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Case Number 325,2014 D

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 REPLY BRIEF

OF COUNSEL:

Eric B. Fisher
Barry N. Seidel
Katie L. Weinstein
DICKSTEIN SHAPIRO LLP
1633 Broadway
New York, NY 10019
(212) 277-6500

And

Jeffrey Rhodes
DICKSTEIN SHAPIRO LLP
1825 Eye Street, NW
Washington, D.C. 20006
(202) 420-3150

Norman M. Powell (No. 2805)
Elena C. Norman (No. 4780)
John J. Paschetto (No. 3766)
Richard J. Thomas (No. 5073)
YOUNG CONAWAY STARGATT & TAYLOR, LLP
1000 N. King Street
Wilmington, DE 19801
(302) 571-6605

Attorneys for Plaintiff-Appellant

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INTRODUCTION

The narrow question of Delaware law certified by the Second Circuit[1] and accepted by this Court presents a straightforward issue of statutory construction: 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? As the Second Circuit explained, upon receipt of this Court's answer to this question of Delaware statutory law, the Second Circuit will decide a second issue, one that is fact-based and ultimately dispositive of the appeal to that court: whether JPMorgan, under applicable principles of New York agency law,[2] provided the requisite authorization. *See* 2d Cir. Op. 15-16, 21-22 (attached as Exhibit A to Appellant's Opening Brief).

As JPMorgan concedes, the applicable provisions of the Delaware statute are unambiguous. When the words of Article 9 are construed according to their ordinary and common meaning, it is clear that a secured party need only authorize the filing of the UCC-3, and nothing more, in order for the filing to be effective.

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1 Unless otherwise stated, defined terms shall have meanings given to them in Plaintiff-Appellant's Opening Brief.

2 JPMorgan agrees that New York agency law applies in this case. Appellee Br. 21, n.14.

The plain language of Article 9 says nothing about the secured party's intent to cause the legal consequences that result from the filing of a termination statement. Under Article 9, the secured party's intent to terminate a particular security interest listed on that UCC-3 has no bearing on whether the filing is authorized and therefore effective.

JPMorgan intentionally avoids answering the narrow question of Delaware statutory law that has been put to this Court. Rather than answer that question, JPMorgan advances much the same argument that it presented to the Second Circuit, one that "obscures the issue" by conflating the pure question of Delaware statutory law that is before this Court with the fact-based question of New York agency law that will be decided later by the Second Circuit. 2d Cir. Op. 15. As the Second Circuit pointed out, JPMorgan's analysis is flawed because it "assumes an answer to the first question and moves directly on to the second." *Id.*

As indicated in the Official Comments to the UCC, law other than Article 9, including without limitation principles of agency law, "generally determines *whether* a person has the requisite authority *to file a record* under" UCC § 9-509.[3] But the principles of New York agency law that the Second Circuit will apply to

[3] UCC § 9-509 cmt. 3 (emphasis added). Principles of agency law are generally applicable because, in most instances, secured parties are corporations or other legal entities that must necessarily act through natural persons, whether officers, employees, or other agents. Of course, in the rare case where a secured party is a natural person acting directly without the use of an agent, agency law is irrelevant and need not be consulted to determine whether such person had the "requisite authority" to file the UCC record. *Id.*

decide the ultimate issue before it on appeal in no way address the question of *what* a secured party must authorize under Delaware's Article 9 for the filing of a UCC-3 termination statement to be effective. As the Second Circuit recognized, these are separate questions. 2d Cir. Op. 15. Agency law is not relevant to the question of Delaware statutory construction before this Court. That question – *what* must be authorized? – is answered by the unambiguous terms of the Delaware statute: the act of filing a termination statement must be authorized for that termination statement to be effective.

In stark contrast to JPMorgan's refusal to answer the certified question of law, proposed *amicus curiae* Commercial Finance Association ("CFA") expresses no such reservations, taking the position that a secured party "must intend to terminate the particular security interest that is listed on the UCC-3," and that it is not sufficient that the secured party authorized the act of filing such UCC-3 "if, due to a clerical error or otherwise, the UCC-3 listed a security interest that the lender did not intend to terminate." Amicus Br. 3-4. CFA fails to offer any analysis to support its novel construction of Delaware's Article 9, which is not supported by the plain language of the statute.

Relatedly, both JPMorgan and CFA argue, without legal foundation, that a secured party should be excused from the consequences of mistakes in its UCC records. This position is contrary to well-established law that recognizes the

effectiveness of authorized, but erroneous, UCC filings. JPMorgan and CFA thus urge the Court to disregard the settled, bright-line rule holding secured parties responsible for their mistakes, in favor of a rule that would allow secured parties to escape the consequences of their authorized, but mistaken, UCC filings. Under their erroneous reading of the law, a secured party can always contend that an authorized but mistaken filing was not "authorized" because the consequences of the filing were not intended.

JPMorgan and CFA further suggest that construing Delaware's Article 9 to require only authorization of the act of filing a UCC-3 would do violence to the UCC notice system. *See* Appellee Br. 28-30, 33-34; *see generally* Amicus Br. This is simply not the case. Once a new lender satisfies itself that the filing of a termination statement has been authorized by the secured party, it should be able to trust in the effectiveness of the filing without having to ponder whether the secured party intended to terminate the particular security interest listed on the termination statement. Furthermore, because secured parties are not bound by the effects of unauthorized UCC-3 filings, they will not be required, as CFA speculates, to constantly check the official UCC records to verify that their security interests are perfected. Rather, as has always been the case under Article 9, and as evidenced by the plain meaning of its words, secured parties are bound only by the UCC-3 filings that they authorize.

ARGUMENT

I. DELAWARE'S UCC ARTICLE 9 REQUIRES ONLY THAT A SECURED PARTY REVIEW AND APPROVE FOR FILING A UCC-3 TERMINATION STATEMENT TO EFFECTIVELY TERMINATE A PERFECTED SECURITY INTEREST

A. The Unambiguous Language Of Delaware's UCC Article 9 Requires Authorization Of The Act Of Filing A Termination Statement, Not The Legal Consequences Of The Filing

JPMorgan concedes that the provisions of Delaware's Article 9 at issue here are unambiguous. Appellee Br. 14. But instead of addressing the unambiguous language of the statute, JPMorgan wanders off into an irrelevant discussion of the Administrative Rules of the Delaware Secretary of State (the "Delaware Administrative Rules"), the Official Comments to the UCC, and applicable principles of New York agency law.[4] JPMorgan's departure from the plain language of the statute not only highlights the infirmity of its argument, it is contrary to the most basic principle of statutory construction.

"It is well-settled that unambiguous statutes are not subject to judicial interpretation." *Leatherbury v. Greenspun, D.O.*, 939 A.2d 1284, 1288 (Del. 2007). "'If the statute as a whole is unambiguous and there is no reasonable doubt as to the meaning of the words used, the court's role is limited to an application of

[4] As further discussed below, it is undisputed that agency law "generally determines whether a person has the requisite authority to file a record under" section § 9-509. UCC § 9-509 cmt. 3. But the principles of agency law serve no purpose whatsoever in construing the unambiguous language of Delaware's Article 9.

the literal meaning of those words.'" *Id*. (citation omitted). As this Court has further recognized:

> "The goal of statutory construction is to determine and give effect to legislative intent." "[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." Moreover, "[w]here the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion."

Friends of the H. Fletcher Brown Mansion v. City of Wilmington, 34 A.3d 1055, 1059 (Del. 2011) (internal footnotes omitted); *see also Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1287 (Del. 1994) ("A court should not resort to legislative history in interpreting a statute where statutory language provides unambiguously an answer to the question at hand.").

The language of Delaware's Article 9 is plain, not reasonably susceptible to more than one interpretation, and a literal reading of the language would not "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). Throughout the relevant sections of the statute, this language clearly and consistently refers to the act of "filing" a termination statement or other record. *See* Del. Code Ann. tit. 6, § 9-509(d)(1) (referring to the entitlement of a person to "file [a termination statement]" if "the secured party of record authorizes the filing" of that document); *id.*, § 9-510(a) (referring to the effectiveness of a "filed record" that "was filed by a

person that may file it"); *id*., § 9-513(d) (referring to "the filing of a termination statement with the filing office").

Furthermore, the statute says nothing at all about the intent of the secured party or the legal consequences that flow from the filing of the termination statement. This point is quite significant. The General Assembly knew how to incorporate notions of intent into Delaware's Article 9 when it deemed it appropriate to do so. *See, e.g.*, Del. Code Ann. tit. 6, § 9-102(a)(7) (2013) ("'Authenticate' means: (A) to sign; or (B) to . . . process a record . . . *with the present intent* of the authenticating person to identify the person and *adopt or accept the record*." (emphasis added)).[5] Had the General Assembly so intended, it could have easily written section 9-509(d)(1) to state, for example, that "a person may file [a termination statement] . . . only if . . . the secured party of record authorizes the filing *and intends to terminate the UCC-1 identified in that filing*." Of course, this is not what the statute says.

Ultimately, JPMorgan cannot escape the plain language of the statute. Despite its best efforts to avoid answering the certified question, it is left with no choice but to concede that it is the *filing* of a particular record that must be

[5] Effective July 1, 2013, subpart (B) of the definition of "authenticate" was revised, and currently reads as follows: "(B) with present intent to adopt or accept a record, to attach to or logically associate with the record an electronic sound, symbol, or process." Del. Code. Ann. tit. 6, § 9-102(a)(7) (2014). Thus, even as revised, the statute refers explicitly to the "present intent" of the person authenticating the record.

authorized. *See* Appellee Br. 16 ("Accordingly, in all cases the secured party needs to 'authorize[] the filing' of the 'amendment.'").[6]

1. The Delaware Administrative Rules Are Not Relevant To Construing The Plain Language Of Delaware's UCC Article 9

In support of its argument, JPMorgan places considerable reliance on the Delaware Administrative Rules. But even if it were necessary or appropriate to use the Delaware Administrative Rules to interpret the unambiguous language of Delaware's Article 9, those rules do not support JPMorgan's position. As the title indicates, the Delaware Administrative Rules are directed towards the administration of the Delaware UCC filing system. The rules do not provide, or for that matter even address, the law on the effectiveness of termination statements and other UCC records that are filed with the filing office.

Thus, JPMorgan's discussion of language that defines an amendment as a document that "purports" to amend a financing statement, and that defines a termination as an amendment "intended" to indicate that a financing statement is no longer effective "with respect to the secured party authorizing the termination,"

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[6] Notably, JPMorgan makes this concession several times in its brief. *See also* Appellee Br. at 18 ("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."); *id.* at 19 ("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."); *id*. at 35 ("[T]he 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.").

is of no moment. The use of the terms "purports" and "intends" merely reflects the so-called "open drawer" policy that circumscribes the discretion of filing officers and requires them to accept UCC records for filing without making a substantive determination as to whether or not the filing was made by a person authorized to do so. *See* Delaware Administrative Rules § 2.[7] Because the filing clerks do not make any determinations as to whether a filing is authorized, it is appropriate (and not at all surprising) that the Delaware Administrative Rules use the language flagged by JPMorgan to make clear that the mere acceptance of the filing does not indicate that the filing is authorized.[8]

2. The Official Comments To The UCC Are Not Relevant To Construing The Plain Language Of Delaware's UCC Article 9

JPMorgan also cites to the Official Comments to the UCC in support of its argument. Appellee Br. 18. But the Official Comments do not support JPMorgan's position. Rather, the Official Comments are entirely consistent with the plain language of the relevant sections of Article 9, discussed above, which

[7] Section 2 of the Delaware Administrative Rules provides that in accepting for filing (or refusing to file) a document, the filing officer does not (i) determine its legal sufficiency or insufficiency, (ii) determine that a security interest exists or does not exist, (iii) determine that information in the document is correct or incorrect, or (iv) create a presumption that information in the document is correct or incorrect. *See generally* Delaware Administrative Rules § 200.1-200.4.

[8] In its proposed *amicus* brief, CFA recognizes this "open drawer" system. After conceding that "a termination statement is effective only if its filing is 'authorized' by the secured party of record," CFA acknowledges that "Article 9 does not require or allow the filing officer to request, or the terminating party to file, any evidence of that authorization." Amicus Br. 6.

provide that in order for a termination statement to be effective, only the act of filing it (and not the legal consequences of the filing) must be authorized. For example, the Official Comment to section 9-509 states that law other than Article 9, including without limitation agency law, "generally determines whether a person has the requisite authority *to file a record* under this section." Del. Code Ann. tit. 6, § 9-509 cmt. 3 (emphasis added). Like UCC § 9-509, the Official Comment to that section speaks to the issue of authority to *file* a document, not authority to bring about the legal consequences that result from the filing of that record.

3. Principles Of Agency Law Are Not Relevant To Construing The Plain Language Of Delaware's UCC Article 9

Unable to overcome the unambiguous language of Delaware's Article 9, JPMorgan attempts to muddle the issue by conflating the narrow question of statutory construction that has been certified to this Court with the related, yet distinct, question of New York agency law that will be decided by the Second Circuit on the complete record that is before it on appeal. In so doing, JPMorgan makes the same unpersuasive argument that it made in the underlying appeal to the Second Circuit. As that court recognized, JPMorgan's argument "obscures the issue." 2d Cir. Op. 15.

The question of statutory construction that has been certified to this Court is a narrow one: *what* is it that a secured party must authorize for a UCC-3 termination statement to be effective? JPMorgan suggests that the law of agency

should be used to answer this question. Appellee Br. 18 ("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.'").

Yet JPMorgan never bothers to explain how principles of New York agency law could possibly help answer this straightforward question of Delaware statutory construction or, for that matter, why the plain language of Delaware's Article 9 – which JPMorgan admits is unambiguous – requires any judicial interpretation in the first place. The Court should reject JPMorgan's invitation to read additional words into Article 9 for the purpose of grafting onto the statute an invented requirement that principles of state agency law should be consulted to determine *what* Article 9 requires a secured party to authorize for a UCC-3 termination statement to be effective. *See Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 560 (Del. 2002) (recognizing that Court should avoid reading words into statute that General Assembly could have easily included); *see also Leatherbury*, 939 A.2d at 1291 ("As the United States Supreme Court has noted, for a court to supply alleged statutory omissions by the legislature transcends the judicial function in a constitutional system that provides for a separation of powers.").

It is undisputed that law other than Article 9, including without limitation (and to the extent applicable) principles of agency law, generally must be applied to determine *whether* or not a person who filed a UCC-3 "has the requisite authority to *file a record*" under section 9-509 of the UCC. Del. Code Ann. tit. 6, § 9-509 cmt. 3 (emphasis added).[9] But that is a separate, fact-intensive question that is to be decided by the Second Circuit, which has the complete record before it. As the Second Circuit determined:

> Intertwined in this appeal are two 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?

2d Cir. Op. 14-15.

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[9] Principles of agency law are likely to be relevant where, as is most often the case, the secured party is a legal entity that is only capable of acting through an agent. In such cases, it is appropriate to apply the relevant (here, New York) law of agency to determine whether a person who filed a UCC-3 had the "requisite authority to file" that record on behalf of the secured party. Del. Code Ann. tit. 6, § 9-509 cmt. 3. But agency law would have no relevance, for example, where the secured party is a natural person who files a UCC-3 directly with the filing office, without utilizing an agent to file the record. Whether the secured party is a legal entity or a natural person, the effectiveness of the filing of a UCC-3 is assessed under the same statutory language. As JPMorgan itself urges, "[t]he construction of any statute should search for consistency in its application regardless of the factual scenario." Appellee Br. 19. On this point, the parties are in agreement.

Indeed, the reason for JPMorgan's misguided focus on the agency issues implicated in the second question to be decided by the Second Circuit is transparent. It is because JPMorgan has no answer to the first question – the pure question of Delaware statutory construction that has been certified to this Court. JPMorgan thus refuses to acknowledge that the language of the Delaware statute is plain, and requires only that the act of filing a UCC-3 termination statement be authorized in order to be effective.

B. Both The Certified Question And The Question To Be Decided By The Second Circuit Focus On The Acts To Be Performed By A Person, Not The Subjective Intent Of The Secured Party

Unable to escape the plain language of Delaware's Article 9, JPMorgan conflates the two separate questions identified by the Second Circuit and attempts to change the topic to principles of agency law.[10] These issues, which require

[10] JPMorgan professes that it "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." Appellee Br. 20. "Instead," it urges, "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." *Id*. As to this point, the parties agree. But the fact-based inquiry of *whether* the particular UCC-3 filing at issue was authorized is what the Second Circuit will decide, on a complete factual record, after this Court decides the narrow question of law that it has accepted for certification – *what* must be authorized? This Court's answer to that question will apply to all UCC filings, without regard to whether agency law principles might have to be applied to determine whether, under the facts of a particular case, a party authorized the filing of a record.

CFA, for its part, takes the position (without providing any analysis) that the secured party's intent to terminate the perfection of a security interest is required in order for a UCC-3 termination statement to be effective. Amicus Br. 3 ("In order for a UCC-3 filing to be effective to terminate a security interest, the secured lender holding such interest must intend to terminate the particular security interest that is listed on the UCC-3."). Yet at the same time, like

application of the principles of New York agency law to the facts of this case, are not before this Court (and, indeed, are irrelevant to the question certified to, and accepted by, this Court), and will be decided by the Second Circuit. Nonetheless, because JPMorgan has decided to raise these issues here, the Committee briefly explains why JPMorgan's reliance on those agency law principles is misplaced.

Similar to section 9-509 of the UCC, which focuses on the act of filing and not the intent to bring about the legal consequences of such act, agency law focuses on the acts to be performed by an agent on behalf of a principal, not on the legal consequences of those acts or the subjective intent of the principal. "Actual authority . . . is created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent *take action* on the principal's behalf." Restatement (Third) of Agency § 3.01 (2006) (emphasis added).[11]

"'[U]nexpressed reservations or limitations harbored by the principal do not restrict the principal's expression of consent to the agent.'" *Palmdale Hills Prop.*,

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JPMorgan, CFA is compelled by the unambiguous statutory language to acknowledge that Article 9 in fact speaks to the act of filing, and not the secured party's intent. *Id*. at 6 ("Under the UCC, a termination statement is effective only if its *filing* is 'authorized' by the secured party of record.") (emphasis added).

[11] *See also RLI Ins. Co. v. Athan Contracting Corp.*, 667 F. Supp. 2d 229, 235 (E.D.N.Y. 2009) ("Actual authority . . . exists when, at the time that an agent takes action 'that has legal consequences for the principal, the agent reasonably believes, in accordance with the *principal's manifestation to the agent*, that the principal wishes the agent so to act.'" (emphasis in original) (quoting Restatement (Third) of Agency § 2.01 (2006))).

LLC v. Lehman Commercial Paper, Inc. (In re Palmdale Hills Prop., LLC), 457 B.R. 29, 47 (B.A.P. 9th Cir. 2011) (quoting Restatement (Third) of Agency § 1.01 (2006) (cmt. d)). Actual authority is therefore created when the agent reasonably believes, based on the principal's "manifestations," that the principal wishes the agent to commit an act. A manifestation, in turn, is "conduct by a person, observable by others, that expresses meaning." Restatement (Third) of Agency § 1.03 (2006) (cmt. b); *see also RLI Ins. Co.*, 667 F. Supp. 2d at 235.

The applicable principles of New York agency law that the Second Circuit will apply upon its receipt of this Court's answer to the certified question are consistent with the unambiguous language of Delaware's Article 9. The Second Circuit will decide whether Mayer Brown reasonably believed, based on JPMorgan's manifestations of assent – including without limitation Simpson Thacher's review and approval of the UCC-3 termination statement for the Main Term Loan UCC-1 – that the act of filing that record was authorized.

C. The Result Urged By JPMorgan And CFA Is Contrary To Well-Settled UCC Law That Was Not Substantively Changed Under The 2001 Amendments To Article 9

JPMorgan endorses the radical (and unsupportable) position that the 2001 amendments to Delaware's Article 9 (1) effected a substantive, fundamental change to the UCC notice filing system, as well as the law regarding the requirement that filed records, in order to be effective, must be authorized, and (2)

effectively abrogated the well-settled line of cases holding that termination statements, even if they contain mistakes and would have unintended consequences, are nonetheless legally effective.[12] This, however, is simply not the case. JPMorgan's and CFA's advocacy for a new regime under revised Article 9 that tolerates carelessness, inattention and mistakes by secured parties finds no support in the law.

Addressing the issue of authority, JPMorgan charges that "the Committee is disingenuous when it argues that the 2001 amendments did not alter the requirement that the filing needed to be authorized." Appellee Br. 31. But there is nothing inaccurate about the Committee's assertion that, both before and after the 2001 amendments, the filing of a termination statement had to be authorized to be effective. *See, e.g.*, Harry C. Sigman, *The Filing System Under Revised Article 9,* 73 Am. Bankr. L.J. 61, 68-69 (1999); *see also* 2d Cir. Op. 12 ("The 2001 amendment loosened the authorization-by-lender's signature requirement to an authorization-by-any-means requirement."). Furthermore, notwithstanding its unfounded accusation, JPMorgan actually *agrees* with the Committee on this point. Appellee Br. 32 (acknowledging that before the 2001 amendments, "[a]uthority to

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[12] *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).

file the contested UCC-3 financing statement amendment was manifested by the appearance of the employee's signature.").

The key point is that the principal statutory change at issue here is the elimination of the signature requirement, which was implemented for the purpose of accommodating electronic and paperless filing. *See* Harry C. Sigman, *The Filing System Under Revised Article 9*, 73 Am. Bankr. L.J. at 68. There is nothing in the statute, the Official Comments, or any legislative history that in any way suggests that the 2001 amendments, and in particular the elimination of the signature requirement, was done in furtherance of a wholesale change to the operation of the UCC notice system. Indeed, JPMorgan acknowledges this, recognizing that "the duty of inquiry has always existed," Appellee Br. 34, and citing to this Court's decision in *Maryland National Bank*[13] that described, in a pre-2001 decision, the purpose of a financing statement being to provide "public notice" of the existence of security agreements so as to allow searchers to conduct due diligence. *Id*. at 29.

Instead, JPMorgan (and CFA) endorse a reading of the law that would deem any UCC record containing a mistake to be unauthorized as long as the secured party did not intend to cause the legal consequences of that filing. Under their view, parties will always be relieved from the legal consequences of their mistaken

[13] *Md. Nat'l Bank v. Porter-Way Harvester Mfg. Co.*, 300 A.2d 8, 10 (Del. 1972).

filings, because in every such instance, that party did not intend such consequences. This, of course, is not the law. If parties could simply immunize themselves from their mistakes by refraining from any subjective consideration of the legal consequences of their UCC filings, they would have absolutely no incentive to ensure the accuracy of information contained in those documents. Rather, they would more likely be incentivized to devote as little attention to their UCC filings as possible, increasing the likelihood of errors and mistakes in those records and thereby undermining the reliability and usefulness of the UCC notice filing system.[14] Conversely, a decision recognizing that only the act of filing a UCC-3 must be authorized in order for the termination statement to be effective would promote the integrity of the UCC filing system by encouraging secured parties to consider, in some manner and with some measure of diligence, the UCC-1 financing statement to which the UCC-3 relates.

Contrary to the alarm sounded by CFA, a decision that only the act of filing a UCC-3 must be authorized in order for the termination statement to be effective will not require secured parties to "constantly check the filing office records and verify its priority liens," thereby driving up the cost of asset-based lending.

[14] In its brief, CFA discusses the "cost-benefit analysis" in which searchers engage when deciding whether "to invest in some level of diligence to check into authorization," noting that a prospective lender "may well take the risk, and often does." Amicus Br. 8. Thus, while CFA and all parties before this Court acknowledge that a UCC-3 cannot be deemed effective merely because it appears in the filing office records, removing any incentive to exercise care in the filing of UCC-3s is not only ill-advised as a matter of policy, it is simply unnecessary as a matter of practice.

Amicus Br. 10. A secured party is not required to take such steps because, as CFA acknowledges, such secured parties are "protected against an *unauthorized* termination of the financing statement (whether willful or inadvertent) by the borrower or any other person." *Id*. at 2. A secured party need not be concerned with the filing of a termination statement it did not truly authorize, because such a filing has no legal effect. *See* Del. Code Ann. tit. 6, § 9-510(a). Delaware's Article 9, under its plain terms, holds secured parties responsible only for the consequences of UCC-3 filings that they authorize. Whether the particular UCC-3 filing at issue in this case was, or was not, authorized by JPMorgan is a matter that the Second Circuit will decide upon its receipt of this Court's answer to the certified question.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Committee's opening brief, 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,

Dated: September 5, 2014

YOUNG CONAWAY STARGATT & TAYLOR, LLP

OF COUNSEL:

Eric B. Fisher
Barry N. Seidel
Katie L. Weinstein
DICKSTEIN SHAPIRO LLP
1633 Broadway
New York, NY 10019
(212) 277-6500

and

Jeffrey Rhodes
DICKSTEIN SHAPIRO LLP
1825 Eye Street, NW
Washington, D.C. 20006
(202) 420-3150

/s/ Norman M. Powell
Norman M. Powell (No. 2805)
Elena C. Norman (No. 4780)
John J. Paschetto (No. 3766)
Richard J. Thomas (No. 5073)
1000 N. King Street
Wilmington, DE 19801
(302) 571-6605

Attorneys for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I, Richard J. Thomas, Esquire, hereby certify that on September 5, 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:

By File & ServeXpress

Gregory P. Williams, Esquire
Brock E. Czeschin, Esquire
Susan M. Hannigan, Esquire
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, DE 19801

/s/ Richard J. Thomas
Richard J. Thomas (No. 5073)