unaware of such lack of knowledge.” As of the time of the filing of GM’s chapter 11 case, nobody at Simpson Thacher or JPMorgan (or though it does not matter with respect to this requirement, Mayer Brown or GM) knew that a termination statement with respect to the Term Loan had been filed. In fact, lacking such knowledge, JPMorgan and GM acted thereafter (including, most significantly, by effecting the paydown of the Term Loan, which was appropriate if, but only if, the Term Loan was then secured) believing that the Term Loan was fully secured.

Third, the acceptance of benefits requirement also has not been satisfied here. While JPMorgan benefitted from GM’s fulfillment of its duties under the Synthetic Lease, there was no comparable benefit at the time with respect to the Term Loan.

Thus the Court is unable to find a ratification here.

C. The Committee’s Other Arguments

The Court then considers other arguments put forward by the Committee to the extent they have not been addressed above.

1. Implied Authority

In one of its briefs, the Committee further argues that GM “implicitly” authorized the filing of the Unrelated UCC-3, and thus that GM had “implied” authority to terminate the Main Term Loan UCC-1. The Court is unable to agree.

Implied authority is a species of actual authority, the latter of which can be express or implied. Express authority is “[a]uthority delegated to [an] agent by words which expressly

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153 Restatement § 4.06.

154 See Comm. SJ Opp. 11.
authorize him to do a delegable act.” It is “authority distinctly, plainly expressed, orally or in writing.” Implied authority, by contrast, is not expressly granted. Rather, it exists when necessary or appropriate to accomplish the agent’s express responsibilities, or when the agent reasonably believes that the action in question is required to accomplish the principal’s objectives. As explained in the Restatement:

“Implied authority” is often used to mean actual authority either (1) to do what is necessary, usual, and proper to accomplish or perform an agent’s express responsibilities or (2) to act in a manner in which an agent believes the principal wishes the agent to act based on the agent’s reasonable interpretation of the principal’s manifestation in light of the principal’s objectives and other facts known to the agent.

Here, by way of example, after JPMorgan had authorized GM to file UCC-3s with respect to the Synthetic Lease Properties, GM or its counsel had implied authority to retain and direct a UCC filing service to file the Synthetic Lease Properties’ UCC-3s. But GM did not have implied authority to do tasks other than those that were appropriate to accomplish the tasks, with

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157 Id. (quoting 1979 version of Black’s Law Dictionary); Hidden Brook Air, 241 F.Supp.2d at 261 (same, quoting Nationwide).

158 Restatement § 2.01 cmt b. The two circumstances are not mutually exclusive. Id.; see also Vig v. Deka Realty Corp., 143 A.D.2d 185, 187, 531 N.Y.S.2d 633, 634 (2d Dept. 1988), leave to appeal denied, 73 N.Y.2d 708, 540 N.Y.S.2d 1003 (1989) (“While the president of a corporation may have implied authority to do necessary acts within the scope of his usual and ordinary duties, he does not possess such authority as to unusual or extraordinary events.”) (emphasis added).

A few decisions, sometimes relying on the 1958 Restatement Second, which preceded the present Restatement, describe implied authority as existing “where the acts or representations of a principal lend the appearance of authority to the agent.” See Nationwide, 1996 U.S. Dist. LEXIS 6729, at *22-23, 1996 WL 263008, at *8. That definition, in the Court’s view, is imprecise and overly broad, inappropriately blending separate concepts that (coupled with other factors, most significantly instilling a belief in a third party) define implied authority, on the one hand, and apparent authority, on the other. Particularly since the issuance of the present Restatement, “implied authority,” as the quotations from the present Restatement make clear, is better thought of as the additional authority necessary to implement actual authority otherwise granted, or that the agent reasonably believes to exist.
respect to the Synthetic Lease Properties, for which GM had been expressly authorized—\textit{i.e.}, to implement the authority GM had otherwise been granted. GM was not authorized to act except with respect to the Synthetic Lease Properties, and filing the Unrelated UCC-3 was not “necessary,” “usual” or “proper” to bring the UCC-1s with respect to the Synthetic Lease Properties to an end.159

Similarly, if GM had \textit{reasonably believed} that it was expressly authorized to bring the Main Term Loan UCC-1 to an end, GM likely, if not plainly, would have had implied authority to take measures to accomplish that end. But again, GM did not have such a belief. There was no actual authority—even authority that GM perceived to exist—to terminate the Main Term Loan UCC-1. For these reasons, the Court cannot find the implied authority doctrine to be applicable here.

2. \textit{“UCC Filings that Mistakenly Terminate a Security Interest Are Legally Effective.”}

Recurring themes in the Committee’s briefs are very broad statements (in one instance, as a topic heading)160 that \textit{“the filing of a termination statement renders ineffective the financing statement to which the termination relates and causes the subject lien to become unperfected,”}161 and, especially, that \textit{“UCC filings that mistakenly terminate a security interest are legally}
Broad statements of that character are unhelpful, and by their excessive breadth unsatisfactorily describe the applicable law.

Because the Committee’s contentions rest on (1) cases involving entities that made the UCC filings themselves; (2) cases that predated the 2001 amendments to UCC Article 9; and (3) cases that while decided after the 2001 amendments to the UCC, relied on the earlier authority without focusing on the fact that the UCC had changed (or some combination of those deficiencies), the Court is not in a position to accept the Committee’s broad statements as properly descriptive of the law, or to consider the underlying cases as relevant to the controversy here.

In the first category are the cases relied upon by the Committee involving erroneous filings by the secured party itself—the Fourth Circuit’s decision in *Kitchin Equipment*;\(^{163}\) the Ninth Circuit BAP’s and Ninth Circuit’s decisions in *Pacific Trencher*;\(^{164}\) the bankruptcy court decisions in *Silvernail*,\(^{165}\) *York Chemical*,\(^{166}\) and *Hampton*;\(^{167}\) and the decision of the Kansas Court of Appeals in *J.I. Case*.\(^{168}\) In each of these, under the UCC’s pre-2001 statutory scheme, the secured party had itself signed the termination statement and caused it to be filed.\(^{169}\)

162 See n.160 above.
163 See n.9 above.
164 See n.132 above.
165 See n.74 above.
In the second category—cases that predated the 2001 amendments—are each of the above as well. Because they were decided under the pre-2001 statutory scheme (and also because the termination statements were filed by the secured parties themselves), none had occasion to consider the authorization requirement.

In the third category are *Roswell* and *S.J. Cox*. The events they addressed took place after the 2001 amendments to the UCC, but they quoted language from the earlier cases in the first two categories without addressing the changes in the UCC. Though they involved the filing of termination statements by agents, they decided those cases as if they were governed by the former statutory scheme, and this Court respectfully must decline to follow them.

*S.J. Cox*, a 2009 bankruptcy court decision, involved an adversary proceeding for wrongful termination of an initial financing statement, under the post-2001 statutory scheme. Here, unlike the earlier cases discussed above (where the termination statement had been filed by the secured party), a termination statement potentially ending an entity’s security interest in the debtor’s farm equipment was filed by someone else—by an employee of “Kentucky Bank” (previously known as “Peoples Bank of Sandy Hook, Kentucky”) with respect to the plaintiff Peoples Bank of Kentucky, Inc., a different entity. The plaintiff Peoples Bank of Kentucky sued Kentucky Bank for wrongfully terminating the former’s initial financing statement, and the *S.J. Cox* court ruled in the plaintiff’s favor—seemingly accepting defendant Kentucky Bank’s first argument that “priority among the Movants must be determined before its liability can be

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170 See n.74 above.
established,” but then rejecting Kentucky Bank’s second argument that Peoples Bank’s first priority status was unaffected by the supposed “‘release’ of the [initial] Financing Statement.”\footnote{2009 Bankr. LEXIS 4573, at *13-14, 2009 WL 939573, at *5 (quotation marks surrounding “release” in original).}

This Court agrees with the \textit{S.J. Cox} court that the filing of a termination statement there was unauthorized. And this Court also agrees that priority among the respective secured creditors had to be determined before deciding whether one of them was civilly liable for wrongful termination of another’s security interest—and thus that it was necessary to determine whether the plaintiff Peoples Bank’s first priority interest was affected at all. But this Court cannot agree with the remainder of the \textit{S.J. Cox} conclusions, and especially its analysis.

Puzzlingly, the \textit{S.J. Cox} court, when first considering the “Effect of termination of the Financing Statement,”\footnote{2009 Bankr. LEXIS 4573, at *8, 2009 WL 939573 at *3.} quoted and considered the Kentucky equivalents of UCC §§ 9-509(a)\footnote{Ky. Rev. Stat. § 355.9-509(1).} (a provision that addresses who may file an \textit{initial} financing statement, an amendment that \textit{adds collateral}, and an amendment that \textit{adds a debtor}, but which does not involve terminations of initial financing statements at all); 9-511 (addressing who is a secured party of record); and 9-513 (addressing a secured party’s duty to cause a termination statement to be filed after no obligations from the debtor to the secured party remain)—and those alone. Oddly, the \textit{S.J. Cox} court never mentioned the Kentucky equivalents of UCC §§ 9-509(d) and 9-510(a),\footnote{Ky. Rev. Stat. §§ 355.9-509(4) and 355.9-510, respectively.} quoted and addressed at length starting at page 26 above, two of the three provisions that address the requirement for authorization for financing statement amendments\footnote{It did quote UCC § 9-513, Ky. Rev. Stat. § 355.9-513, in part, including quotation of UCC § 9-513(d), Ky. Rev. Stat. § 355.9-513(4), but failed to take note of the clause at the beginning of that subsection, “[e]xcept as otherwise provided in KRS 355.9-510 [UCC§ 9-510].”}—and that provide, expressly, that amendments may be filed only when the secured party of record authorizes them,
and that amendments are effective only to the extent that they have been filed by a person who has been so authorized.

Additionally (perhaps by reason of its failure to consider UCC §§ 9-509(d) and 9-510), the S.J. Cox court incorrectly stated that “these provisions” (presumably the provisions of the UCC that it had quoted) “make it clear that the only party authorized to file a termination statement is the secured party of record.”\textsuperscript{178} And the S.J. Cox court went on with a broad statement, in reliance on Silvernail and Kitchin, that “[t]he termination of a financing statement, even if mistaken, releases the secured creditor’s lien against the debtor’s property”\textsuperscript{179}—without noting that each of Silvernail and Kitchin involved a termination by the secured creditor itself (and not a third party); that the UCC had been amended in 2001 after Silvernail and Kitchin; and that UCC §§ 9-509(d) and 9-510 made authorization a \textit{sine qua non} to a valid termination. The S.J. Cox court proceeded to reach the conclusions it did by reliance on the very different Silvernail and Kitchin, including Kitchin’s broad (and now overly broad) statement that a termination statement’s “effect on a security interest is dramatic and final.”

The S.J. Cox court concluded that a cause of action had been established for unauthorized termination of a UCC-1 when, because the termination was unauthorized, it should have held that there was no termination at all.\textsuperscript{180}

Puzzlingly, the Committee here contends that S.J. Cox is “on point” and relies on it.\textsuperscript{181}

But for the reasons stated above, the Court does not believe that it should do so.

\textsuperscript{179} 2009 Bankr. LEXIS 4573, at *11, 2009 WL 939573 at *4.
\textsuperscript{180} Likewise, a UCC treatise has observed that S.J. Cox was incorrectly decided. \textit{See Hawkland} § 9-509:4 [Rev] n0.50 (“court seems to hold, incorrectly, that the filing actually terminated the financing statement”).
\textsuperscript{181} \textit{See Comm. Partial SJ Reply} 17-18.
Roswell, in contrast, plainly reached the right bottom line, and indeed was affirmed (on the first of its two rationales) by the Second Circuit.\(^{182}\) But in articulating a second rationale for its decision, the Roswell court expressed thoughts with which this Court, once again, cannot agree.

Roswell involved an action by several secured lenders, for whom Roswell Capital Partners was collateral agent (the “Roswell Lenders”), to foreclose on the assets of their borrower Alternative Construction Technology, Inc. (referred to in the decision by the acronym “ACT”). The Roswell Lenders’ effort to foreclose was opposed not by their borrower ACT, but rather by assertedly secured competing lenders—an individual, James Beshara, and his sole proprietorship, JMB Associates (referred to in the decision by the acronym “JMB,” but here, for greater clarity, as the “JMB Lenders”).\(^{183}\)

The JMB Lenders extended secured credit to ACT, with respect to which they had duly filed UCC-1s, but thereafter (in June 2006) they exercised a contractual right to convert their debt into equity, and took equity in their borrower ACT instead.\(^{184}\) After the value of the equity had gone down, in July 2008, the JMB Lenders exercised another contractual right they had, to return their shares and reinstate the debt obligation. But in the meantime (in July 2007), one or more UCC-3s were filed by ACT\(^ {185} \) to terminate the JMB Lenders’ earlier security interest, and the Roswell Lenders extended their secured credit and filed UCC-1s after the filing of those UCC-3s.

\(^{182}\) Though the second rationale was addressed by each side in its briefing to the Second Circuit, the Circuit did not speak to the second rationale, upon which the Committee here relies.


The *Roswell* court ruled that the equity conversion extinguished the JMB Lenders’ security interest, and with it, the JMB Lenders’ lien.\(^{186}\) When the JMB Lenders’ debt was extinguished after the conversion to equity, there was no longer an obligation to secure. And a “security interest [could not] exist without a debt.”\(^{187}\) That conclusion was affirmed by a summary order of the Second Circuit, which stated, in its succinct decision, that “because the equity conversion extinguished the debt obligation, and a security interest cannot survive the debt's extinguishment, when JMB converted its debt to equity shares in ACT, any security interest it had in the collateral was also extinguished.”\(^{188}\)

But in a portion of its decision that was not endorsed by the Circuit on appeal, the *Roswell* court went on to set forth a second rationale for its conclusion, which was unnecessary to support *Roswell*’s plainly correct result.\(^{189}\) The Committee relies on that second rationale. But that rationale included several elements with which this Court cannot agree.

In the second part of its legal analysis, captioned “JMB’s UCC-1 Financing Statement is Ineffective,” the *Roswell* court considered an additional contention by the Roswell Lenders: that ACT’s filing of a UCC-3 termination statement had canceled the JMB Lenders’ previously filed UCC-1s. Deciding the matter with reference to the Florida UCC (which conformed to the UCC


\(^{189}\) The discussion of the second rationale began “[w]hile JMB’s failure to show that it had any enforceable security interest in the Collateral at the time the Plaintiffs filed their UCC-1 financing statements in July 2007 permits summary judgment to be awarded to the Plaintiffs, the parties dispute as well the validity and effect of ACT’s filing … of the UCC-3.” *Roswell*, 2010 U.S. Dist. LEXIS 90695, at *21, 2010 WL 3452378, at *7. That would at least arguably suggest that the second rationale was dictum. *See Willis Management (Vermont), Ltd. v. United States*, 652 F.3d 236, 243 (2d Cir. 2011) (a statement in a footnote in an earlier Second Circuit opinion “was not essential to the Court’s holding because it was offered in the alternative and therefore it is dictum that is not binding on us”).

*Roswell’s* second rationale has been described in a UCC treatise as “troubling dictum.” *Hawkland* § 9-510:2 [Rev] at n.150. But the Court does not need to decide whether or not it was dictum, because district court decisions are not binding on bankruptcy courts, except with respect to any district court mandate pursuant to an appeal.

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generally), the *Roswell* court rejected the JMB Lenders’ contention “that the termination statement was ineffective because [the JMB Lenders] did not authorize ACT to file it.” The *Roswell* court stated, in that connection:

> Even if the termination statement was not authorized by JMB, it nonetheless extinguished any perfected security interest JMB had in the Collateral.

And it declined to consider a factual argument with respect to whether authorization was lacking, stating that:

> 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.

Unlike the court in *S.J. Cox*, the *Roswell* court made reference to the proper statutory provisions, including the Florida equivalents of UCC §§ 9-509 and 9-510, discussed at length above. But it then proceeded with a caselaw-driven analysis without reference to what textual analysis of those two provisions (along with UCC § 9-513, which the *Roswell* court did not address) would require. In that connection, it relied on *S.J. Cox* (which had been issued in reliance on the wrong provisions of the UCC, and which had ignored UCC §§ 9-509(d) and 9-510), and on *Kitchin Equipment, Silvernail* and *Pacific Trencher* (each of which, as noted above, involved filings by the secured party itself, and was decided under the pre-2001 statutory scheme).

More specifically, the *Roswell* court repeated *S.J. Cox’s* statements (each based on pre-2001 law) that “[t]he termination of a financing statement, *even if mistaken*, releases the secured
creditor’s lien against the debtor’s property,”¹⁹⁴ and that a “termination statement’s effect on a security interest is dramatic and final.” And it went on to say that:

This clear rule accords with the policy of the UCC. Potential creditors must be able to rely on termination statements filed in the public record, even if they were filed in error or without authorization.¹⁹⁵

It thereafter continued with the statements quoted above to the effect that even if the UCC-3 termination statement was unauthorized, it nonetheless extinguished any perfected security interest the JMB Lenders had in their collateral.

Like others,¹⁹⁶ this Court is unable to agree. These conclusions cannot be squared with the provisions of UCC §§ 9-509(d), 9-510 and 9-513(d), and UCC § 9-502’s Official Comment 3, which provides that a “filing has legal effect only to the extent it is authorized.”

The *Roswell* court further stated that “[t]he 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 know whether a termination statement was authorized or not.”¹⁹⁷ And it rejected, in a footnote, the JMB Lenders’ argument that because the UCC adopted “notice filing”—a system contemplating further inquiry to determine the scope of a security agreement—subsequent

¹⁹⁵ *Id.* (emphasis added).
¹⁹⁶ See Negus-Sons-BAP, 460 B.R. 754, 757 n.10 (“We are also hesitant to endorse the holding in [*Roswell*], relied on by the Trustee, that a termination statement filed by a third party is effective regardless of whether it was authorized. … Roswell’s holding appears to be contrary to the plain language of the Uniform Commercial Code.”); *AEG Liquidation Trust v. Toobro N.Y. LLC*, 32 Misc. 3d 1202(A), 2011 N.Y. Misc. LEXIS 3041, at *27 n.1, 2011 WL 2535035, at *9 n.1 (Sup. Ct. N.Y. Co. Commer. Div. Jun. 24, 2011) ("*Toobro*") ("For these reasons [which are discussed beginning at page 70 below], the court declines to follow the SDNY Court’s analysis in *Roswell Capital*.‘); *Hawkland* § 9-510:2 [Rev] at n.1.50 (describing Roswell conclusions as “troubling,” though regarding them as dictum).
lenders like the Roswell Lenders would have to further investigate the filing of the UCC-3 termination statement to determine the true status of the JMB Lenders’ security interests.

However in this respect also, the Court cannot agree. “Notice filing” is indeed the regime under the UCC, as recognized in the UCC’s Official Comments, and less directly by the Second Circuit in its Credit Bancorp decision. As Official Comment 2 makes clear, documents of record may be insufficient to ascertain “the complete state of affairs,” but UCC Article 9 only requires information sufficient to engage in further inquiry. When the authorization underlying a previously filed termination statement matters to a subsequent lender (as it usually will), the lender can simply include any necessary further inquiry as part of its due diligence.

As stated in Official Comment 2 to UCC § 9-502, which addresses the sufficiency of a financing statement:

This section adopts the system of “notice filing.” …

The notice itself indicates merely that a person may have a security interest in the collateral indicated. Further inquiry from the parties concerned will be necessary to disclose the complete state of affairs.

SEC v. Credit Bancorp, Ltd., 386 F.3d 438, 454 (2d Cir. 2004) (“Credit Bancorp”).

Roswell was cited approvingly with respect to “notice filing” in a recent North Carolina case, Ward v. Bank of Granite (In re Hickory Printing Group, Inc., 479 B.R. 388 (Bankr. W.D. N.C. 2012) (“Hickory Printing”). This Court would not differ with the Hickory Printing result that is most relevant here (i.e., that the filing of a UCC-3 by the secured lender’s employee was authorized, and thus that it terminated the bank’s security interest in debtor collateral) since the Hickory Printing court considered UCC §§ 9-509(d), 9-510(a), and 9-513(d) as part of its analysis; the UCC-3 was filed by an employee of the secured creditor itself; and the secured creditor admitted that the UCC-3 filing was authorized. See 479 B.R. at 396-97 (bank’s employee “filed hundreds of termination statements, followed her normal (and apparently approved) procedures when filing the Termination Statement, and intended to terminate the Original Financing Statement”; “by the summary judgment hearing, the Bank was willing to concede that, while it was a mistake, the Termination Statement was authorized”). However, the Court cannot concur with Hickory Printing’s endorsement of Roswell’s “notice filing” analysis, see id. at 398, and its endorsement of Roswell’s statements as to burdens on the part of secured creditors to maintain their perfected liens, see id. at 404, for the reasons stated above. Nor can the Court agree with the overly broad language in Hickory Printing based on Kitchin Equipment, Pacific Trencher, York Chemical, and Silvernail.

In cases like Hickory Printing (but unlike the one here) where the UCC-3 is filed by the secured party itself; and not by a debtor or other third party (and thus where authorization is not at issue), pre-2001 cases may still have vitality. But they do not support the “notice filing” conclusions the Roswell court reached, and the Hickory Printing court endorsed.
Then, the *Roswell* court believed, erroneously in this Court’s view, that notice filing applies only to UCC-1s. Rejecting the JMB Lenders’ contentions (based on the UCC’s Official Comments and *Credit Bancorp*), that because the UCC had adopted notice filing, the Roswell Lenders were required to further investigate the filing of the UCC-3, the *Roswell* court stated:

The problem with JMB's argument is that *Credit Bancorp* and the Official Comments refer only to “financing statements,” and not to termination statements. 201

But the Court believes the *Roswell* conclusion that flowed from that to be incorrect. As noted above,202 a “termination statement” is one kind of a “financing statement.” The term “financing statement,” as defined in UCC § 9-102(39), includes not just an “initial financing statement”203 (which may be what the *Roswell* court had in mind), but also “any filed record relating to the initial financing statement.”

Finally, if there were a duty on the part of secured lenders to monitor their UCC filings to protect them from improper termination, one must ask what would a secured lender do if it discovered anything? By then, under the *Roswell* rationale, termination of the secured lender’s security interest—which by *Roswell*’s reasoning would have taken place even if unauthorized—would already have transpired. 204

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202 See page 28 & n.72 above.

203 Emphasis added.

204 The *Roswell* court seemed to believe that a provision of the UCC imposing civil liability for unauthorized filings, see UCC § 9-625, Fla. Stat. § 679.625, would provide a satisfactory remedy for unauthorized termination. See 2010 U.S. Dist. LEXIS 90695, at *22, 2010 WL 3452378, at *7. This is in substance a policy view rather than an element of statutory interpretation or application, but to the extent it is relevant, the Court is reluctant to agree with it. More than a few of the disputes in federal district courts and the commercial divisions of state courts, and a huge number of the disputes in bankruptcy courts, are disputes between creditors jousting for priority. Each of *Roswell*, *Toobro*, *Negus-Sons* and this case is a good example. In many cases, the debtor or other unauthorized filer would be unable to make the secured lender whole for the resulting damages if an unauthorized filing were deemed to be effective, leaving the secured lender without an effective remedy. Each of *Roswell*, *Negus-Sons* and this case is a good example of that as well.
The concerns this Court voiced with respect to Roswell’s second rationale were shared in Toobro. In relevant part, in the context of a New York CPLR 3211 motion to dismiss, Toobro too involved a need to determine the relative priority of two competing secured lenders, there American Equities Group Inc. (referred to in the decision as “AEG,” but referred to here, for greater clarity, as “American Equities”) and Signature Bank—each of which had extended credit to Ahava Diary Products Corp. (“Ahava Dairy”), initially in 1996 (under a secured factoring agreement) in the case of American Equities, and in 2005 in the case of Signature Bank. Each lender had duly filed UCC-1s. But in between those two dates, in 2002, an “unknown party,” allegedly without authorization and knowledge of American Equities, had filed UCC-3s purporting to terminate the first lender American Equities’ liens. The Toobro court was required to determine the lenders’ respective priorities.

The Toobro court did so by reference to UCC §§ 9-509(d) and 9-510. It ruled, based on the allegation that “AEG as the secured party did not authorize the filing of the termination statements,” that “the termination statements … were ineffective under Section 9-510.” Thus the financing statements to which they related remained in effect.

The Toobro court then addressed Roswell, in a lengthy footnote, disagreeing with Roswell for much the same reasons this Court has done so. The Toobro court noted that the cases

Roswell cited in support of its analysis were interpreting earlier versions of Article 9. It also differed with Roswell’s “notice filing” analysis, for the same reasons this Court does. It then closed this element of its discussion by saying that for these reasons, it “declines to follow” the Roswell analysis.

For these reasons, the Court is unable to agree that there is a general principle of law that “UCC Filings that Mistakenly Terminate a Security Interest Are Legally Effective.” The question is rather whether they have been authorized. That issue must be addressed in the manner this Court addressed it above. For the reasons there set forth, the requisite authority was lacking.

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213 Id.

214 The Toobro court stated, in this connection:

In Roswell Capital, the SDNY court considered but distinguished the “notice filing” comment of UCC § 9–502 stating that it “refer[s] only to financing statements,’ and not to termination statements.” See 2010 LEXIS 90695 *24, n. 14. This distinction is inconsistent with the definitions of “financing statement” and “termination statement” under Article 9. See UCC §§ 9–102(39), (79). … Since a termination statement is a record “relating to the initial financing statement,” it is part of a “financing statement” as this term is defined by the UCC. See UCC § 9–102(39). Consequently, the “notice filing” comment of UCC § 9–502 applies to termination statements.

Id.

215 Id. Toobro’s holding was approved in a UCC treatise. See Hawkland § 9-510:2 at n.1.50 (“court correctly held that termination statement filed by a person not authorized to do so by secured party was ineffective to terminate financing statement even though it might mislead searchers; court declined to follow troubling dictum to the contrary in [Roswell]”).

216 The Court need not lengthen this decision further by specifically addressing any of the other contentions raised by the Committee on these motions. The Court has canvassed them and satisfied itself that no material points other than those it has specifically addressed were raised and require discussion. To the extent those points were not expressly addressed in this decision, they must be rejected.

Similarly, in light of its conclusions, the Court does not need to address JPMorgan’s constructive trust argument, or any of the other bases upon which JPMorgan asserted that it should prevail.
IV.

Certification to Circuit

On rare occasions, a direct appeal from a bankruptcy court to the court of appeals makes sense. In the Court’s view, this is one of those occasions where the Circuit might want to consider that as an option.

In that connection, 28 U.S.C. § 158 grants a court of appeals jurisdiction to hear appeals from final judgments of the bankruptcy court under certain circumstances. First the bankruptcy court (acting on its own motion or on the request of a party to the judgment), or all the appellants and appellees acting jointly, must certify that—

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken…. 217

Then the court of appeals decides whether it wishes to hear the direct appeal. 218

In this case, the Court considers each of the three bases for a certification to be present.

With respect to the first prong, the decision here is one of law based on undisputed facts, presented to the Court on cross motions for summary judgment, as to which there is no

218 Id.; see also In re General Motors Corp., 409 B.R. 24, 27 (Bankr. S.D.N.Y. 2009) (the “Sale Appeal Certification Decision”) (“The Circuit does not have to take the appeal, however, and can decide whether or not to do so in the exercise of its discretion.”).
controlling decision by the Second Circuit (or any Circuit), the Delaware Supreme Court, the
New York Court of Appeals, or the highest court of any other state. Though the size of the
amount in controversy here, and its effect upon thousands of GM creditors, may be regarded as
personal to them, the underlying legal issues are important, as are their potential effect, going
forward, on secured lending.

With respect to the second prong, available authorities, while helpful to a point, came
nowhere close to addressing a factual situation of this nature. The issues were complicated by
broad language in the caselaw, much of which, in this Court’s view, should no longer be
regarded as having validity in cases involving UCC filings by an entity other than the secured
party. Though the Court believes that the authorities may be harmonized, in part, and many may
be distinguished on their facts, broad language in many of those cases required resolution of
conflicting decisions. The Court has declined to follow the reasoning of the second rationale of
Roswell, which, if it were regarded as anything other than dictum, would result in a conflict
between lower courts in the Second Circuit.

With respect to the third prong, the Court believes that an immediate appeal from the
judgment in this adversary proceeding is likely to advance the progress of the GM case. The
outcome of this controversy may have a material impact on unsecured creditor distributions, and
will obviously have a material effect on secured creditor distributions. A second level of appeal
(which would otherwise be likely, given the stakes of the controversy) would have a foreseeable
adverse effect on the timing and finality of creditor distributions.219

219 In one of its earlier decisions in the GM case, see the Sale Appeal Certification Decision, 409 B.R. at 27-
29, this Court denied certification to the Circuit of its order approving GM’s section 363 sale after this
Court’s decision in In re General Motors Corp., 407 B.R. 463 (Bankr. S.D.N.Y. 2009) (the “363 Sale
Decision”), stay pending appeal denied, 2009 WL 2033079 (S.D.N.Y. 2009) (Kaplan, J.), appeal dismissed
appeal dismissed, No. 10–4882–bk (2d Cir. July 28, 2011)—even though, as the subsequent history of the
363 Sale Decision indicates, it ultimately did go up to the Circuit.
Conclusion

The Court concludes, based on the undisputed facts and under the applicable law, that JPMorgan did not authorize the termination of the UCC-1 with respect to the Term Loan, and that anything JPMorgan said or did in connection with the payoff of the Synthetic Lease was not effective in bringing the UCC-1 securing the Term Loan to come to an end.

JPMorgan’s motion for summary judgment is granted. The Committee’s motion for partial summary judgment is denied. Pursuant to Fed. R. Civ. P. 58 (made applicable to this adversary proceeding by Fed. R. Bankr. P. 7058), the Court is today entering a separate standalone judgment consistent with its first ruling, denying the relief sought by the Committee in its complaint. The Court is also today entering an order with respect to the underlying cross-motions, which includes a decretal paragraph, consistent with the Court’s second ruling, denying the Committee’s motion for partial summary judgment.

The Court is certifying its judgment for direct appeal to the Second Circuit.

Dated: New York, New York
March 1, 2013

/s/Robert E. Gerber
United States Bankruptcy Judge

This Court did so because while GM’s well-being and that of its suppliers, as a business matter, had substantial public importance, the legal issues were not particularly debatable. The 363 Sale Decision was a straightforward application of controlling authority in the Second Circuit (if not also elsewhere)—including five published decisions of the Second Circuit on the 363 Sale issue, and the Circuit’s oral affirmance of Chrysler (on a direct appeal) on the successor liability issue. See Sale Appeal Certification Decision, 409 B.R. at 28-29; 363 Sale Decision, 407 B.R. at 489 & n.39.

Here, by contrast, the Court had much less in the way of available caselaw—and none from the Circuit—with which to work. Also, though the Court is mindful of its earlier statement in the Sale Appeal Certification Decision that appellate courts “review judgments, not statements in opinions,” 409 B.R. at 28, and its view that this should be taken into account when deciding whether the necessary conflict exists to warrant certification, here both sides, and the Court, were required to work with statements in the conflicting authority for lack of any better alternative.
Appendix A
UCC FINANCING STATEMENT AMENDMENT

FOLLOW INSTRUCTIONS FRONT AND BACK CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER (optional)

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

Bryan Kluever
CT
208 South LaSalle Street
Suite 814
Chicago, IL 60604

THE ABOVE SPACES FOR FILING OFFICE USE ONLY

1. INITIAL FINANCING STATEMENT FILE # 6416084 on 11/30/06

2. TERMINATION: Efforts to the statement identified above is terminate(ing) as to security interest(s) of the Secured Party(s) authorizing the Termination Statement.

3. CONTRIBUTION: Efforts to the statement identified above are to security interest(s) of the Secured Party authorizing the Contribution Statement is continued for the additional period provided for applicable law.

4. AMENDMENT (Put or check): Give name of assignee in Item 7a or 7b and address of assignee in Item 7e and also give name of assignee in Item 8.

5. AMENDMENT (PARTY INFORMATION): This Amendment affects [] Secured Party [ ] Debtor. Check only one of these two boxes.

   [ ] Secured Party: Give second name
   [ ] Debtor: Give second name

Change to following: Please refer to previous instructions in Item 7 for details.

6. CURRENT RECORD INFORMATION:

   a. ORGANIZATION NAME
      GENERAL MOTORS CORPORATION
   b. INDIVIDUAL'S LAST NAME

7. CHANGED (NEW OR ADDED) INFORMATION:

   a. ORGANIZATION NAME
   b. INDIVIDUAL'S LAST NAME
   c. MAILING ADDRESS

8. AMENDMENT (COLLATERAL CHANGES): check all that are

    [ ] Description of collateral assigned or given to [ ] Description of collateral not described or assigned

9. NAME OF SECURED PARTY OR RECORD AUTHORIZING THIS AMENDMENT (name of assignee, if this is an Assignment; name of Secured Party, if this is a Termination authorized by a Debtor which takes possession of the Collateral, or Secured Party, if this is a Termination authorized by a Debtor, check here and give name of Debtor or Secured Party)

   a. ORGANIZATION NAME
      JPMORGAN CHASE BANK, AS ADMINISTRATIVE AGENT
   b. INDIVIDUAL'S LAST NAME

10. OPTIONAL FILING REFERENCE DATA

    File with DE SOS [Mat. No. 00652290] [General-13] [Doc. No. 1459278] 6X-Hel18467S-5

FILING OFFICE COPY -- UCC FINANCING STATEMENT AMENDMENT (FORM UCC) (REV. 05/2009)

EXHIBIT NO. 5

Kelly A. Sitzes

CONFIDENTIAL

MB006384
of this Section and any written consent to such assignment required by paragraph (b) of this Section, the Agent shall accept such Assignment and Acceptance and record the information contained therein in the Register.

(c) (i) Any Lender may, without the consent of the Borrower or the Agent, sell participations to one or more banks or other entities (a “Participant”) in all or a portion of such Lender’s rights and obligations under this Agreement (including all or a portion of its Commitments and the Loans); provided that (A) such Lender’s obligations under this Agreement shall remain unchanged, (B) such Lender shall remain solely responsible to the other parties hereto for the performance of such obligations, (C) the Borrower, the Agent and the other Lenders shall continue to deal solely and directly with such Lender in connection with such Lender’s rights and obligations under this Agreement and (D) such Lender shall have given prior written notice to the Borrower of the identity of such Participant. Any agreement pursuant to which a Lender sells such a participation shall provide that such Lender shall retain the sole right to enforce this Agreement and to approve any amendment, modification or waiver of any provision of this Agreement; provided that such agreement may provide that such Lender will not, without the consent of the Participant, agree to any amendment, modification or waiver that (I) requires the consent of each Lender pursuant to the proviso to the second sentence of Section 10.01 and (II) directly affects such Participant. Subject to paragraph (c)(ii) of this Section, the Borrower agrees that each Participant shall be entitled to the benefits of Sections 2.13, 2.14, 2.15, 2.16 and 10.05 to the same extent as if it were a Lender and had acquired its interest by assignment pursuant to paragraph (b) of this Section.

(ii) A Participant shall not be entitled to receive any greater payment under Sections 2.13, 2.14, 2.15, 2.16 or 10.05 than the applicable Lender would have been entitled to receive with respect to the participation sold to such Participant, unless the sale of the participation to such Participant is made with the Borrower’s prior written consent. Any Participant that is a Non-US Lender shall not be entitled to the benefits of Section 2.15 unless such Participant complies with Section 2.15(b).

d) Each Lender shall maintain at its office a copy of each participation agreement to which it is a party and a register for the recordation of the names and addresses of the Participants under such participation agreement and the Commitments of, the principal amount of, and any interest on, the Loans owing to and paid to each Participant pursuant to the terms hereof from time to time.

e) Nothing herein shall prohibit any Lender from pledging or assigning all or any portion of its Loans to any Federal Reserve Bank in accordance with applicable law or to any holder of, or trustee for the benefit of the holders of, such Lender’s securities; provided that no such pledge or assignment shall release such Lender from any of its obligations hereunder or substitute any such pledgee or assignee for such Lender as a party hereto. In order to facilitate any such pledge or assignment, the Borrower hereby agrees that, upon request of any Lender at any time and from time to time, the Borrower shall provide to such Lender, at the Borrower’s own expense, a promissory note, substantially in the form of Exhibit B, evidencing the Loans owing to such Lender.
(f) On or prior to the effective date of an assignment, the assigning Lender shall surrender any outstanding Notes held by it all or a portion of which are being assigned, and the Borrower shall, upon the request to the Agent made at the time of such assignment by the assigning Lender or the Assignee, as applicable, execute and deliver to the Agent (in exchange for the outstanding Notes of the assigning Lender) a new Note to the order of such Assignee in an amount equal to the amount of such Assignee's Loan owing to it. Any such new Notes shall be dated the Funding Date and shall otherwise be in the form of the Note replaced thereby. Any Notes surrendered by the assigning Lender shall be returned by the Agent to the Borrower marked "canceled".

(g) Notwithstanding the foregoing, any Conduit Lender may assign any or all of the Loans it may have funded hereunder to its designating Lender without the consent of the Borrower or the Agent and without regard to the limitations set forth in paragraph (b) of this Section (other than paragraph (b)(ii)(D)); provided, that no Conduit Lender shall be entitled to receive any greater amount pursuant to Sections 2.13, 2.14, 2.15, 2.16 or 10.05 than the designating Lender would have been entitled to receive in respect of the extensions of credit made by such Conduit Lender. In addition, any Conduit Lender may disclose, on a confidential basis, the existence and terms of the Loans it has funded to any rating agency, commercial paper dealer or provider of any surety, guarantee or credit or liquidity enhancements to such Conduit Lender; provided that no such Person shall receive any confidential financial information with respect to the Borrower unless such Person has complied with paragraph (h) of this Section as if such Person were a Transferee. The Borrower, each Lender and the Agent hereby confirms that it will not institute against a Conduit Lender or join any other Person in instituting against a Conduit Lender any bankruptcy, reorganization, arrangement, insolvency or liquidation proceeding under any state bankruptcy or similar law, for one year and one day after the payment in full of the latest maturing commercial paper note issued by such Conduit Lender; provided, however, that each Lender designating any Conduit Lender hereby agrees to indemnify, save and hold harmless each other party hereto for any loss, cost, damage or expense (including legal expenses) arising out of its designation of a Conduit Lender, including the inability to institute such a proceeding against such Conduit Lender during such period of forbearance.

(h) The Borrower authorizes each Lender to disclose to any prospective Participant, any Participant or any prospective Assignee (each, a “Transferee”) any and all financial information in such Lender's possession concerning the Borrower and its Affiliates which has been delivered to such Lender by or on behalf of the Borrower pursuant to this Agreement or which has been delivered to all Lenders by or on behalf of the Borrower in connection with their respective credit evaluations of the Borrower and its Affiliates prior to becoming a party to this Agreement; provided that (i) such Transferee has executed and delivered to the Borrower a written confidentiality agreement substantially in the form of that contained in the Confidential Information Memorandum, dated November 2006 and (ii) in the case of any information other than that contained in the Confidential Information Memorandum, dated November 2006, the Borrower has been informed of the identity of such Transferee and has consented (such consent not to be unreasonably withheld) to the disclosure of such information thereto. Nothing contained in this paragraph (h) shall be deemed to prohibit the delivery to any Transferee of any financial information which is otherwise publicly available.
(i) Notwithstanding anything herein to the contrary, any Person subject to
confidentiality obligations hereunder or under any other related document (and any employee,
representative or other agent of such Person) may disclose to any and all Persons, without
limitation of any kind, such Person’s US Federal income tax treatment and the US Federal
income tax structure of the transactions contemplated by this Agreement relating to such Person
and all materials of any kind (including opinions or other tax analyses) that are provided to it
relating to such tax treatment and tax structure. However, no such Person shall disclose any
information relating to such tax treatment or tax structure to the extent nondisclosure is
reasonably necessary in order to comply with applicable securities laws.

SECTION 10.07. Adjustments. If any Lender (a “benefited Lender”) shall at any
time receive any payment of all or part of its Loans or interest thereon, or receive any collateral
in respect thereof (whether voluntarily or involuntarily, by set-off or otherwise), such that it has
received aggregate payments or collateral on account of its extensions of credit in a greater
proportion than any such payment to or collateral received by any other Lender, if any, in respect
of such other Lender’s extensions of credit which are then due and payable, or interest thereon,
such benefited Lender shall purchase for cash from the other Lenders a participating interest in
such portion of each such other Lender’s extensions of credit, or shall provide such other
Lenders with the benefits of any such collateral, or the proceeds thereof, as shall be necessary to
cause such benefited Lender to share the excess payment or benefits of such collateral or
proceeds ratably with each of the Lenders; provided, however, that if all or any portion of such
excess payment or benefits is thereafter recovered from such benefited Lender, such purchase
shall be rescinded, and the purchase price and benefits returned, to the extent of such recovery,
but without interest, unless the Lender from which such payment is recovered is required to pay
interest thereon, in which case each Lender returning funds to such Lender shall pay its pro rata
share of such interest.

SECTION 10.08. Counterparts. This Agreement may be executed by one or
more of the parties to this Agreement on any number of separate counterparts (including by
telecopy or electronic image scan), and all of said counterparts taken together shall be deemed to
constitute one and the same instrument. A set of the copies of this Agreement signed by all the
parties shall be lodged with the Borrower and the Agent.

SECTION 10.09. Severability. Any provision of this Agreement which is
prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the
extent of such prohibition or unenforceability without invalidating the remaining provisions
hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or
render unenforceable such provision in any other jurisdiction.

SECTION 10.10. GOVERNING LAW. THIS AGREEMENT AND THE
RIGHTS AND OBLIGATIONS OF THE PARTIES UNDER THIS AGREEMENT
SHALL BE GOVERNED BY, AND CONSTRUED AND INTERPRETED IN
ACCORDANCE WITH, THE LAW OF THE STATE OF NEW YORK.

SECTION 10.11. Jurisdiction; Consent to Service of Process. (a) Each Loan
Party hereby irrevocably and unconditionally submits, for itself and its property, to the
nonexclusive jurisdiction of any New York State court or Federal court of the United States of
America sitting in New York City, and any appellate court from any thereof, in any action or proceeding arising out of or relating to this Agreement, or for recognition or enforcement of any judgment, and each of the parties hereto hereby irrevocably and unconditionally agrees that all claims in respect of any such action or proceeding may be heard and determined in such New York State court or, to the extent permitted by law, in such Federal court. Each of the parties hereto agrees that a final judgment in any such action or proceeding shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law. Nothing in this Agreement shall affect any right that any Agent or any Lender may otherwise have to bring any action or proceeding relating to this Agreement against any Loan Party or its properties in any jurisdiction.

(b) Each Loan Party hereby irrevocably and unconditionally waives, to the fullest extent it may legally and effectively do so, any objection which it may now or hereafter have to the laying of venue of any suit, action or proceeding arising out of or relating to this Agreement in any New York State or Federal court. Each of the parties hereto hereby irrevocably waives, to the fullest extent permitted by law, the defense of an inconvenient forum to the maintenance of such action or proceeding in any such court.

c) Each Loan Party irrevocably consents to service of process in the manner provided for notices in Section 10.02. Nothing in this Agreement will affect the right of any party to this Agreement to serve process in any other manner permitted by law.

SECTION 10.12. Releases of Collateral. Upon any Permitted Transfer of any Collateral (other than a Permitted Transfer to a Subsidiary that is to become a Guarantor as provided in Section 10.15), or upon the effectiveness of any written consent to the release of the security interest granted under any Loan Document in any Collateral pursuant to Section 10.01 of this Agreement, the security interest in such Collateral shall be automatically released. In connection with any termination or release pursuant to this Section, the Agent shall execute and deliver to any Loan Party, at such Loan Party’s expense, all documents that such Loan Party shall reasonably request to evidence such termination or release upon receipt by the Agent of a certificate of a Financial Officer of the Borrower (i) certifying that such release is in connection with a Permitted Transfer and (ii) either (A) setting forth the total net book value (as determined as of the end of the most recent fiscal quarter of the Borrower for which a Collateral Value Certificate or Summary Collateral Value Certificate has been delivered hereunder) of all Dispositions of Collateral with an aggregate net book value of greater than $100,000,000 individually (whether in a single transaction or a series of related transactions) since such date or (B) certifying that the aggregate net book value (as determined as of the end of the most recent fiscal quarter of the Borrower for which a Collateral Value Certificate or Summary Collateral Value Certificate has been delivered hereunder) of all Dispositions of Collateral since such date is equal to or less than $500,000,000. Any execution and delivery of documents pursuant to this Section shall be without recourse to or warranty by the Agent.

SECTION 10.13. USA Patriot Act. Each Lender hereby notifies the Borrower that pursuant to the requirements of the USA Patriot Act (Title III of Pub. L. 107-56 (signed into law October 26, 2001)) (the “Act”), it is required to obtain, verify and record information that identifies the Borrower, which information includes the name and address of the Borrower and

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other information that will allow such Lender to identify the Borrower in accordance with the Act.

SECTION 10.14. WAIVER OF JURY TRIAL. EACH OF THE PARTIES HERETO HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES TRIAL BY JURY IN ANY LEGAL ACTION OR PROCEEDING RELATING TO THIS AGREEMENT AND FOR ANY COUNTERCLAIM.

SECTION 10.15. Additional Guarantors. Upon execution and delivery by the Agent and any direct or indirect wholly-owned domestic Subsidiary of the Borrower of a joinder agreement in form and substance reasonably acceptable to the Agent for the purpose of causing such Subsidiary to become a Guarantor hereunder and a Grantor under and as defined in the Collateral Agreement, such Subsidiary shall become a Guarantor hereunder with the same force and effect as if originally named as a Guarantor herein. The execution and delivery of any such instrument shall not require the consent of any other Loan Party or any Lender hereunder. The rights and obligations of each Loan Party hereunder shall remain in full force and effect notwithstanding the addition of any new Guarantor as a party to this Agreement.

Remainder of page left blank intentionally; signature pages to follow
IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed and delivered by their proper and duly authorized officers as of the day and year first above written.

GENERAL MOTORS CORPORATION, as the Borrower,

by

Name: Walter E. Borst
Title: Treasurer

SATURN CORPORATION, as a Guarantor,

by

Name: 
Title: 

JPMORGAN CHASE BANK, N.A., as Agent and a Lender,

by

Name: 
Title: 

[SIGNATURE PAGE TO GENERAL MOTORS TERM LOAN AGREEMENT]
IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed and delivered by their proper and duly authorized officers as of the day and year first above written.

GENERAL MOTORS CORPORATION, as the Borrower,
by
Name: [Signature]
Title: [Title]

SATURN CORPORATION, as a Guarantor,
by
Name: [Signature]
Title: General Manager, Vice President

JPMORGAN CHASE BANK, N.A., as Agent and a Lender,
by
Name: [Signature]
Title: [Title]
IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed and delivered by their proper and duly authorized officers as of the day and year first above written.

GENERAL MOTORS CORPORATION, as the Borrower,

by

Name: ________________________________
Title: ________________________________

SATURN CORPORATION, as a Guarantor,

by

Name: ________________________________
Title: ________________________________

JPMORGAN CHASE BANK, N.A., as Agent and a Lender,

by

Name: RICHARD W. DUKER
Title: MANAGING DIRECTOR
CREDIT SUISSE, CAYMAN ISLANDS BRANCH

as a Lender,

by

Name: JOHN D. TORONTO
Title: DIRECTOR

PRAKASH MOHAN
ASSOCIATE

[Signature Page to General Motors Term Loan Agreement]
BARCLAYS BANK PLC

as a Lender,

by

[Signature]

Name: David Barton
Title: Associate Director

[SIGNATURE PAGE TO GENERAL MOTORS TERM LOAN AGREEMENT]
THE BANK OF NEW YORK

as Lender,

by

Name: KEVIN T. CAVANAGH
Title: Vice President

[Signature Page to General Motors Term Loan Agreement]
National City Bank

as a Lender,

by

Name: Kenneth M. Blackwell
Title: Vice President

[Signature Page to General Motors Term Loan Agreement]