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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

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NATURE OF PROCEEDINGS

This matter arises out of an avoidance action commenced in July 2009 by the Official Committee of Unsecured Creditors ("Committee") against JPMorgan Chase Bank, N.A. ("JPMorgan") in the bankruptcy proceedings of General Motors Corporation ("GM"). The Committee seeks to avoid the perfection of a security interest held by JPMorgan and other lenders on account of a $1.5 billion senior secured term loan facility ("Term Loan"), and, on that basis, to claw back the amounts repaid to these lenders in the bankruptcy proceedings. A UCC-3 termination statement relating to the Term Loan was inadvertently drafted and filed by GM's counsel in October 2008 during the repayment by GM of a separate, unrelated $150 million loan relating to a real estate transaction as to which JPMorgan served as administrative agent.

Following pre-trial discovery, in July 2010, the Committee and JPMorgan each filed cross motions for summary judgment. In a thorough 74 page opinion, the United States Bankruptcy Court for the Southern District of New York ("Bankruptcy Court") granted JPMorgan's motion, denied the Committee's motion and dismissed the Committee's complaint.

The Bankruptcy Court correctly held that under 6 *Del. C.* § 9-509(d)(1), a filed UCC-3 termination statement has to be "authorized" by the secured party in order to be effective. Applying agency law, the Bankruptcy Court

determined that JPMorgan, as principal, did not authorize GM, its agent, to file the UCC-3 at issue. The Bankruptcy Court focused on all of the facts and circumstances manifesting the scope and limits of GM's authority, including importantly, the undisputed facts that: a written agreement signed by JPMorgan and GM explicitly restricted GM's authority to file UCC-3 termination statements only as to certain parcels of real estate that were collateral for the real estate loan; the sworn, unequivocal testimony from GM and its attorneys that they did not believe that they had any authority to file a UCC-3 relating to the Term Loan; GM's understanding of JPMorgan's sole objective, which was to obtain repayment of the real estate loan; and that no party (neither GM, JPMorgan, nor their respective counsel) to the closing of the real estate transaction repayment intended to file a UCC-3 relating to the Term Loan, or was even aware of the filing until after GM filed for bankruptcy.

The Committee appealed the Bankruptcy Court's decision directly to the United States Court of Appeals for the Second Circuit ("Second Circuit"). In a decision dated June 17, 2014, the Second Circuit certified to this Court a question of statutory construction as to the meaning of the phrase "authorizes the filing" under section 9-509(d)(1).

SUMMARY OF ARGUMENT

1. Denied. The Committee asks this Court to wear legal blinders by erroneously focusing on the word "filing" within the phrase "authorizes the filing" in section 9-509(d)(1), as if that word could be construed in a vacuum. The Committee appears to argue (*see* Point I.C.4 *infra*) that "authorizes the filing" means, in all cases, that a secured party need only "approve" the act of transmitting a record to the filing office. The Committee has no support for its position, which ignores the purpose and language of the statute, as well as the guidance of the Official Commentary. Further, its interpretation disregards the mandate of the Uniform Commercial Code ("UCC") that requires the application of the pertinent law of authority (here agency law) to determine whether the filing of a UCC-3 termination statement was authorized and therefore effective. Nothing in the statute, including the use of the word "filing," limits or displaces the need to apply the applicable state law of authority to make this determination. Indeed, the application of the law of authority enables a coherent resolution of authority questions under various factual scenarios and different theories of authority. The Committee, on the other hand, cherry picks facts and on that basis creates its own rule to support a favorable result in this particular case, disregarding that it would lead to unpredictable and undesirable results in other cases.

2. Denied. The Committee's argument that the 2001 amendments to

Article 9 created no changes in the applicable statutory regime misstates the law. The 2001 amendments eliminated pre-existing Part 4 of Article 9 in favor of current Part 5. Part 5 added new provisions focusing on authority – including the specific provisions at issue here. Prior to 2001, the requirement of a signature of the secured party on amendments typically manifested authority. After the 2001 amendments, however, anyone can make a "filing" that is now unsigned – but the filing has no effect unless the person who made the filing was "authorized" to do so.

3. Denied. The Committee's contention that JPMorgan's position would impose new and burdensome due diligence requirements on potential lenders is contrary both to law and how secured finance actually works. The law is clear that subsequent searchers must always take steps to determine "the complete state of affairs" (*see* U.C.C. § 9-502 cmt. 2 (2010)) and cannot simply rely on filed records. The due diligence obligation does not, and practically could not, stop at merely determining that someone "approved" the communication of a record to a filing office. Rather, the obligation necessarily entails determining whether the perfection of the security interest was released by a secured party. JPMorgan's position is consistent with the long standing and common practice of secured lenders, and contrary to the Committee's assertions, does not impose either new or burdensome due diligence requirements.

STATEMENT OF FACTS[1]

A. The Synthetic Lease Transaction

In October 2001, GM entered into a synthetic lease financing arrangement with multiple parties, including JPMorgan ("Synthetic Lease Transaction") that provided GM with up to $300 million from a lending syndicate of financial institutions for GM's purchase of several parcels of real estate. (Op. at 2.) JPMorgan served as the administrative agent for the lenders. (B9.)

GM's obligation to repay was secured by twelve real properties defined in the Synthetic Lease Transaction documents as the "Properties." (Op. at 2-3.) UCC-1 financing statements were filed in counties in which such Properties were located to perfect a security interest in related fixtures, and also with the Delaware Secretary of State. (*Id.* at 3.) Simpson Thatcher & Bartlett LLP ("Simpson") represented JPMorgan. Mayer Brown LLP ("Mayer Brown") represented GM. (B9.)

B. The Term Loan

Five years later, on November 29, 2006, GM and its then-subsidiary Saturn Corporation ("Saturn") entered into a seven year term loan facility – the Term Loan – with JPMorgan, again acting as administrative agent for a different

[1] The Bankruptcy Court's decision on JPMorgan and the Committee's cross-motions for summary judgment dated March 1, 2013, along with other relevant documents are attached hereto in JPMorgan's Appendix and cited herein as "B". The Second Circuit's decision dated July 17, 2014 ("Op.") is attached as Exhibit A to the Plaintiff-Appellant's Opening Brief dated July 21, 2014 ("Committee Br.").

syndicate of lenders (the "Term Loan Lenders"). (Op. at 3.) "The Term Loan was entirely unrelated to the Synthetic Lease [Transaction] and provided [GM] with approximately $1.5 billion in financing from a different syndicate of financial institutions." (*Id.*) Simpson did not represent JPMorgan, and Mayer Brown did not represent GM in connection with the Term Loan. (B9.)

The Term Loan Lenders obtained security interests in all of GM's equipment and fixtures at forty-two GM and Saturn plants and facilities ("Term Loan Collateral"). (B10; Op. at 3.)[2] JPMorgan caused the filing of twenty-eight UCC-1 financing statements to perfect the Term Loan Lenders' security interests in the Term Loan Collateral: (a) two UCC-1s with the Delaware Secretary of State (one for GM and one for Saturn); and (b) twenty-six state fixture filings in the counties where the GM had plants that housed Term Loan Collateral. (B10.) The filing number assigned by the Delaware Secretary of State to the UCC-1 for GM filed in that office was "6416808 4." (*Id.*)

C. The Termination of the Synthetic Lease Transaction

On September 30, 2008, GM informed its counsel Mayer Brown that GM planned to repay the balance due under the Synthetic Lease Transaction – approximately $150 million at the time – and asked Mayer Brown to prepare the

[2] Pursuant to agreement with GM, the Term Loan Lenders' perfected security interests in the Term Loan Collateral could not be terminated unless GM fully repaid the loan or all of the Term Loan Lenders gave express written consent. (B46.)

necessary documentation to repay the lenders and release the lenders' interests in the Properties. (B10-11.) Robert Gordon, a partner at Mayer Brown, assigned this project to his associate Ryan Green. (*Id.*) Among the many documents Mr. Green prepared were: (i) a termination agreement; (ii) a closing checklist; (iii) UCC-3 termination statements; and (iv) an escrow letter. (Op. at 4.)

1. The Synthetic Lease Termination Agreement

In connection with the repayment of the Synthetic Lease Transaction, Mayer Brown, on GM's behalf, drafted and initially circulated a "Termination Agreement and Release of Operative Agreements" ("Synthetic Lease Termination Agreement") to GM and Simpson on October 15, 2008. (B11.) The agreement was executed on October 30, 2008, the closing date of the repayment. (B14, B79-90.) The Synthetic Lease Termination Agreement explicitly restricted GM's authority to file UCC-3 termination statements as to existing UCC-1 financing statements *"relating to the Properties"* that were collateral in the Synthetic Lease Transaction:

> *[T]he Administrative Agent [i.e. JPMorgan] and 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) authorize Lessee [i.e., GM] to file a termination of any existing Financing Statements relating to the Properties.*
> (B79; Op. at 6-7) (emphasis added).

"Properties" were defined in the Synthetic Lease Transaction documents as twelve specific parcels of real estate. (B12-13.) As Mr. Gordon of Mayer Brown testified and the Bankruptcy Court held, this agreement was the "only document embodying a grant of authority" by JPMorgan to file any UCC-3s. (B44, B108 at 53-54.) The Committee dismisses this important agreement. (Committee Br. at 7, n.2.)

2. The Synthetic Lease Closing Checklist

Mr. Green also drafted and circulated what was called a closing checklist ("Synthetic Lease Closing Checklist"). (Op. at 5.) This document referenced documents Mr. Green believed to be necessary to effectuate the repayment of the Synthetic Lease Transaction. (*Id.*; B14.)

As the Bankruptcy Court held, the Synthetic Lease Closing Checklist was merely a listing of documents and contained no "invite or call for (or even mention [of])" a grant of authority from JPMorgan. (B39.) It listed several dozen closing documents relating to the Properties, including multiple UCC-1 financing statements. (B15.) Section 5 referenced file numbers for three Delaware UCC-1 financing statements. (*Id.*) One of the file numbers listed was "file number 6416808 4." (*Id.*)[3]

[3] These file numbers derived from a search performed by a Mayer Brown paralegal to identify UCC-1 financing statements filed against GM in favor of JPMorgan in Delaware. (B15.) The paralegal was unfamiliar with the subject matter of the transaction on which Mr. Green was working, and so erroneously included all of the financing statements in favor of JPMorgan that he found – including one for the unrelated Term Loan. (*Id.*)

No one recognized that the file number "6416808 4" pertained to a UCC-1 filed in Delaware in connection with the Term Loan. (B16; Op. at 5.) Without dispute, everyone at Mayer Brown believed that all of the Delaware UCC-1 financing statement file numbers referenced on the checklist pertained only to the Synthetic Lease Transaction. (Op. at 6.)

Mr. Green circulated drafts of the checklist to GM and Simpson on October 15 and 21, 2008. (*Id.*) The subject lines of Mr. Green's cover e-mails attaching the drafts referenced "GM/JPMorgan Chase - Synthetic Lease." (B16.) None of the e-mails and drafts referenced the Term Loan. (*Id.*) No one recognized that the file number "6416808 4" was unrelated to the Synthetic Lease Transaction. (*Id.*) There were no discussions among the parties at all about this numerical reference. (*Id.*) In sum, it is undisputed that "everyone believed they were working on the Synthetic Lease Transaction." (*Id.*; Committee Br. at 8.)

3. The Unrelated UCC-3 Termination Statement

On October 15, 2008, Mr. Green circulated nearly one hundred pages of draft documents the titles of which had been listed on the Synthetic Lease Closing Checklist, including ten UCC-3 termination statements. (B18.) Mr. Green believed that all of his drafts related to the repayment of the Synthetic Lease Transaction. (*Id.*) Nothing in Mr. Green's cover e-mail or the drafts referenced the Term Loan. (*Id.*)

One of the ten draft UCC-3 termination statements circulated by Mr. Green corresponded to a UCC-1 financing statement with the file number 6416808 4, which actually related to the Term Loan ("the Unrelated UCC-3"). (B17-18.) The Unrelated UCC-3 made no reference to the Term Loan. (B17.) Indeed, on the Unrelated UCC-3 itself, the Mayer Brown paralegal typed in an internal Mayer Brown client-matter number relating to that firm's representation of GM on the Synthetic Lease Transaction. (*Id.*)

The Committee makes much of an October 17, 2008 email from a Simpson attorney, in response to Mr. Green's circulation of the draft documents, which stated "[] Nice job on the documents . . ." (Committee Br. at 9.) Mr. Green testified, however, that he did not understand that this comment authorized him to file any documents at all, much less a UCC-3 related to the Term Loan. (B104 at 91-92.)

4. The Synthetic Lease Escrow Letter

To facilitate the closing of the Synthetic Lease Transaction, GM and JPMorgan used an escrow agent to hold the closing documents in escrow pending repayment. (B18.) Thus, on behalf of GM, Mayer Brown also drafted and circulated an escrow letter ("Synthetic Lease Escrow Letter") that provided the escrow agent with instructions to effectuate the closing. (B19; Op. at 8.) The subject line of Mr. Green's cover e-mail referred only to the Synthetic Lease

Transaction: "RE: GM/JPMorgan Chase – Synthetic Lease (Auto Facilities Real Estate Trust-200-1)." (B19.) The subject line on the first page of the Synthetic Lease Escrow Letter explicitly indicated that its purpose was to terminate the Synthetic Lease Transaction. (B20.)

The Synthetic Lease Escrow Letter listed 47 sets of documents, defined collectively as the "Escrow Documents." (B19.) Among the Escrow Documents listed were "Termination of UCC Financing Statements (File Numbers 2092532 5, 2092526 7, and 6416808 4) (the "General UCC-3 Terminations")." (B20-21.) There was no reference to the Term Loan. (*Id.*) The letter instructed the escrow agent, upon closing, to forward the UCC-3 termination statements to Mayer Brown. (B21.) The Synthetic Lease Escrow Letter did not purport to provide any instruction or authority to anyone to file any UCC-3s.[4] (B43.) GM repaid the amount due on the Synthetic Lease Transaction on October 30, 2008. (Op. at 9.) Thereafter, GM's counsel, Mayer Brown, caused the filing of UCC-3 termination statements with the Delaware Secretary of State, including (erroneously, and without authority) the Unrelated UCC-3 pertaining to the Term Loan. (B22.)

[4] The Committee references a response from Simpson that the Synthetic Lease Escrow Letter "was fine." (Committee Br. at 10.) It does not include the undisputed testimony from Mr. Green, however, that he understood this comment to mean that there were no additional comments on the letter – not that he was authorized to do anything by virtue of the letter. (B105.)

5. GM and Mayer Brown's Belief

All of the Mayer Brown attorneys and paralegals who worked on the repayment of the Synthetic Lease Transaction testified that they believed that everything they prepared and filed on GM's behalf in connection with the repayment related only to that transaction, nothing more. (B22, B102-106, B109 at 66.) They were not GM's counsel on the Term Loan, and they all testified that at no point did they believe they had any authority to file a UCC-3 termination statement related to the Term Loan. (*Id.*) Likewise, the GM representative who executed the Synthetic Lease Termination Agreement affirmed that GM did not believe it had any authority to terminate any UCC-1 financing statement related to the Term Loan, nor did GM provide Mayer Brown with any authority to file a termination statement relating to the Term Loan. (B22, B79-90.) The Committee ignores all of this uncontroverted testimony.

GM, Mayer Brown, JPMorgan and Simpson first learned about the unauthorized filing of the Unrelated UCC-3 in June 2009, after GM filed for bankruptcy.[5] (B22-23.)

[5] In fact, GM continued to treat JPMorgan and the Term Loan Lenders as fully perfected, secured parties under the Term Loan long after the closing of the Synthetic Lease Transaction. For example, GM and the Term Loan Lenders agreed to amend the Term Loan on March 4, 2009. (B91-100.) The amendment added collateral protection to JPMorgan and the Term Loan Lenders. (*Id.*) Further, JPMorgan and the Term Loan Lenders were repaid in the bankruptcy proceedings as secured lenders. (B23.)

ARGUMENT

I. ARTICLE 9 IS UNAMBIGUOUS AND MANDATES THE APPLICATION OF THE LAW OF AGENCY TO DETERMINE WHETHER A FILING WAS AUTHORIZED

A. Question Presented

To determine whether a filed UCC-3 termination statement "effectively extinguish[es] the perfected nature of a UCC-1 financing statement" (Op. at 21) under 6 *Del. C.* § 9-509(d)(1), the Second Circuit asks this Court to construe the phrase "authorizes the filing" appearing in that statute. (*Id.* at 16.) The Second Circuit believes the issue is a matter of first impression:

> We conclude that this case presents an issue of first impression under Delaware law – whether a secured lender must authorize the act of filing a UCC-3 termination statement or must authorize the termination of the security interest identified for termination on that UCC-3 statement – and certify the question to the Delaware Supreme Court. (*Id.* at 2.)[6]

Certified questions are reviewed by this Court "in the context in which they arise." *Chaplake Holdings, Ltd. v. Chrysler Corp.*, 766 A.2d 1, 4 (Del. 2001) (citation omitted). The Court also has discretion to "reformulate or rephrase the question of law certified." *Doe v. Wilmington Housing Auth.*, 88 A.3d 654, 661 (Del. 2014).

[6] *See also* Op. at 16 ("Is it enough that a secured lender authorize the act of filing a particular UCC-3 termination statement? Or must the secured lender authorize the termination of the particular security interest identified for termination on that UCC-3? ").

B. Scope of Review

The standard of review is *de novo*. *See Lambrecht v. O'Neal*, 3 A.3d 277, 281 (Del. 2010).

C. Merits of the Argument

1. Pertinent Statutory Construction Rules

The Court should first determine whether or not the statute is ambiguous. *Ins. Comm'r. of State of Del. v. Sun Life Assurance Co. of Can. (U.S.)*, 21 A.3d 15, 20 (Del. 2011). "The fact that the parties disagree about the meaning of the statute does not create ambiguity." *Chase Alexa, LLC v. Kent Cnty. Levy Court*, 991 A.2d 1148, 1151 (Del. 2010). A statute is ambiguous if it is either reasonably susceptible to different interpretations, or if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature. *In re Krafft-Murphy Co.*, 82 A.3d 696, 702 (Del. 2013). The Court should read the statute as a whole and read each section of the statute in light of all other sections to produce a harmonious whole. *Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 538 (Del. 2011); *Leatherbury v. Greenspun*, 939 A.2d 1284, 1288 (Del. 2007). JPMorgan contends that, for purposes of this analysis, the statute is unambiguous.

The General Assembly adopted and made effective the 2001 and 2010 amendments to Article 9 of the Delaware UCC in substantially the same form as

the Model Uniform Commercial Code. *See* 72 *Del. Laws*, c. 401 (2000); Del. H.B. 8, 147th Gen. Assem. (2013). The Delaware UCC states that it "must be liberally construed" [t]o promote its underlying policies, including "to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties." 6 *Del. C.* § 1-103(a). Further, the Official Comments to the Model UCC are "useful in interpreting the Code, as it is to be applied in Delaware, in view of the Code's expressed purpose of making uniform the law among the various jurisdictions." *PNC Bank v. Marty's Mobile Homes, Inc.*, 2001 WL 849866, at *1 n.4 (Del. Ch. July 10, 2001) (citation omitted). *See also Acierno v. Worthy Bros. Pipeline Corp.*, 656 A.2d 1085, 1090 (Del. 1995) (stating as to the UCC's Official Comments "[a]n official comment written by the drafters of a statute and available to a legislature before the statute is enacted has considerable weight as an aid to statutory construction.").

2. The Plain Language of Article 9 Supports JPMorgan's Position

The 2001 amendments to Article 9 eliminated the requirement that the secured party sign a UCC-3 financing statement amendment prior to its filing. *Compare* 6 *Del. C.* §§ 9-509 and 9-510 *with former* 55 *Del. Laws*, c. 349 § 9-404 (1966). Under revised Article 9, any person (not just a secured party) can file a UCC-3 financing statement amendment, but an already filed record is effective

only if the secured party *authorized* the filing of such amendment. *See id.* § 9-509(d)(1).

Section 9-513 provides that "*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." *Id.* § 9-513(d) (emphasis added). Section 9-510(a) clarifies that a filed record, which includes a UCC-3 termination statement, "is effective only to the extent that it was filed by a person that may file it under Section 9-509." *Id.* § 9-510(a). Section 9-509(d)(1), in turn, states:

> (d) Person entitled to file certain amendments- A person may file an amendment[7] 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*; . . .

Id. § 9-509(d)(1) (emphasis added).

The phrase "authorizes the filing" as used in section 9-509(d)(1) refers back to the words "an amendment" in that same section. Accordingly, in all cases the secured party needs to "authorize[] the filing" of the "amendment." The section applies to various types of amendments to a financing statement. The UCC-3 financing statement amendment form (*see, e.g.*, B78) gives the filer the

[7] A UCC-3 (the method for terminating a financing statement and taking other action with respect to an existing filing) is an amendment. *See* 6 *Del. C.* § 9-102(a)(80).

choice of checking off: (a) "Termination" (*see* box 2); (b) "Continuation" (*see* box 3); or (c) "Assignment" (*see* box 4). Each has a different legal consequence for the secured party. The Administrative Rules of the Delaware Secretary of State ("Delaware Administrative Rules") further confirm that the mere act of filing a record is not dispositive. They define "Amendment" as:

> a UCC document that *purports* to amend the information contained in a financing statement. Amendments include assignments, continuation and terminations.

Delaware Administrative Rules § 101.1 (emphasis added).[8] Notably, the Delaware Administrative Rules also define "Termination" as:

> an amendment intended to indicate that the related financing statement has ceased to be effective with respect to the secured party *authorizing the termination*.

Id. § 101.13 (emphasis added). The Delaware Administrative Rules underscore that the mere "filing" of a UCC-3 that purports to be a termination does not, by itself, cause the underlying financing statement to cease to be effective. Rather, the effectiveness of an already filed termination statement depends on whether the "secured party authorize[ed] the termination." *See id.* As set forth below, that determination is made by applying the law of authority.

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[8] *See Administrative Rules of the Delaware Secretary of State Division of Corporations Uniform Commercial Code Revised Article 9* (Delaware Sec'y of State Div. of Corps. 2011), http://corp.delaware.gov/uccadminrules.pdf. 6 *Del. C.* § 9-526 instructs the Delaware Secretary of State to "adopt and publish rules to implement this Article" and such rules must be "consistent with this Article."

3. Article 9 Requires Application of Agency Law

The word "authorizes" within the phrase "authorizes the filing" in section 9-509(d)(1) is not defined in Article 9 nor anywhere else in the UCC. Instead, Article 9 mandates that the applicable law of authority be utilized to determine whether the secured party authorized the filing of a particular financing statement or its amendment.[9] The Official Comment to section 9-509, for instance, explicitly provides that "[l]aw 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." U.C.C. § 9-509 cmt. 3 (2010) (emphasis added). In addition, 6 *Del. C.* §1-103 explicitly provides that "[u]nless displaced by the particular provision of the Uniform Commercial Code, the principles of law and equity, including the . . . law relative to . . . principal and agent . . . supplement [the UCC] provisions."[10]

Nothing in Article 9 or the Official Commentary limits or displaces the use of the applicable state law of authority to determine what constitutes authorization by a secured party, including "what" a secured party must authorize in order for a filed UCC-3 termination statement to be "effective." Rather, as the Bankruptcy Court correctly concluded:

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[9] The Bankruptcy Court rejected the Committee's original argument that mistakenly filed termination statements are always effective regardless of whether authorized. (B6, n.10.)

[10] Other Official Comments to U.C.C. Article 9 also make clear that the law of agency supplements the UCC. *See, e.g.*, U.C.C. §§ 9-502 cmt. 3 (2010); 9-313 cmt. 3; 9-511 cmt. 3.

> 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 that issue), and contemplated that law outside UCC Article 9 would decide it. (B32-33.)

The applicable state law of "authority" traditionally includes, *inter alia*, the law defining "actual authority" given to an agent, "apparent authority," "ratification" and/or the law governing the *respondeat superior* liability of an employer for an employee. (B33.) *See also* Restatement (Third) of Agency § 1.01 cmt. c (2006). Indeed, in this case, the Committee originally argued that JPMorgan "authorized the filing" of the Unrelated UCC-3 under actual authority, apparent authority and ratification.[11] Article 9 mandates that the applicable law of authority be applied, in full, to the particular facts of a case to determine whether a secured party has authorized, in whatever scenario, the filing of a termination statement.

The construction of any statute should search for consistency in its application regardless of the factual scenario. Applying the law of authority to Article 9 allows for a coherent construction of the statute. As this Court has held, "[t]he object of statutory construction is to give, if possible, a sensible and practical meaning to a statute as a whole so that it may be applied in future cases as well as the present one without difficulty." *E.I. Du Pont de Nemours & Co. v. Clark*, 88 A.2d 436, 438 (Del. 1952); *see also Rapposelli v. State Farm Mut. Auto. Ins. Co.*,

[11] The Committee, however, did not appeal the Bankruptcy Court's dismissal of its theories of apparent authority and ratification. (B55-59.)

988 A.2d 425, 427 (Del. 2010). Indeed, the Delaware UCC references the law of authority, and specifically the law of agency, throughout the statute. The meaning of "authorizes" in Article 9, and in section 9-509(d)(1) in particular, should be applied consistently with these other UCC provisions.[12]

Contrary to the Committee's suggestion (Committee Br. at 18-19), JPMorgan does not contend that Article 9 states that the effectiveness of any filed UCC-3 termination statement requires a finding that the secured party intended to terminate the perfection of a particular security interest. In this regard, the Second Circuit's focus on the "intent" of the secured party as being an alternative construction of this statute is not JPMorgan's position.[13] Instead, Article 9 simply requires that the applicable law of authority be used to determine whether a filing was authorized. Such a determination is case specific and will depend on the facts of each case as applied to the type of authority at issue. Article 9 mandates that the answer in all cases lies in the application of the applicable law of authority.

Here, for example, the Committee asserts that JPMorgan provided actual authority to its agent, GM, to file the Unrelated UCC-3. (B36.) Thus, the applicable law of authority at issue in this particular case is agency law. (B33.)

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[12] *See, e.g.*, 6 *Del. C.* § 8-109; U.C.C. § 2-403 cmt. 1 (2010); U.C.C. § 3-406 cmt. 2.

[13] "Under UCC Article 9 . . . for a UCC-3 termination statement to effectively extinguish the perfected nature of a UCC-1 financing statement . . . must the secured lender intend to terminate the particular security interest that is listed on the UCC-3?" (Op. at 21.)

Under both Delaware and New York agency law,[14] actual authority is created by direct manifestations from principal to agent. *See Demarco v. Edens*, 390 F.2d 836, 844 (2d Cir. 1968); *Billops v. Magness Constr. Co.*, 391 A.2d 196, 197 (Del. 1978). The extent of the agent's actual authority is interpreted in light of *all surrounding circumstances*. *See Schock v. Nash*, 732 A.2d 217, 226 n.32, 228, 230 (Del. 1999) (rejecting "bright line" test in determining agent's authority in context of interpreting a power of attorney); *Realty Growth Investors v. Council of Unit Owners*, 453 A.2d 450, 455 (Del. 1982); *Demarco*, 390 F.2d at 844. Those circumstances include the agreement between the parties, subject matter of the transaction, belief of the agent and awareness of the parties. *Id.*

In addition to a written agreement between the principal and agent as is present here, the agent must believe that the principal authorized the agent to take an action that has legal consequences for the principal. *See* Restatement (Third) of Agency § 2.01 (2006).[15] Indeed, "[l]ack 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 authority encompassed the

[14] Although New York agency law applies in this case, the jurisprudence on agency law in both states would yield the same result. *See Sung Hwan Co., v. Rite Aid Corp.*, 2013 WL 4104481, at *2 (N.Y. Sup. Ct. Aug. 14, 2013).

[15] Delaware and New York view the Restatement of Agency as authoritative. *See Dassen v. Boland*, 2011 WL 1225579, at *5 (Del. Super. Ct. Mar. 23, 2011); *U. S. v. Montreal Trust Co.*, 358 F.2d 239, 254 n.8 (2d Cir. 1966) (Timbers, D.J., dissenting).

act in question." *Id.* § 2.02 cmt. e; *see also* B34-35.[16] Further, an agent's understanding of the principal's interests and objectives is an element in assessing an agent's actual authority. *See* Restatement (Third) of Agency § 2.02 cmt. e.[17] Here, the Bankruptcy Court correctly examined all of the circumstances relating to JPMorgan's manifestations of authority to GM, including the Synthetic Lease Termination Agreement and the agent's belief, and concluded that JPMorgan did not authorize GM (nor its counsel Mayer Brown) to file a UCC-3 that terminated the Term Loan financing statement. (B32-49.)

Decisions issued after the 2001 amendments to Article 9 are illustrative. For example, in *In re A.F. Evans Co., Inc.*, 2009 WL 2821510 (Bankr. N.D. Cal. July 14, 2009), *aff'd sub nom. Official Comm. of Unsecured Creditors v. City Nat'l Bank, N.A.*, 2011 WL 1832963 (N.D. Cal. May 13, 2011), the bankruptcy court analyzed whether the secured party had authorized an escrow agent to file a termination statement which terminated its security interest in all property instead of specific assets of the debtor. *Id.* at *1-2. The bankruptcy court construed the agent's actual authority to act in light of all surrounding

[16] Accordingly, courts consistently consider the testimony of the agent concerning the agent's belief as to the scope of its authority in determining whether actual authority existed. *See, e.g., Playboy Enters., Inc. v. Dumas*, 960 F. Supp. 710, 721 (S.D.N.Y. 1997), *aff'd*, 159 F.3d 1347 (2d Cir. 1998); *Merex A.G. v. Fairchild Weston Sys., Inc.*, 810 F. Supp. 1356, 1369-70 (S.D.N.Y. 1993), *aff'd,* 29 F.3d 821 (2d Cir. 1994).

[17] *See also* Restatement (Third) of Agency § 2.02 illus. 11 (principal's authorization of an "act" contrary to the interests of the principal known to the agent does not constitute actual authority); *id.* at cmt. h ("A reasonable agent should consider whether the principal intended to authorize the commission of collateral acts fraught with major legal implications for the principal . . .").

circumstances. Specifically, the bankruptcy court reviewed the written agreement between the parties setting forth the scope of authority, and relied on a declaration from the creditor stating that the escrow agent failed to act within its scope of authority. *Id.* at *3-5. It applied principles of agency law to determine that the secured party did not authorize the termination of its entire security interest but only released two of several assets. *Id.*

Ward v. Bank of Granite & Hickory Printing Solutions, LLC (In re Hickory Printing Group., Inc.), 479 B.R. 388 (Bankr. W.D.N.C. 2012) did not involve a principal's authorization of its agent, but rather whether a secured party's own employee authorized the filing of termination statements at issue. *Id.* at 396-97. In holding that the filing was authorized, the bankruptcy court reasoned that the filing of the termination statement was within the scope of the employee's responsibilities, the employee followed the procedures established by her employer when she filed the termination statement in question, and that the employee testified that she both "intended to terminate" the specific UCC-1 financing statement in issue and that the "Termination Statement was authorized." *Id.*[18]

This Court's determination that the answer to the certified question requires that the law of agency be applied without limitation will not usurp any

[18] As the Bankruptcy Court held, unlike here, in *In re Negus-Sons Inc.*, 2011 WL 2470478 (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), the secured party signed a letter which expressly authorized in writing the agent to file the termination statements at issue. (B50-51.)

prerogative of the Second Circuit. This Court has been asked by the Second Circuit to construe the phrase "authorizes the filing" under Delaware law. (Op. at 16.) Once this Court determines that the statute mandates application of the law of agency, the Second Circuit may then consider the question of authority as it applies to the facts of this case.

4. The Committee's Analysis Ignores Settled Law

The Committee appears to argue that the phrase "authorizes the filing" in section 9-509(d)(1) means that for a filed amendment to be effective, a secured party need do nothing more – *in all circumstances* – than to "approve" the ministerial act of communicating a termination statement to the filing office. (Committee Br. at 18.) Even as to this, the Committee vacillates and, to cover the short-comings of its position, provides two other alternative and inconsistent iterations of what it says the statute requires.[19] Tellingly, outside of repeating the word "filing" used in the statute, and the unremarkable statement in 6 *Del. C.* § 9-516 of when a filing mechanically occurs, the Committee provides no support for its position(s). As discussed below, the Committee's view is wrong for multiple

[19] *See* Committee Br. at 16 (secured party needs to "authorize [as opposed to "approve"] the act of filing a termination statement") and Committee Br. at 30 (secured party must "*review*[] and *knowingly approve*[] [the] filing [of] a UCC-3 purporting to extinguish a perfected security interest") (emphasis added).

reasons. While it suits the Committee's goal of achieving victory in this case, if accepted, it would lead to unpredictable results.[20]

a. The Committee Incorrectly Focuses on the Word "Filing"

First, the Committee focuses exclusively on the word "filing." (Committee Br. at 15-16, 18.) The Committee simply ignores the full phrase in which the word "filing" appears – "authorizes the filing". When that phrase is read as a whole and in the statutory context, the statement unambiguously contemplates the need to assess whether there was "authorization" to file an amendment to make that filing effective, and not just the ministerial act of "filing" a piece of paper. *See* U.C.C. § 9-509 cmt. 2 (2010) ("As long as the appropriate person authorizes the filing . . . it is insignificant whether the secured party or another person files any given record. The question of authorization is one for the court, not the filing office."). And that assessment is to be based on the law of agency.

Indeed, the inquiry into "authorization" occurs only *after* the act of filing an amendment has occurred. *See, e.g.,* 6 *Del. C.* § 9-510(a) ("*Filed record* effective if authorized.") (emphasis added); *see also* Delaware Administrative

[20] The Bankruptcy Court's decision, on other hand, has been uniformly accepted as being correctly decided. *See, e.g., Unauthorized Termination Statements Revisited*, 47 No. 11 U.C.C. Law Letter NL 3 (Jan. 2014) ("We are pleased to report that a recent decision arising out of the reorganization of General Motors – In re Motors Liquidation Co. – also gets the [unauthorized termination statement does not have the legal effect of terminating the related financing statement] issue right.").

Rules § 310.2 ("a termination [statement – obviously one already filed] shall have no effect upon the status of the financing statement and the financing statement shall remain active in the Information Management System until one year after it lapses . . .").[21] In fact, the Official Comments encourage parties to retain records indicating that the filing of an amendment was "authorized." *See* U.C.C. § 9-509 cmt. 6 (2010). The Bankruptcy Court held, the filing "is only the start – and not the end – of the judicial inquiry" as to whether the filing was authorized. (B6.)

b. The Committee Displaces the Law of Authority

Second, the Committee's argument, in essence, sidesteps the explicit language at issue – "authorizes the filing" – substituting instead "approval" of the "act" of filing. (*See* Committee Br. at 18.) Nowhere in Article 9 does the effectiveness of a filing depend on "approval," much less approval of the mere act of transmitting a piece of paper to the filing office. Nor is there any suggestion that the word "authorizes" in the statute is tantamount to "approval" or "knowing approval."[22] In this regard, Article 9 does not support the suggestion formulated

[21] Indeed, Article 9 now assumes that in some cases "filings" may be unauthorized when initially filed. *See, e.g.*, U.C.C. § 9-322 cmt. 4 (2010) (describing in "Example 1" how a financing statement that is "ineffective when filed becomes thereafter effective upon the "debtor's post filing authorization or ratification.").

[22] The Delaware UCC, however, does define "knowledge" as "actual knowledge." *See* 6 *Del. C.* § 1-202(b). In addition, under the Restatement of Agency, "ratification" of an act by the principal requires full or actual knowledge of all material facts. *See* Restatement (Third) of Agency § 4.06 (2006). Further, Delaware courts that have addressed the term "knowingly" in other contexts have referred to it as "conscious," "deliberate" and "intentional." *See Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 749 (Del. Ch. 2008); *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 66-67 (Del. 2006). Thus, under the uncontroverted facts of this case and as a legal matter under Delaware law, JPMorgan did not "consciously" and therefore,

by the Second Circuit, that authorization of a filing may occur if a secured party "knowingly approved" for filing a UCC-3.[23]

The Committee's position displaces the application of agency law with a self-serving rule that the failure to detect a piece of paper in a stack of documents equals a grant of actual authority. In the Committee's view, the filing of the Unrelated UCC-3 is effective, not because of any consideration of the body of agency law, but simply based on its own cherry-picking of certain facts: Simpson's receipt of a closing checklist and escrow letter bearing the file number for a UCC-1 financing statement ("64116808 4") pertaining to the Term Loan, the undetected Unrelated UCC-3 among a stack of closing drafts, and because Simpson (which did not represent JPMorgan on the Term Loan) said "nice job" on the documents. (Committee Br. at 9.) The Committee conveniently ignores the mandate of agency law that all of the circumstances are to be considered including: the Synthetic Lease Termination Agreement, the uncontroverted testimony of the agent's representatives, and the fact that no one recognized that the Unrelated UCC-3 pertained to the Term Loan, or intended to terminate the perfection of a security interest in the Term Loan. In this case, the Bankruptcy Court correctly

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did not "knowingly" approve the filing (or even approve the act of filing) of the Unrelated UCC-3.

[23] "Under UCC Article 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 . . ." (Op. at 21.)

considered *all* of these facts and circumstances, and correctly determined that JPMorgan did not authorize the filing of the Unrelated UCC-3 within the meaning of section 9-509(d)(1). (B36-49.)

Furthermore, as noted above, although only "actual" authority is now at issue here, other forms of authority include, *inter alia*, "apparent authority" and "ratification." Thus, a secured party could conceivably authorize a filing by apparent authority or by ratification. But determining – as the Committee argues – that "authorizes the filing" *always* means that a secured party need only "approve" the ministerial act of transmitting a record to the filing office would offer no guidance in other cases in the face of such other theories of authority. For example, "apparent authority" arises from manifestations which, reasonably interpreted, cause *a 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. *See* Restatement (Third) of Agency § 2.03. Whether a principal has consented to a filing is not dispositive in connection with an assessment of apparent authority. *Id.*

c. The Committee's View is Inconsistent with Delaware's Notice Filing System

The Committee's construction is also inconsistent with the "notice filing" system adopted in Delaware. The Official Comments to section 9-509 of the UCC provide:

> 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 set of affairs.

U.C.C. § 9-502 cmt. 2 (2010). Similarly, in *Maryland National Bank v. Porter-Way Harvester Mfg. Co.*, 300 A.2d 8, 10 (Del. 1972), this Court held:

> The Delaware Uniform Commercial Code's financing statement is designed to give public notice of the existence of a security agreement and to give enough information as to permit interested persons to make inquiries to the parties of the secured transaction to ascertain details regarding the debtor's encumbered assets.[24]

The 2001 amendments explicitly promote the due diligence requirement.[25] The Official Comment to section 9-519 of the UCC explicitly states:

> The rule also contemplates that searchers - not the filing office - will determine the significance and effectiveness of filed records.

U.C.C. § 9-519 cmt. 6 (2010).

This due diligence obligation, which occurs after the filing has occurred, is completely inconsistent with the Committee's view that for a termination statement to be effective, the secured party need only "approve" the ministerial act of filing that record. Rather, the notice system's requirement that

[24] *See also* Fred H. Miller & William H. Henning, *The Danger of Dictum*, 45 No. 1 UCC Law Letter 2, 1 (Mar. 2011) (duty is to discover the "true state of affairs"). As the Bankruptcy Court correctly held (B70-73), this duty of inquiry also applies to UCC-3 termination statements. *See* U.C.C. § 9-518 cmt. 2 (2010); *see also AEG Liquidation Trust v. Toobro N.Y. LLC*, 2011 WL 2535035, at *9 n.1 (N.Y. Sup. Ct. June 24, 2011).

[25] For instance, several new sections prohibit filing offices from rejecting filings (outside of a few non-applicable exceptions), require filing offices to link all subsequent records related to a UCC-1 financing statement and prohibit the filing office from deleting a financing statement and related records from files no earlier than one year after lapse. *See* U.C.C. § 9-101 cmt. 4(h) (2010) ("Filing-office operations").

interested parties learn the "complete state of affairs" and the "details of the debtor's encumbered assets" would and does logically result in an inquiry into whether the secured party's debt was paid off and whether the secured party authorized the consequences of the filing of a termination statement.[26]

5. The 2001 Amendments Rewrote Article 9

The Committee next asserts that the 2001 amendments did not intend to change the operation of the "filing and notice system" or the requirement that UCC-3 termination statements need to be authorized. (Committee Br. at 20.) As presented, this argument is highly misleading in several respects.

a. The Focus of Article 9, as Amended, is on Whether There was "Authorization"

First, the Official Comments unambiguously state that Article 9 was "substantially rewritten" and replaced with respect to the filing of amendments.

[26] The Committee's construction also could lead to unintended consequences, including potential mischief from an unscrupulous debtor attempting to fraudulently eliminate the perfection of a security interest in its property. This very case exemplifies that risk. Here, every single piece of correspondence from GM and its counsel, and all of the underlying documents, represented to JPMorgan and Simpson that all of the UCC-3 termination statements included therein related to the Synthetic Lease Transaction. (B45.) Yet, outside of GM and Mayer Brown's inadvertent error, this case would be no different than had GM been an unscrupulous debtor that wanted to fraudulently unencumber all of its assets. The unscrupulous debtor could camouflage the documentation as pertaining to a different transaction, in an effort to sneak an unrelated UCC-3 past the secured party. The Committee's view that the secured party – in all cases – need only approve the "act" of transmitting the communication of a termination statement to the filing office (regardless of whether it or its agent was aware of or intended the result) could mean that such a fraudulent filing would be effective. To the extent the Committee contends that a fraudulent filing would not be effective, an interested party would still need to make an inquiry as to the complete state of affairs of any filed UCC-3 to determine, in part, whether it was fraudulent or not. Such an inquiry would not differ in any material respect from an inquiry as to whether the secured party authorized the consequences of the filing of a termination statement. *See* Point I.C.5.b. *infra*.

See U.C.C. § 9-101 cmt. 4(h) (2010). Contradicting the Committee's position, the sections of Article 9 at issue before this Court (sections 9-509, 9-510, 9-513) did not even exist prior to the 2001 amendments.

Second, the Committee is disingenuous when it argues that the 2001 amendments did not alter the requirement that the filing needed to be authorized. (Committee Br. at 19-24.) Prior to 2001, outside of forgery, the concept of authority was rarely at issue because the UCC-3 was signed by the secured party, thereby manifesting authority. *See* Harry C. Sigman, *The Filing System Under Revised Article 9*, 73 Am. Bankr. L. J. 61, 70-71 (1999) (attached as Exhibit C to Committee Br.). The 2001 amendments, however, eliminated the requirement that the secured party sign a UCC-3, allowed that *any person* could file it, and for the first time expressly stated that a filed UCC-3 financing statement amendment would be effective only if *authorized* by the secured party. *See* 6 *Del. C.* §§ 9-509 and 9-510. Thus, Article 9, as amended, now focuses unambiguously on whether there was "authorization" to file the particular financing statement or amendment, and not just on the act of "filing." *See* Points I.C.2-3 *supra*.

In this regard, the pre-2001 authority relied upon by the Committee

(Committee Br. at 21) is inapposite.[27] None of those cases address the issue of authority as it relates to the facts in this case. Here the central issue is whether the secured party authorized its agent to file a UCC-3 termination statement. These earlier cases all turned on UCC-3 termination statements signed by the creditor's own employee. And so they hold, on different facts, that a UCC-3 termination statement signed and filed by the secured party itself, even if done by mistake, is nonetheless effective. Authority to file the contested UCC-3 financing statement amendment was manifested by the appearance of the employee's signature. No further consideration of agency principles was necessary. Moreover, all of these cases rely on Part 4 of Article 9, which was replaced in whole by Part 5 of Article 9 in 2001. For instance, in several of these cases, the courts reasoned that Article 9 did not adopt a notice filing system as to UCC-3 amendments – a position that is in direct conflict with the amended statute. *See, e.g.*, *In re Kitchin*, 960 F.2d at 1247 (filing of termination was "dramatic and final" because Article 9 had not adopted a "notice filing system" as to termination statements); *In re Silvernail*, 142 B.R. at 989 ("[t]he filing of a Termination Statement is a method of making the record

[27] *See Crestar Bank v. Neal (In re Kitchin Equip. Co. of Va., Inc.)*, 960 F.2d 1242, 1244-46 (4th Cir. 1992) (secured party signed and filed UCC-3); *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) (same); *In re Silvernail Mirror & Glass Inc.*, 142 B.R. 987, 988-90 (Bankr. M.D. Fla. 1992) (same); *Rock Hill Nat'l Bank v. York Chem. Indus., Inc. (In re York Chem. Indus., Inc.)*, 30 B.R. 583, 584-85 (Bankr. D.S.C. 1983) (secured party filed UCC-3).

reflect the true state of affairs so that fewer inquiries will have to be made by persons who consult the public records").

b. The UCC Established a "Notice Filing" System

The Committee next argues that JPMorgan's position would undermine the "public notice system that is central to the UCC, introducing uncertainty and disruption to the secured lending markets requiring bottomless inquiries into the intentions that lie behind those records." (Committee Br. 28-29.) This misstates the law as well as the practice.

First, the Delaware UCC is not a "public notice system." It is a "notice filing" system – one that requires further inquiry by concerned parties to ascertain the *complete* state of affairs after a filing has already occurred. *See* Point I.C.4.c. *supra*; U.C.C. § 9-502 cmt. 2 (2010); *see also* B70.

Second, the Committee's view that JPMorgan's position would require subsequent lenders to conduct "bottomless" inquiries is meritless. In fact, Article 9 itself provides a mechanism to perform due diligence. *See* U.C.C. § 9-210 cmt. 3 (2010) (debtor can request its existing creditor to provide a statement of the unpaid obligations and a list of collateral that secured the obligations, in order for the debtor to provide such information to subsequent interested parties). Moreover, potential new lenders often simply request a copy of a payoff letter to establish whether the filing of a termination statement was authorized. *See*

Practical Law Finance, Practice Note, *UCC: Conducting and Reviewing UCC Searches* (http://us.practicallaw.com/5-506-5300).[28] Contrary to the Committee's view, the duty of inquiry has always existed and is not burdensome.

Third, contradicting its argument, the Committee concedes in a footnote that due diligence by searchers is required. (Committee Br. 28, n.7.) But it argues, without support, that any inquiry should arbitrarily stop at determining the "authenticity" of the document. (*Id.*) The Committee fails to explain how a searcher would discover the "authenticity" of a UCC-3 termination statement when it is an unsigned, typed form that can be filed by anyone. Further, limiting the inquiry to "authenticity" is inconsistent with the searchers' obligation to learn the "true" or "complete" state of affairs. In fact, the required inquiry will inevitably lead to an information exchange with either the debtor or the secured party that will reveal whether the financing was repaid, and thus, whether the secured party authorized the legal consequences of the filing.[29]

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[28] *See also* Christelle Dorcil, Jason White & Julian S.H. Chung, *Motors Liquidation Bankruptcy Court Applies the Brakes to Unauthorized Termination Statements*, 45 No. 2 UCC L.J. 211, 221 (Aug. 2013) ("A prudent potential lender may wish to request further documentation, such as a payoff letter, to establish whether the filing of the termination statement was authorized.").

[29] The Committee's authority (Committee Br. at 25-28) is inapposite. *See In re Silvernail,* 142 B.R. at 988-90 (rationale conflicts with Delaware law); *In re Lortz*, 344 B.R. 579, 582 (Bankr. C.D. Ill 2006) (concerned perfection under Illinois' Vehicle Code, not Article 9); *Clean Burn Fuels, LLC v. Purdue BioEnergy, LLC (In re Clean Burn Fuels, LLC)*, 492 B.R. 445 (Bankr. M.D.N.C. 2013) (did not discuss filing of a termination statement); *ACF 2006 Corp. v. Merritt*, 2013 WL 466603 (W.D. Okla. Feb. 7, 2013) (involving argument by secured lender that equity should supplant UCC's provisions governing priority of security interests, not "effectiveness" of a filed record).

CONCLUSION

For the foregoing reasons, the Court should answer the certified question as follows: Under the Delaware Article 9, for a UCC-3 "termination statement to effectively extinguish the perfected nature of a UCC-1 financing statement" (Op. at 21), the secured party must "authorize[] the filing" of the UCC-3. The phrase "authorizes the filing" in 6 *Del. C.* § 9-509(d)(1) does not mean that, in all circumstances, a secured party need only authorize the "act" of filing a UCC-3 termination statement (Op. at 2), or "review and knowingly approve" for filing a UCC-3 (*Id.* at 21), or even that a secured party must always "intend to terminate a particular security interest." (*Id.*) Instead, the phrase "authorizes the filing" means that the applicable law of authority (here, agency law) must be applied, without limitation, to the facts and circumstances of each case to determine whether the secured party authorized the filing of the UCC-3 termination statement in question, and therefore whether such filing is effective.

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2014, a copy of the foregoing was served via File & ServeXpress upon the following attorneys of record:

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