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Case Number 325,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF MOTORS LIQUIDATION COMPANY,	:	
Plaintiff-Appellant,	:	No. 325, 2014
v.	:	Certification of Question of Law from the United States Court of Appeals for the Second Circuit
JP MORGAN CHASE BANK, N.A., individually and as Administrative Agent for various lenders party to the Term Loan Agreement described herein,	:	C.A. No. 13-2187-bk
Defendant-Appellee.	:	

PLAINTIFF-APPELLANT'S OPENING BRIEF

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Dated: July 21, 2014

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NATURE OF THE PROCEEDING

This action arises from an adversary proceeding commenced by Plaintiff-Appellant in connection with the jointly administered bankruptcy cases filed in June 2009 by General Motors Corporation ("GM") and certain of its subsidiaries (collectively, the "Debtors") in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). On March 1, 2013, the Bankruptcy Court entered a judgment holding that a UCC-3 termination statement, although reviewed and approved by the secured party prior to filing, was not authorized, and was therefore ineffective to terminate the perfection of a security interest in the Debtors' property. On June 5, 2013, the United States Court of Appeals for the Second Circuit (the "Second Circuit") granted Plaintiff-Appellant's petition for direct appeal to that court pursuant to 28 U.S.C. § 158(d)(2). On June 17, 2014, the Second Circuit issued an opinion certifying to this Court the following question of statutory interpretation:[1]

> 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] The opinion of the Second Circuit Court of Appeals regarding its certified question, dated June 17, 2014, is attached hereto as Exhibit A.

After this Court answers this question of Delaware statutory law, the Second Circuit will address the separate question of whether, under applicable principles of agency law and the facts of this case, the secured lender here granted the relevant authority. This Court accepted certification on June 20, 2014.

SUMMARY OF THE ARGUMENT

1. The applicable provisions of Article 9 of the Delaware Uniform Commercial Code (the "UCC") plainly require that the act of filing a termination statement – and not the legal consequences that flow from that act of filing – be authorized by a secured party in order for the termination statement to be effective. First, Section 9-513(d) of the UCC explains that "upon *the filing* of a termination statement with the filing office" in accordance with Sections 9-509 and 9-510, "the financing statement to which the termination statement relates ceases to be effective." (emphasis added). Section 9-510(a) of the UCC provides that "a *filed* record" is effective only if it was "*filed* by a person that may *file* it under Section 9-509." (emphasis added). Finally, Section 9-509(d)(1) provides that "a person may *file*" a termination statement only if "the secured party of record authorizes the *filing* . . . ." (emphasis added).

The provisions of the Article 9 statute at issue in this case are unambiguous. Under well-established principles of statutory construction, if a statute is unambiguous, the plain meaning of the statutory language controls. When the words of the relevant provisions of Article 9 are construed in accordance with their common and ordinary meaning, it is clear that the act of filing a termination statement – and nothing more – must be authorized in order for the termination statement to be effective. There is nothing in the plain language of Article 9 that

even remotely suggests that the secured party's intent to bring about the legal consequences of the filed record has any bearing at all on its effectiveness.

2. There is a strong presumption that alterations to the language of a statute do not effect a substantive change, unless the new statutory language provides, in clear and unambiguous terms, that such a change is intended. Prior to 2001, Article 9 of the UCC required that UCC-3 termination statements be authorized, as well as signed, by the secured party of record. In order to facilitate the electronic filing of UCC records, the 2001 amendments to Article 9 eliminated the requirement that UCC records, including termination statements, be signed. There is, however, nothing in the 2001 revisions to Article 9 – either in the plain language of the statute, the advisory committee comments, or the legislative history – that suggests that the drafters intended (a) to cause a substantive change to the notice filing system of the UCC, or to the requirement that, in order to be effective, the filing of UCC-3 termination statements must be authorized, or (b) to abrogate the series of judicial decisions holding that termination statements authorized by secured parties, even if they contain errors that result in unintended legal consequences, are nonetheless legally effective.

3. Construing Article 9 to require that the secured party review and approve for filing a UCC-3 termination statement is consistent with the principles of clarity and certainty of notice that underlie the perfection laws. Conversely,

adding to these Article 9 provisions the unstated requirement that the secured party must intend the legal consequences of a filed record would fundamentally undermine the reliability of the UCC notice filing system. If the secured party's intent and state of mind must be taken into account, then creditors searching the public records would not only have to confirm that a termination statement was filed by a secured party that approved the filing of the UCC-3, they would also be burdened with the additional task of ensuring that the secured party was fully cognizant of the legal consequences of its actions. Similarly, if the intent of the secured party to cause a particular legal result is necessary for the filing of a termination statement to be "authorized" within the meaning of UCC § 9-509(d)(1) and therefore effective, then secured parties would be insulated from the consequences of the mistakes or errors contained in their UCC records, since by definition, no one ever intends to make a mistake. Such a result would be inconsistent with settled law.

STATEMENT OF FACTS

1. The Synthetic Lease

In October of 2001, GM entered into a "synthetic lease" financing transaction that provided it with approximately $300 million in financing for the acquisition of, and construction on, several parcels of real property. Opinion of the Second Circuit Court of Appeals on Certified Question dated June 17, 2014 ("2d Cir. Op.") 2. JPMorgan Chase Bank, N.A. ("JPMorgan") was the administrative agent under the synthetic lease transaction. *Id*. at 3.

GM's obligation to repay the amounts advanced in the synthetic lease financing transaction was secured by liens on various parcels of real property. *Id*. at 2-3. The synthetic lease lenders' security interests were perfected by the filing of UCC-1 financing statements in the various counties where the real property collateral was located and with the Delaware Secretary of State. *Id*. at 3.

2. The Term Loan

In November of 2006, GM and its subsidiary, Saturn Corporation, entered into a secured term loan facility with a syndicate of lenders. *Id*. Pursuant to the term loan, the term loan lenders advanced approximately $1.5 billion that was secured by a security interest in all of GM's equipment and fixtures at forty-two GM and Saturn facilities located throughout the United States. *Id*.

JPMorgan also served as administrative agent and as a lender under the term loan facility. *Id*. In its capacity as administrative agent, JPMorgan caused the

filing of numerous UCC-1 financing statements to perfect the lenders' security interests in the term loan collateral, including the filing of a main financing statement with the Delaware Secretary of State (UCC-1 financing statement, filing #64168084) (the "Main Term Loan UCC-1"). *Id.* The Main Term Loan UCC-1 identifies JPMorgan, in its capacity as administrative agent, as the secured party of record. *Id*. at 3.

3. The Payoff Of The Synthetic Lease

In October 2008, with the synthetic lease scheduled to mature at the end of the month, GM and JPMorgan were working together to close a transaction for the payoff of the synthetic lease financing. *Id*. at 4. GM was represented by Mayer Brown in connection with the payoff transaction, and JPMorgan was represented by Simpson Thacher. *Id*. at 4 & 6.

Mayer Brown prepared various documents in connection with the synthetic lease payoff transaction, including a closing checklist, an escrow letter, and a set of draft UCC-3 termination statements.[2] *Id*. at 4.

a. The Closing Checklist

The closing checklist included a list of UCC-1 financing statements for which termination statements would be filed in connection with the payoff of the

[2] Among other documents, Mayer Brown also prepared and circulated a draft of a termination agreement. 2d Cir. Op. 6. That agreement, among other things, principally provided that GM was exercising its option to repay the amounts owing under the synthetic lease, and that JPMorgan and the synthetic lease lenders were to release all of their related liens against GM's assets. *Id*.

synthetic lease. *Id*. at 5. In order to determine the financing statements for which termination statements should be prepared and identified on the closing checklist, Mayer Brown performed a search for UCC-1 financing statements recorded against GM in Delaware. *Id*.

As a result of the search, Mayer Brown included in the closing checklist, under the subheading "Termination of UCCs," three UCC-1 financing statements. *Id*. The first two were identified as "[b]lanket-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)." *Id*. The third financing statement listed was the Main Term Loan UCC-1, identified as "financing statement as to equipment, fixtures and related collateral located at certain U.S. manufacturing facilities (file number 6416808 4, file date 11/30/06)." *Id*. at 5-6.

On October 15, 2008, Mayer Brown sent a draft of the closing checklist to JPMorgan's counsel, Simpson Thacher, and sent a substantially identical draft to Simpson Thacher later that day. *Id*. at 6. Everyone involved – GM, JPMorgan, Mayer Brown and Simpson Thacher – mistakenly believed that the Main Term Loan UCC-1 related to the synthetic lease transaction. *Id*.

b. The UCC-3 Termination Statements

On October 15, 2008, Mayer Brown also sent drafts of UCC-3 termination statements, including a draft of a UCC-3 for the termination of the Main Term Loan UCC-1, to JPMorgan's counsel, Simpson Thacher. *Id*. at 7.

Two days later, on October 17, 2008, Simpson Thacher replied to Mayer Brown, stating 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."

Id.

c. The Escrow Letter And Closing Of The Payoff Transaction

On October 24, 2008, Mayer Brown sent a draft escrow letter to Simpson Thacher. *Id*. at 9. The escrow letter appointed the title company LandAmerica to serve as escrow agent, recording agent, and title insurance issuer for the synthetic lease payoff transaction. *Id*. at 8. Pursuant to the escrow letter, LandAmerica was to receive, among other documents, final versions of UCC-3 termination statements for three UCC-1 financing statements – including the Main Term Loan UCC-1 – that were identified by file number. *Id*. Upon the closing of the payoff transaction, LandAmerica was to release, among other documents, copies of the

three UCC-3 termination statements to Mayer Brown, who would then file them. *Id*. at 8-9.

In its October 24, 2008 transmittal email, Mayer Brown asked if Simpson Thacher had any comments to the draft escrow letter. *Id*. at 9. In a subsequent email sent on October 27, 2008, Mayer Brown explained that it would send a set of documents to JPMorgan and the other lenders for execution, and again asked if Simpson Thacher had any comments on the draft escrow letter. *Id*. Simpson Thacher replied that "it was fine." *Id*.

On October 30, 2008, the synthetic lease payoff transaction closed. *Id*. In accordance with the escrow letter, LandAmerica released copies of the UCC-3 termination statements to Mayer Brown. *Id*. Later that day, Mayer Brown caused the UCC-3's, including the UCC-3 termination statement for the Main Term Loan UCC-1, to be filed with the Delaware Secretary of State. *Id*.

4. The GM Bankruptcy Cases And The Adversary Proceeding

In June 2009, GM and certain of its affiliated Debtors filed petitions for relief under chapter 11 of the Bankruptcy Code. *Id*. at 10. Thereafter, counsel for JPMorgan informed the official committee of unsecured creditors appointed in the GM bankruptcy cases (the "Committee") that a UCC-3 termination statement relating to the Main Term Loan UCC-1 had been inadvertently filed in October

2008. *Id*. On July 31, 2009, the Committee[3] commenced the underlying adversary proceeding against JPMorgan in the Bankruptcy Court, seeking, among other things, a determination that the filing of the UCC-3 was effective to terminate the Main Term Loan UCC-1, that the security interest in the term loan collateral was unperfected, and that most of the indebtedness under the Term Loan is therefore unsecured.[4] *Id*.

On cross-motions for summary judgment, the Bankruptcy Court concluded that the filing of the UCC-3 termination statement relating to the Main Term Loan UCC-1 was unauthorized because, even though JPMorgan had "arguably consented to the filing," neither JPMorgan nor GM intended the legal consequences of the UCC-3 – namely, the termination of the Main Term Loan UCC-1. *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.*), 486 B.R. 596, 606 (Bankr. S.D.N.Y. 2013); 2d Cir. Op. 10-11. The Bankruptcy Court then certified this case for direct appeal to the Second Circuit, which accepted certification pursuant to 28 U.S.C. § 158(d)(2). 2d Cir. Op. 11.

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[3] In connection with GM's confirmed plan of reorganization, the Motors Liquidation Company Avoidance Action Trust (the "Trust") was established to continue the pursuit of this action on behalf of GM's unsecured creditors. Pursuant to the plan, this action, including the Committee's right to pursue the action, was transferred to the Trust.

[4] Under the Bankruptcy Code's "strong arm" power, 11 U.S.C. § 544, security interests that are unperfected as of the commencement of the case are avoidable by the bankruptcy estate for the benefit of the estate's unsecured creditors.

On June 17, 2014, the Second Circuit issued its opinion, attached hereto as Exhibit A, certifying its question of law to this Court. In its opinion, the Second Circuit explained that it was certifying one of two distinct, yet "closely related," questions:

> First, the question we certify below, is what precisely a secured lender of record must 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? Second, a question we will address upon receipt of the Delaware court's answer: Did 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. at 14-15. The Second Circuit further explained that these "two questions must be taken up separately" and noted that, with respect to the question certified, the determination of what it is that a secured party must authorize "is an issue of statutory interpretation." *Id*. at 15.

Upon receipt of this Court's answer to the first question regarding the interpretation of the Delaware statute, the Second Circuit will address the second question regarding the applicable principles of agency law. *Id*. at 16.

On June 20, 2014, this Court entered an order, attached hereto as Exhibit B, accepting certification.

ARGUMENT

I. DELAWARE'S UCC ARTICLE 9 REQUIRES THAT A SECURED PARTY REVIEW AND APPROVE FOR FILING A UCC-3 TERMINATION STATEMENT, AND NOTHING MORE, TO EFFECTIVELY TERMINATE A PERFECTED SECURITY INTEREST

A. Question Presented

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? *See* 2d Cir. Op. 21.

B. Scope Of Review

As this Court has stated, when addressing certified questions of law, "the normal standards of review do not apply." *Rales v. Blasband*, 634 A.2d 927, 931 (Del. 1993). "Questions certified for resolution by the Court under Supreme Court Rule 41 are determined as a matter of law on the undisputed facts submitted by the certifying court in its Certificate of Questions of Law." *Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1021 (Del. 2001). Furthermore, this Court reviews certified questions "in the context in which they arise." *Chaplake Holdings, LTD. v. Chrysler Corp.*, 766 A.2d 1, 4-5 (Del. 2001) (citations omitted).

The question presented in this matter arises as a question of law certified to this Court by the United States Court of Appeals for the Second Circuit. This Court reviews such a question of law *de novo*. *Doe v. Wilmington Hous. Auth.*, 88 A.3d 654, 661 (Del. 2014); *Lambrecht v. O'Neal*, 3 A.3d 277, 281 (Del. 2010).

C. Merits Of The Argument

1. Article 9 Of The UCC Is Unambiguous, And Requires Authorization Of The Act Of Filing A Termination Statement And Nothing More

The principles of statutory construction under Delaware law are straightforward. "The rules of statutory construction are designed to ascertain and give effect to the intent of the legislators, as expressed in the statute." *Chase Alexa, LLC v. Kent Cnty. Levy Ct.*, 991 A.2d 1148, 1151 (Del. 2010). First, the Court must determine whether the statute is ambiguous. *Id*. If the statute is unambiguous, judicial interpretation is not required, and the plain meaning of the language used in the statute controls. *Ins. Comm'r v. Sun Life Assurance Co. of Can. (U.S.)*, 21 A.3d 15, 20 (Del. 2011); *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999).

A mere disagreement between the parties about the meaning of the statute does not render it ambiguous. *Chase Alexa*, 991 A.2d at 1151. Rather, a statute is ambiguous only if it is reasonably susceptible to more than one interpretation, or "if a literal reading of the statute would lead to an unreasonable or absurd result not

contemplated by the legislature." *Dir. of Revenue v. CNA Holdings, Inc.*, 818 A.2d 953, 957 (Del. 2003). Neither of these circumstances is present here. Accordingly, the statute should not be considered ambiguous.

In construing a statute, "undefined words are given their ordinary, common meaning." *Wyatt v. Rescare Home Care*, 81 A.3d 1253, 1260 (Del. 2013); *see also LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 933 n.14 (Del. 2007); *see also* Del. Code Ann. tit. 1, § 303 ("Words and phrases shall be read with their context and shall be construed according to the common and approved usage of the English language."). Moreover, when reviewing a statute, "this Court will read all sections of the statute, 'in light of all the others to produce a harmonious whole.'" *Wyatt*, 81 A.3d at 1261 (citation omitted). When these firmly established rules of statutory construction are applied in the construction of the relevant sections of Article 9 of the UCC, it is evident that a secured party must authorize the "filing" of a UCC-3 termination statement – and nothing more – in order for the UCC-3 to be effective.

A plain reading of the applicable Article 9 provisions demonstrates why this is so. First, UCC § 9-513 explains the effect of a termination statement filed in accordance with UCC § 9-510:

> (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.

Del. Code Ann. tit. 6, § 9-513(d) (emphasis added).

Second, UCC § 9-510 provides that a termination statement or other filed record is effective only if it is filed by a person entitled to do so under UCC § 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.

Del. Code Ann. tit. 6, § 9-510(a) (emphasis added).

Finally, UCC § 9-509(d)(1) addresses when a person may file a termination statement or other amendment to a UCC-1 financing statement:

> (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*.

Del. Code Ann. tit. 6, § 9-509(d)(1) (emphasis added). Conspicuously absent from these provisions is any mention of the secured party's intent to cause a particular legal result flowing from the "filing" at issue.

These provisions of Article 9 plainly establish that in order to "extinguish" or terminate the perfection of a financing statement, the secured party need do nothing more than authorize the act of filing a termination statement. Neither the

statute itself, nor any other authority, even remotely suggests that the secured party's intention to terminate a particular financing statement has any bearing whatsoever on whether the secured party has authorized the act of filing the termination statement.

That the phrase "authorizes the filing" as used in UCC § 9-509(d)(1) refers to the act of filing a termination statement, and nothing more, is further supported by UCC § 9-516(a). Under the subheading "What constitutes filing[,]" Section 9-516(a) provides in relevant part that "*communication of a record* to a filing office and tender of the filing fee or acceptance of the record by the filing office constitutes *filing*." Del. Code Ann. tit. 6, § 9-516(a) (emphasis added). Like the Article 9 sections discussed above, there is no suggestion at all in UCC § 9-516 that a party's intention has any bearing on what constitutes "filing."

When the definition of "filing" is considered in the context of the question certified to this Court, there is no doubt that it is the act of filing a UCC-3 termination statement that a secured party must "authorize[]" within the meaning of UCC § 9-509(d)(1). Substituting the language of § 9-516(a) for the word "filing" in Section 9-509(d)(1), as indicated in the bracketed language below, clearly illustrates this point:

> A person may file an amendment . . . only if . . . the secured party of record authorizes the [communication of a record to a filing office].

This substitution exercise confirms that the proper focus of UCC § 9-509(d)(1) is whether the secured party approved the act of communicating the termination statement to the filing office.

Indeed, if the General Assembly had intended the phrase "authorize[] the filing" in UCC § 9-509(d)(1) to require not only that secured parties approve the submission of termination statements and other amendments to the filing office, but also that secured parties intend the legal consequences resulting from such filings, it easily could have written the statute to include such a requirement. But the General Assembly did not write UCC § 9-509(d)(1) to read "authorizes the [terms of the amendment and their legal effects]," or include other words to that effect. Instead, the General Assembly focused on the act of filing, plainly indicating that, to satisfy UCC § 9-509(d)(1), all that is necessary is that the secured party approve the transmission of the amendment to the filing office. *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)).

"The most important consideration for a court in interpreting a statute is the words the General Assembly used in writing it." *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 950 (Del. Ch. 2013). Here, the plain

meaning of the statutory language is that it is the act of filing a termination statement that must be authorized in order for that document to effectively extinguish the perfection created by the underlying UCC-1 financing statement. The intent of the secured party to achieve a specific legal result as a consequence of the act of filing is irrelevant to the question of whether the filing of a UCC-3 termination statement is "authorized" within the meaning of Article 9 of the UCC. Accordingly, the plain language of the statute provides a clear answer to the question certified to this Court: for a UCC-3 termination statement to be "authorized" and therefore effective, it is, in fact, enough that the secured party review and approve for filing a UCC-3 purporting to terminate a perfected security interest.

2. The 2001 Amendments To Article 9 Did Not Effect A Substantive Change To UCC Laws Relating To The Filing And Effectiveness Of Termination Statements

Construing the revised Article 9 to require, as a condition to the effectiveness of a termination statement, that the secured party authorize the legal consequences of a UCC record (as opposed to the act of filing itself) would effect a fundamental change in the law as it has existed since before the 2001 amendments. "There is a 'strong presumption' that alterations to statutory language do not effect a substantive change, unless 'the new language in fact makes such a change in clear unambiguous terms.'" *Sun Life Assurance Co. of Can. (U.S.)*, 21 A.3d at 22

(citation omitted). There is nothing in the 2001 revisions to Article 9 of the UCC to suggest that the drafters intended to cause a substantive change to the operation of the UCC filing and notice system, or to the requirement that, in order to be effective, the filing of UCC-3 termination statements must be authorized.

Indeed, the principal statutory change at issue here – the elimination of the requirement that a termination statement be signed by the secured party of record before filing – was not intended to address in any way the issue of whether the filing of a UCC record was authorized. Rather, the elimination of the signature requirement in the 2001 amendments to Article 9 was done to facilitate the electronic and paperless filing of UCC records. *See* Harry C. Sigman, *The Filing System Under Revised Article 9*, 73 Am. Bankr. L.J. 61, 68 (1999), attached hereto as Exhibit C. The elimination of the signature requirement, accompanied as it was by the substitution of language in Article 9 explicitly retaining the requirement that filings must be authorized to be legally effective, did not introduce a new, additional requirement that the effectiveness of a filed record is conditioned on the intent of the secured party to bring about a particular legal result by virtue of that record.[5]

[5] It should be emphasized that even prior to the 2001 amendments, the filing of a termination statement had to be authorized in order to be effective. *See* Harry C. Sigman, *The Filing System Under Revised Article 9*, 73 Am. Bankr. L.J. at 68-69 attached hereto as Exhibit C ("Revised Article 9 deletes the requirement that filings be signed . . . . There is no reason why evidence of authority to file . . . should be on the public record. Revised Article 9, of course, continues to require authority to file as a condition of effectiveness of a filing."); *see also* 2d Cir.

Furthermore, a reading of revised Article 9 that conditions the effectiveness of a filed termination statement on the intent of the secured party to terminate the particular security interest that is encompassed by the UCC-3 would effect a substantive change in the law by abrogating established precedent which holds that termination statements, even if they contain mistakes and would have unintended consequences, are nonetheless legally effective. *See generally Crestar Bank v. Neal (In re Kitchin Equip. Co. of Va., Inc.)*, 960 F.2d 1242 (4th Cir. 1992); *Koehring Co. v. Nolden (In re Pac. Trencher & Equip., Inc.)*, 27 B.R. 167 (B.A.P. 9th Cir. 1983), *aff'd*, 735 F.2d 362 (9th Cir. 1984); *In re Silvernail Mirror & Glass, Inc.*, 142 B.R. 987 (Bankr. M.D. Fla. 1992); *Rock Hill Nat'l Bank v. York Chem. Indus., Inc. (In re York Chem. Indus., Inc.)*, 30 B.R. 583 (Bankr. D.S.C. 1983).

Decisions issued after the 2001 revisions to Article 9 confirm that this principle of law – that mistaken UCC records whose filing was authorized are effective and the effect of a termination statement on a security interest is "dramatic and final," *In re Kitchin Equip. Co. of Va., Inc.*, 960 F.2d at 1247 – was unaltered by the 2001 revisions to Article 9. For example, in the case of *Negus-Sons*, the bankruptcy court held that Wells Fargo, a third party re-financing lender, was authorized by the bank that was the existing secured party to file the

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Op. 12 ("The 2001 amendment loosened the authorization-by-lender's-signature requirement to an authorization-by-any-means requirement . . . .").

termination statements at issue, when the bank executed a letter sent to it by Wells Fargo seeking its consent to Wells Fargo's preparation of termination statements relating to two identified financing statements. *Lange v. Mut. of Omaha Bank (In re Negus-Sons, Inc.)*, 2011 WL 2470478, at *5 (Bankr. D. Neb. June 20, 2011), *aff'd*, 460 B.R. 754 (B.A.P. 8th Cir. 2011), *aff'd*, 701 F.3d 534 (8th Cir. 2012). According to the bankruptcy court, "[b]ecause the bank authorized Wells Fargo to file termination statements, the bank's [UCC] financing statements were in fact terminated." *Id*. In arriving at this holding, the bankruptcy court noted that:

> [t]he correspondence between the bank and Wells Fargo is clear that the [UCC] "amendments" Wells Fargo intended to file upon the bank's authorization would terminate the bank's security interest "in all the collateral." The bank representative consented in writing to this arrangement. If he had questions about the scope of the release or termination of the bank's interests, he could have contacted Wells Fargo for clarification. One who signs a document is presumed to have read that document and is bound by its terms.

Id. (citation omitted). The court further held that the bank was bound by its consent to the filing of the termination statements, even though, due to its own mistake, it did not intend to terminate the entirety of its security interest. *Id.*

Similarly, in the 2012 *Hickory Printing* case, the bankruptcy court analyzed whether a termination statement filed by the secured party's employee was authorized to be filed and therefore legally effective. *See Ward v. Bank of Granite & Hickory Printing Solutions LLC (In re Hickory Printing Grp., Inc.)*, 479 B.R.

388, 396 (Bankr. W.D.N.C. 2012) (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."). Although the secured party initially argued that the filing was unauthorized, the court explained that while the employee "may or may not have made a mistake in filing the Termination Statement (given that the Bank still had a loan outstanding), her *mistake in no way implies lack of authorization* to file the Termination Statement." *Id.* at 397 (emphasis added).

The *A.F. Evans* case also supports the conclusion that, even after the enactment of revised Article 9, termination statements containing errors are legally effective, provided they are authorized. *In re A.F. Evans Co.*, 2009 WL 2821510 (Bankr. N.D. Cal. July 14, 2009), *aff'd sub nom. Official Comm. of Unsecured Creditors v. City Nat'l Bank*, 2011 WL 1832963 (N.D. Cal. May 13, 2011). In *A.F. Evans*, the borrower prepared draft UCC termination statements for review by the secured party. *Id*. at *1. The draft termination statements properly indicated that the lender's security interest in only two specified properties would be terminated, leaving the lender with a perfected security interest in a third property. *Id.* Notably, the draft UCC forms did not contain an "X" in box number 2 of the UCC form, which would have indicated that the lender's entire security interest in all three properties was being terminated. *Id*. After the secured party transmitted

these approved UCC forms to the escrow agent for filing, someone (presumed, but not established, to be the escrow agent) checked the termination box before filing the UCC termination statement. *Id.* at *3.

In ruling that the lender's perfected security interest in the third property was not terminated by the UCC-3, the court relied upon the fact that the UCC form transmitted to the escrow agent did not have the termination box checked, and that the filed form thus differed from the form approved by the lender. *Id.* The court concluded that the filing was unauthorized, because the secured party had not approved the filing of the termination statement that was submitted to the filing office. *Id.* at *4. According to this analysis, if the filed form had been identical to the form approved by the lender (as occurred with JPMorgan in this case), then the filing of that form would have been authorized, and therefore effective.

As these cases illustrate, the 2001 amendments to UCC Article 9 did not establish a new system that immunizes secured parties who authorize the filing of termination statements in the public records from the legal consequences of such filings. There is simply nothing in the text, comments, or legislative history that in any way suggests that the 2001 amendments to UCC Article 9 effected such a fundamental change to the operation of the UCC filing and notice system.

3. Article 9's Focus On The Act Of Filing, Rather Than The Legal Consequences Of The Filed Record, Is Consistent With The Public Policies That Underlie The Perfection Laws

Even if the relevant provisions of Article 9 at issue here were reasonably susceptible to more than one reading (and they are not), interpreting those provisions to require an assessment of a secured party's state of mind in order to determine whether a UCC filing was authorized would be inconsistent with the policies on which the perfection laws are based.[6] On the other hand, a straightforward and logical reading that construes Article 9 to require that the secured party review and approve for filing a UCC-3 termination statement is entirely consistent with the principles of clarity and certainty of notice that underlie the perfection laws.

This point is illustrated in the case of *In re Lortz*, 344 B.R. 579 (Bankr. C.D. Ill. 2006). In *Lortz*, due to the secured party's accounting error, its records reflected that the debtor's account had been paid in full, when in fact the secured party had received no collectible funds. *Id*. at 581. As a result of this error, the secured party mistakenly released its lien on a certificate of title to a motor vehicle that secured the debtor's obligation, and returned the title to the debtor, thereby

[6] Where the text of a statute is considered to be susceptible to more than one reading and thus ambiguous, this Court "will resort to other sources [of the statute's apparent purpose], including relevant public policy." *Wyatt*, 81 A.3d at 1261 (citation omitted); *see also Sun Life Assurance Co. of Can. (U.S.)*, 21 A.3d at 20 ("When confronting an ambiguous statute, a court should construe it 'in a way that will promote its apparent purpose and harmonize [it] with other statutes' within the statutory scheme.") (*quoting Eliason*, 733 A.2d at 946).

causing the secured party's security interest to become unperfected under Illinois law. *Id*. The bankruptcy court accepted the secured party's representation that "it did not intend to release its security interest for anything less than full payment of the loan, which is simply another way of saying that the lien was released by mistake." *Id.* at 585. Nonetheless, the bankruptcy court held that the secured party's lien was unperfected, and that the secured party's intent was not relevant:

> As with all perfection laws, however, 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.

Id. (emphasis added).

As the bankruptcy court in *Lortz* further recognized, the mistaken release of the creditor's security interest in that case was no different than "a mortgagee who mistakenly records a release of mortgage in the county recorder's office." *Id.* at 585 n.5 ("When bankruptcy intervenes during such period of unperfection, the mistakenly released mortgage is avoidable by the trustee."). The same holds true for mistaken UCC termination statements whose filing was authorized. *See In re Negus-Sons, Inc.*, 2011 WL 2470478, at *5 (lender bound by consent to filing of termination statement that released security interest in entirety of collateral although, due to its own mistake, it only intended partial release of collateral). For the same reason, a secured party's intent, and in particular its lack of intent to "unperfect" its security interest in the collateral securing a loan, is irrelevant.

Furthermore, a decision that a secured party must intend to terminate the particular security interest listed on the UCC-3 in order for the filing to be effective would have the result that secured parties would always be relieved of the consequences of their filed records containing mistakes, for the simple reason that, by definition, no one ever intends to make a mistake. If this were the law, secured parties would have little incentive to ensure the accuracy of their UCC filings. The resulting inattention and carelessness on the part of secured parties and other UCC filers that would be sure to follow would degrade the integrity and usefulness of the UCC record system.

Conditioning the effectiveness of a termination statement on the intent of a secured party to achieve particular legal consequences is both impractical and contrary to the overarching public policy that potential creditors are entitled to rely on properly filed records maintained under the UCC system. *See Clean Burn Fuels, LLC v. Purdue BioEnergy, LLC (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."); *In re Silvernail Mirror & Glass, Inc.*, 142 B.R. at 987-89 ("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."). As one court has noted:

> 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.

ACF 2006 Corp. v. Merritt, 2013 WL 466603, at *4 (W.D. Okla. Feb. 7, 2013), *aff'd*, 557 F. App'x 747 (10th Cir. 2014) (citation omitted).[7] Similarly, a decision that secured parties must authorize the legal consequences of a filing in order for the filed record to be effective will undermine the public notice system that is central to the UCC, introducing uncertainty and disruption to the secured lending

[7] Of course, the mere presence of a filed record in the UCC filing system does not ensure its effectiveness, and searchers of UCC records bear the risks involved in taking those filed records at face value. But this was equally true before the 2001 amendments to Article 9. Even before the elimination of the signature requirement under revised Article 9, a prudent searcher of the UCC records would be well advised to conduct due diligence and to determine, for example, whether a filed termination statement was genuine and not a forgery. The 2001 amendments did not change the extent to which the public may rely on the integrity of the UCC filing system. *See* Harry C. Sigman, *The Filing System Under Revised Article 9*, 73 Am. Bankr. L.J. at 68, n.61, attached hereto as Exhibit C ("While an off-the-cuff reaction to the deletion of the signature requirement might be that this would result in the degradation of the public record, it should be borne in mind that (i) no filing office has the capability to determine that a signature is not a forgery or otherwise unauthorized, and (ii) the incidence of bogus filings under current law makes clear that the signature requirement does not prevent abuse of the filing system."). But engrafting a new requirement of investigation into the subjective state of mind of a secured party (as opposed to objectively determinable facts such as the authenticity of a document) would seriously undermine the integrity and usefulness of the filing system.

markets by requiring bottomless inquiries into the intentions that lie behind those records.

CONCLUSION

For the foregoing reasons, the Court should answer the certified question as follows: Under UCC Article 9, as adopted into Delaware law by Del. Code Ann. tit. 6, art. 9, if a secured party reviews and knowingly approves for filing a UCC-3 purporting to extinguish a perfected security interest, the filing of the UCC-3 is effective to extinguish the perfected nature of the corresponding UCC-1 financing statement. The secured party's intent to terminate the particular security interest that is listed on the UCC-3 is irrelevant to the question of whether or not the filing of the UCC-3 is effective.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard J. Thomas, Esquire, hereby certify that on July 21, 2014, I caused to be served a true and correct copy of the foregoing document upon the following counsel of record in the manner indicated below:

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