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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: MOTORS LIQUIDATION COMPANY *et al.*, Debtors.	Chapter 11 Case Case No. 09-50026 (MG) (Jointly Administered)
MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST, by and through Wilmington Trust Company, solely in its capacity as Trust Administrator and Trustee, Plaintiff, vs. JPMORGAN CHASE BANK, N.A., *et al.*, Defendants.	Adversary Proceeding Case No. 09-00504 (MG)

MOTION OF TERM LOAN LENDERS FOR JUDGMENT ON THE PLEADINGS

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Movants, the "**Term Loan Lenders**," the largest group of defendants in this action, seek judgment on the pleadings under Fed. R. Civ. P. 12(c) based on untimely service and release. *See* Dkt. 341 (scheduling order contemplating such a motion).

PRELIMINARY STATEMENT

Plaintiff filed this adversary proceeding over six years ago, seeking to claw back up to $1.5 billion from hundreds of "term lenders" who provided secured funding to old General Motors Corporation ("**GM**" or "**Debtor**") through a Term Loan and then were repaid under an order approving Debtor-In-Possession ("**DIP**") financing. Plaintiff, however, served none of those term-lender defendants, except JPMorgan Chase Bank. While the other defendants were excluded from the case, Plaintiff and JPMorgan litigated important merits issues—through discovery, summary judgment, and appeals. This bizarre and extraordinary course of proceedings, accomplished by Plaintiff's not making full disclosure to the Court, has substantially prejudiced the absent term lenders and calls for dismissal by this Court.

When the term lenders extended credit to GM, their debt was secured by a lien on billions of dollars of GM assets, perfected by a properly filed UCC-1 financing statement listing as Secured Party of Record JPMorgan "as Administrative Agent." In 2008, while acting as administrative agent for *different* lenders, in connection with a *separate* transaction, and without authority from the other term lenders, JPMorgan "reviewed and assented to the filing of" an erroneous UCC-3 that named JPMorgan as "Secured Party of Record" and purported to terminate the principal UCC-1 protecting the term lenders' security interest. *In re Motors Liquid. Co.*, 777 F.3d 100, 105 (2d Cir. 2015). This information about the filing was not alleged in Plaintiff's adversary complaint, which focused on the existence of the UCC-3 termination.[1]

In October 2009, Plaintiff's counsel appeared before Judge Gerber at the first status

[1] This information now has been included in term lenders' crossclaims against JPMorgan. *E.g.*, Dkt. 241.

conference, along with counsel for JPMorgan, the only defendant that Plaintiff had served with the complaint. Plaintiff presented the Court with a "game plan" in which they would conduct discovery and litigate the case, through dispositive motions, "without the involvement" of the hundreds of other term lenders from whom Plaintiff sought monetary recovery. Plaintiff proposed that the Court postpone the deadline for serving the absent term lenders until *after* Plaintiff and JPMorgan had conducted discovery and briefed summary judgment motions.

Because Plaintiff had not served any other term lenders, it presented its "game plan" to the Court *ex parte*. It thus had a duty "to inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse." N.Y. R. Prof. Conduct 3.3(d). At a minimum, both Plaintiff and JPMorgan knew, and Plaintiff should have advised the Court, of the facts surrounding JPMorgan's involvement in the erroneous UCC-3 filing; that JPMorgan had at least a potential conflict of interest with the unserved term lenders; and that it lacked authority to speak for them and could not represent their interests. No one disclosed any of these things, and the matter was presented to Judge Gerber in a way that suggested that JPMorgan could and would represent the absent term lenders' interests. The Court thus did not have crucial facts bearing upon the propriety of the service extensions.

In fact, the extensions, which stretched across six years, violated Federal Rule of Civil Procedure ("**FRCP**") 19 and also were not authorized by Rules 4 or 6. They allowed Plaintiff to litigate the effectiveness of the UCC-3 termination statement without hundreds of parties who were required to be joined—named as defendants *and served*—before such an issue could be litigated. Those are the parties from whom the Plaintiff claims over 90% of the $1.5 billion in payments that it seeks to avoid, yet, during critical litigation, they were not only left out but also left without even a proper representative. And the only grounds offered to try to justify the

extensions—a desire to avoid the "involvement" of the term lender defendants, a concern about litigation costs, and an unwillingness to serve parties thought unlikely to have "meaningful discovery"—were patently insufficient. It is never enough to want to proceed in a case without one's adversaries or to avoid the routine costs of serving and litigating against those adversaries. And here, such a desire is particularly insufficient and improper where the plaintiff seeks a ten-figure recovery, wishes not simply to delay service but to exclude from discovery, summary judgment, and appeal nearly all of the parties from whom it seeks that recovery, can serve by mail, and in fact effected service easily when it eventually made the effort in 2015.

In addition, the moving parties' failure to disclose to the Court the potential prejudice to the absent term lenders from the service extensions was itself sufficient to render the orders improper. Had the Court considered that potential prejudice—including that Plaintiff would be litigating crucial issues bearing on liability without "involv[ing]" the very defendants from whom repayment was sought—it almost certainly would have found that conducting discovery and deciding summary judgment without them would be prejudicial. And the Court would have appreciated the extraordinary way in which Plaintiff sought to litigate its $1.5 billion in claims.

In fact, the resulting proceedings did irreversibly prejudice the absent term lenders. While leaving them out of the case, Plaintiff conducted significant proceedings in this Court, and obtained two appellate precedents adverse to the term lenders—in the Second Circuit and Delaware Supreme Court. Although these decisions should not be preclusive against the absent parties, they create serious practical obstacles to their defense. Instead of litigating against the parties from whom it seeks most of its recovery, Plaintiff litigated against a single defendant, apparently on the theory that it would be representing all other term lenders, yet Plaintiff proceeded outside the due-process protections of Rule 23, and, unknown to the Court, the

supposed representative was plainly disqualified from serving in such capacity. Indeed, that improper representative is now reserving the right to invoke against the purportedly represented term lenders the delays caused by the service extensions, by contending that their crossclaims against it are time barred. More generally, for six years, the absent term lenders were excluded from discovery, briefing, and potential settlement discussions; because they undoubtedly would have differed with JPMorgan on critical strategic decisions along the way, this case would have proceeded much differently had they been served and properly brought into the case. Nor was it the absent term lenders' duty to seek out information about these proceedings and then join them; rather, the law is clear that an unserved defendant never has a duty to waive service and appear.

By contrast, any prejudice to Plaintiff from the relief sought in the present motion is mitigated by the fact that Plaintiff is not pursuing any pre-existing right for which its predecessors (the unsecured creditors) bargained; it seeks a windfall from an improper UCC filing in which none of the unserved defendants played any role. And by coming to the Court *ex parte*, withholding important information, and procuring exclusion of the absent term lenders until after merits issues were decided and appealed, Plaintiff acted at its peril, because the Court always would have the power later, at the absent parties' behest, to vacate the orders that it granted in their absence and without full information.

What has happened here is extraordinary and egregious. Now, at last fully informed, the Court should correct the harms of six years of delayed service in this $1.5 billion case, by vacating the extensions and dismissing the complaint for insufficient service of process.

Separately, Plaintiff's third cause of action, for prepetition preferential transfers under Bankruptcy Code § 547, should be dismissed for failure to state a claim. The DIP Order lacks the authorization necessary for Plaintiff to bring preference claims. And in authorizing the post-

petition repayment of the Term Loan, the order *releases* claims against the term lenders, with a specific exception that does not apply to the claim in question.

BACKGROUND

A. The Term Loan Agreement and Debtor-in-Possession Financing Order.

On June 25, 2009, soon after GM filed for Chapter 11 protection, this Court issued its DIP Order, which authorized GM to use some of the DIP financing to pay off certain prepetition claims, including "the amount then outstanding" (around $1.5 billion) under a Term Loan Agreement involving over 500 secured lenders, including the Term Loan Lenders. *In re Motors Liquidation Co.*, 486 B.R. 596, 615 (Bankr. S.D.N.Y. 2013); DIP Order ¶ 19(a) (No. 09-50026, Dkt. 2529). A few days later, as authorized under the DIP Order, GM repaid the Term Loan, 486 B.R. at 615, by paying JPMorgan, the Administrative Agent for the Term Loan, which made distributions to the other term lenders, *see* Am. Compl. ¶¶ 9, 578, 594-95.

B. Plaintiff's Service Extension Proposal in 2009.

A month later, Plaintiff (in the form of the Committee) filed an adversary complaint naming as defendants JPMorgan and hundreds of term lenders that received repayments under the DIP Order. The complaint sought to claw back those payments, as well as certain funds paid before GM's bankruptcy filing. More specifically, it sought to avoid the security interest securing the Term Loan on the ground that a UCC-3, mistakenly filed in 2008, terminated its perfection. The Committee thereby hoped to benefit from the UCC-3 by reducing the lenders to unsecured status, "sharing *pari passu* with the many billions of dollars of other unsecured claims in GM's chapter 11 case." 486 B.R. at 615 n.54. The Second Circuit would later decide that the UCC-3 was filed with JPMorgan's review and assent, even though it was erroneous because it was filed in connection with the payment of a separate debt. 777 F.3d at 105. Indeed, it was made without authority from the term loan lenders, as the Term Loan had not then been paid off.

Despite having filed a complaint demanding relief from hundreds of defendants, Plaintiff then served the complaint only on JPMorgan. This was by design, as became clear at a status conference in October 2009. Judge Gerber opened the conference by saying that he wanted to "get to know" counsel. It was "the first status conference," and he was "not up to speed" on the case to the same extent as if a motion were in front of him. Plaintiff's counsel then offered its "game plan for litigating" the action. Admitting that its claims targeted not only JPMorgan but also "hundreds of other financial institution defendants," for "significant amounts, in excess of $1.5 billion," counsel stated that "*we've conferred extensively with counsel for JPMorgan* and we have a plan to litigate this case quickly and *without the involvement of the hundreds of other defendants*." He noted that "JPMorgan served as administrative agent on the loan that's really at issue here," while the hundreds of other defendants were merely "defendants to the extent that they received payments under the loan." Further, "neither side"—that is, neither Plaintiff nor JPMorgan—"believe[d] that those hundreds of other defendants have meaningful discovery." Counsel explained that the Plaintiff and JPMorgan were submitting a scheduling order extending the time for service "to 240 days" to allow them "to essentially litigate this case from beginning through dispositive motions" by themselves. Hr'g Tr., 10/06/09, at 10, 14.

Judge Gerber then asked for JPMorgan's views. After counsel introduced himself as appearing for JPMorgan "both individually and as administrative agent," the Court sought assurance that JPMorgan had "some of its own money still in the facility"—that it had had "a piece of the action . . . in the underlying indebtedness" rather than the Term Loan's having been "all, hundred percent, syndicated out." JPMorgan's counsel responded, "yes," or "correct," and told the Court that "we've been trying to wrestle with the idea of how do we get this thing resolved without bringing in 300 other investors, members of the syndicate." *Id.* at 11-12.

Despite Judge Gerber's apparent expectation that JPMorgan would be an appropriate representative for the interests of other term lenders, and despite the *ex parte* nature of the proceedings, neither Plaintiff's nor JPMorgan's counsel disclosed information that the Court needed in assessing Plaintiff's plan for them to litigate liability issues by themselves—namely, that the unserved term lenders had not authorized JPMorgan to act for them in the action; that, on the key question whether the flawed UCC-3 filing that allegedly destroyed the term lenders' secured-party status was authorized and/or effective, JPMorgan had a conflict of interest with the other term lenders, because, among other reasons, it "reviewed and assented to" that filing (and they were not involved at all); and that the absent term lenders faced substantial prejudice if merits issues relating to the effectiveness of the UCC-3 termination statement were discovered, briefed, and decided before they were even served. Had the Plaintiff disclosed these facts, it would have been clear to Judge Gerber not only that JPMorgan could not be any sort of representative for the term lenders, but also that the term lenders needed to be heard in their own right. Indeed, in persuading the Court that it would be more efficient to litigate the case without the other defendants, Plaintiff obtained an advantage for itself: the opportunity to litigate dispositive motions only against JPMorgan.

The Court proposed that the appearing parties prepare a stipulation, and entered the scheduling order that Plaintiff and JPMorgan prepared. It gave no reasons for the extension and contained no finding of good cause. Adv. Proc., Dkt. 10, at 2; *see* Hr'g Tr., 10/06/15, at 13.

C. Further Service Extensions, Summary Judgment, and Appeals.

In January 2010, Plaintiff sought another extension. The stipulated order recited only that Plaintiff and JPMorgan had "diligently engaged in discovery" and had "agreed [to] and scheduled multiple depositions." Again, the order did not identify efforts by Plaintiff to serve

the other lenders or any cause for the extension. Nor did it disclose facts that by then had been discovered concerning JPMorgan's conflicts. The Court entered the order without explanation.

This new order, by extending Plaintiff's deadline for service until thirty days after "the Court's decision on any dispositive motion," made more explicit than the 2009 stipulation the appearing parties' intention to litigate Plaintiff's $1.5 billion clawback claims *through decision on dispositive motions* without including the other term lenders. Dkt. 17, at 2. It thus confirmed the prejudice that had been a mere risk in 2009. Plaintiff and JPMorgan indeed did, by themselves, conduct discovery, cross-move for summary judgment, and brief those dispositive motions. *See Motors Liquidation*, 486 B.R. at 603 n.2 & 604; Dkts. 24-42. Plaintiff asked the Court to hold, "as a matter of law, [that] the lien asserted by th[e] lenders, and certain transfers to those lenders, are subject to avoidance." Dkt. 26, at 5. It added, notably, that, "if the Committee prevails on this motion, the only remaining issues for discovery concern the amounts recoverable by the Committee." *Id.* at 7, n.1. While the motions were pending, the end point of the limitations periods on Plaintiff's claims passed. *See* 11 U.S.C. §§ 546(a)(1) & 549(d)(1).

In early 2013, the Court granted JPMorgan's summary judgment motion, and Plaintiff appealed. 486 B.R. at 648. Plaintiff again sought, with JPMorgan, an extension for service on the term lenders. Dkt. 79. In this new request, they inserted a purportedly retroactive "good cause" finding for the prior extensions (that "the Court, for good cause, has previously entered orders extending Plaintiff's time to serve the Summons and Complaint upon the Other Defendants") even though the prior orders included no such finding. The 2013 stipulation also stated, with respect to the new extension, that it "appear[s] to the Court that, among other things, the avoidance of substantial expenses by the Plaintiff which ultimately may not have to be incurred constitutes good cause for further extending Plaintiff's time to serve the Summons and

Complaint until after the entry of a final, non-appealable order resolving the Cross-Motions for Summary Judgment." The Court entered the Stipulation, which extended the service deadline to 30 days after entry of such an order. Dkt. 82, at 2. Like all that preceded it, the Stipulation did not provide for notifying the absent defendants of the service extension.

Plaintiff and JPMorgan then litigated alone in the Second Circuit and the Delaware Supreme Court the validity of the improperly filed, JPMorgan-approved UCC-3 statement. 755 F.3d 78 (2d Cir. 2014); 103 A.3d 1010 (Del. 2014); 777 F.3d 100 (2d Cir. 2015) (per curiam). Both courts ruled for Plaintiff, with no argument or evidence developed by the innocent term lenders and no hint that either court knew any more of JPMorgan's conflict than did Judge Gerber. The Second Circuit directed this Court "to enter partial summary judgment for the Plaintiff as to the termination of the Main Term Loan UCC-1." 777 F.3d at 106; *see* Dkt. 96.

D. Further Service Extensions, and Post-Appeal Service in 2015.

In May 2015, Plaintiff and JPMorgan submitted, and the Court entered, a stipulation authorizing an amended complaint and extending the service deadline to 60 days thereafter. Dkt. 90, at 2. The filing of the amended complaint set July 20, 2015, as the new service deadline. During May and June, Plaintiff finally began serving the term lenders. The week before the new deadline, Plaintiff moved for another extension—to September 30, 2015—because, as it told the Court, it had recently served many of the term lenders but had not completed the process. This was the first time in six years that Plaintiff tried to serve the term lenders. Dkt. 122, at 8, 11.

Having finally been served, the Term Loan Lenders appeared for the first time. They objected to the extension request and asked that, at a minimum, the order be "modified to require Plaintiff to complete service by August 31, 2015." Dkt. 131, at 1. Judge Gerber granted the Plaintiff's motion. Plaintiff later filed affidavits stating that it has served all Defendants. *See* Dkt. 163 (Sept. 18, 2015); Dkt. 164 (Oct. 2, 2015); Dkt. 170 (Oct. 8, 2015).

ARGUMENT

I. PLAINTIFF'S ACTION AGAINST THE TERM LOAN LENDERS SHOULD BE DISMISSED FOR INSUFFICIENT SERVICE OF PROCESS.

"When a defendant moves to dismiss under Rule 12(b)(5), the plaintiff bears the burden of proving adequate service." *Dickerson v. Napolitano,* 604 F.3d 732, 752 (2d Cir. 2010). Plaintiff cannot meet that burden here because the *ex parte* extension orders were an extraordinary abuse of the service-extension rules. In procuring them, Plaintiff excluded nearly all of the defendants from whom its $1.5-billion recovery would be sought, while enabling itself to litigate crucial liability issues through appeals against a single, conflicted defendant. Such an abuse of this procedural device is unprecedented.[2] Because Plaintiff acted at its peril in proceeding *ex parte*, and because the lengthy delay and resulting appellate rulings have seriously prejudiced the term lenders, this Court should vacate the extension orders and dismiss.

A. The Court may reconsider its *ex parte* orders extending Plaintiff's deadline for serving the term lenders other than JPMorgan.

"[E]very order short of a final decree is subject to reopening at the discretion of the . . . judge." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 (1983); *see also* FRCP 54(b); Fed. R. Bankr. P. 7054(a). That particularly includes orders obtained *ex parte*, which, since they are not "battled for," are not law of the case. *Munro v. Post*, 102 F.2d 686, 688 (2d Cir. 1939); *see Official Comm. of Unsec. Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 167 (2d Cir. 2003). With respect specifically to orders extending the deadlines for service, "a district court . . . [may] vacate [its] extension and dismiss the case for untimely service, if it concludes that the plaintiff in fact had not shown good cause for the

[2] Commentators have criticized even more limited extension practices in the bankruptcy courts. *See* J.A. Wurst & M.T. Rozea, *Secret Extensions - Preference Actions Avoiding the Statute of Limitations*, Am. Bankr. Inst. J. (Mar. 2011) (the practice "flies in the face of Congress's intent when enacting the statute of limitations under § 546" and will "result in greater uncertainty"); *accord* D.L. Thorne & K. L. Matsoukas, *Rule 4(m): An Impermissible Detour Around § 546's Statute of Limitations*, Am. Bankr. Inst. J. (Dec./Jan. 2011).

extension." *McCrae v. KLLM Inc.*, 89 F. App'x 361, 363–64 (3d Cir. 2004); *id.* at 364 (abuse-of-discretion standard governs whether prior extension order was proper); *accord Tso v. Delaney*, 969 F.2d 373, 377 (7th Cir. 1992); *Putnam v. Morris*, 833 F.2d 903, 904–05 (10th Cir. 1987). And the case for reopening is even stronger where the extension order was obtained *ex parte* or without full and accurate disclosures to the Court. *McCrae*, 89 F. App'x at 364; *see also In re Worldspace*, Adv. Proc. No. 10-53286, at 8-9 (Bankr. D. Del. June 5, 2014).[3]

Here, for six years following the filing of this action, all of the orders extending the service deadline were obtained *ex parte*—the absent term lenders were given neither formal "notice of the motions to extend [nor] formal opportunity to respond to them." 89 F. App'x at 363. This Court clearly has authority to set them aside.

B. The Court's orders extending the time for service were impermissible exercises of discretion under Rules 4(m) and 6(b), so they should be set aside as improper.

Due process requires that a party sought to be bound have prior notice and an opportunity to be heard. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). A minimum requirement in litigation is service of process, which is "fundamental to any procedural imposition on a named defendant." *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999). Rule 19 protects these principles by ensuring that a party's interests are not litigated without its participation. And Rule 4 confirms that merely naming a party as a defendant is not enough. Before a court may exercise jurisdiction over a defendant, "the procedural requirement of service of summons must be satisfied." *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987); *see also Mississippi Publ'g Corp. v. Murphree*, 326 U.S. 438, 444-45 (1946). Even "notice to the defendant and a constitutionally sufficient relationship between the

[3] *See* Dkt. 263 (providing copies of this order and all other orders cited herein, and explaining their procedural contexts).

defendant and the forum" is insufficient to bind an unserved party. *Omni Capital*, 484 U.S. at 104.

1. The orders violated Rule 19 because they permitted litigation of the Term Loan's priority without required parties.

Under Rule 19, "[a] person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party" if "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may as a practical matter impair or impede the person's ability to protect the interest." FRCP 19(a)(1); *see* Fed. R. Bankr. P. 7019. If the "person has not been joined as required, the court must order that the person be made a party." *Id.* 19(a)(2). This ensures that, "[w]henever feasible, the persons materially interested in the subject of an action . . . be joined as parties so that they may be heard." *Id.*, advisory comm. note.

Here, the term lenders were "persons required to be joined" in litigation over the effect of the UCC-3 filing. FRCP 19(a). They had an "interest relating to the subject of the action," and resolving it without them "m[ight] as a practical matter impair or impede [their] ability to protect" that interest. *See*, *e.g.*, *Berkeley Acquisitions, LLC v. Mallow, Konstam & Hager, P.C.*, 262 F.R.D. 269, 273 (S.D.N.Y. 2009) (a party to contract at issue is a necessary party). And the *risk* of practically impairing that interest was as clear before summary judgment as the *fact* of practical impairment is now, with the Second Circuit's adverse ruling in place. Indeed, before the absent term lenders even answered the complaint, Plaintiff was contending that "the underlying UCC question has been settled," so "what this case is about is valuation [of collateral]." Hr'g Tr., 8/13/15, at 27.

Although the Second Circuit's ruling cannot bind the term lenders as a matter of collateral estoppel, it, like the Delaware Supreme Court's ruling, will "undoubtedly have a

practical effect." *Global Disc. Travel Servs., LLC v. TWA*, 960 F. Supp. 701, 708 (S.D.N.Y. 1997) (Rule 19 requires joinder where court interpretation of agreement "will affect a subsequent action brought by a party to the agreement"); *see Provident Tradesmen Bank & Tr. Co. v. Patterson*, 390 U.S. 102, 110 (1968); *Spiro v. Parker Bros*., 1992 U.S. Dist. LEXIS 11500, at *4 (S.D.N.Y. Aug. 4, 1992) ("The establishment of a negative precedent can provide the requisite prejudice to the absentee."). And both precedents impair the term lenders' settlement position—a fact that itself is prejudicial. *See, e.g.*, *Kawahara Enters. v. Mitsubishi Elec. Corp.*, 1997 U.S. Dist. LEXIS 14282, *7-8 (S.D.N.Y. Sept. 19, 1997).

It was not enough, under Rule 19, that the complaint named the term lenders as defendants. Just as merely naming the lenders did not subject them to the Court's jurisdiction, *Omni Capital*, 484 U.S. at 104, it did not satisfy Rule 19's mandate that they be *joined* in the litigation. Joinder means an opportunity to "be heard." FRCP 19, advisory comm. note. That means being brought into the litigation *via proper service*. As the Advisory Committee has made clear, "parties actually joined in the action" means "parties already before [the court] through proper service of process," in contrast with "absent parties." *Id.*; *see Murphy*, 526 U.S. at 350 ("[O]ne becomes a party officially . . . only upon service of a summons."); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (referring to having "been made a party by service of process"). That is why being "subject to service" is a prerequisite to requiring joinder. FRCP 19(a)(1). Rule 19 is subverted if a party, even though "subject to service," is not served before any material "disposing of the action." *Id.* Accordingly, a party is not joined under Rule 19 unless it is named *and served* before any litigation for which its involvement is required.

Rule 19 has only one exception—for *bona fide* class actions brought against a representative party under Rule 23. *See* FRCP 19(d); Fed. R. Bankr. P. 7023. Under Rule 23,

and core due-process principles, any non-appearing parties sought to be bound must be adequately represented and given "notice, an opportunity to be heard, and a right to opt out of the class." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 349 (2011). Here, Plaintiff did not proceed under Rule 23—nor could it have done so, given JPMorgan's conflict of interest that precluded it from representing the term lenders. *See* 7A Wright & Miller, *Federal Prac. & Proc. Civ.* § 1769 (3d ed.) (Rule 23 requires that "the interests of the representative[e] must be coextensive with those of the class"); *Hansberry*, 311 U.S. at 40 (due process requires interests of class representative to be aligned with those of the class). In asking in 2009, while considering the requested service extension, whether JPMorgan "ha[d] some of its own money" in the Term Loan, Judge Gerber seemed to expect JPMorgan to represent the absent parties. Hr'g Tr., 10/06/09, at 11. But because the two appearing parties did not invoke Rule 23 or disclose the real circumstances, he acted without knowing of JPMorgan's debilitating conflict.

Because the Term Loan Lenders were required to be joined in this action, and because the action did not proceed under Rule 19's class-action exception, the action should not have proceeded without them. Accordingly, the orders permitting their non-participation violated Rule 19 and so were not within the Court's discretion under Rules 4(m) and 6(b). *Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008) (error of law is an abuse of discretion).

2. The orders violated Rules 4(m) and 6(b) because they were not supported by "good cause" or any other proper consideration.

Rules 19 and 23 reflect a judgment that a party whose interests are affected by an action has a right to participate, and that a desire to avoid such participation is not a valid consideration. The same is true of Rules 4 and 6. Rule 4(m) states that, "[i]f a defendant is not served within 90 days after the complaint is filed," the court "must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows

good cause for the failure, the court must extend the time for service for an appropriate period." *See* Fed. R. Bankr. P. 7004. Thus, "an extension is always warranted upon a showing of 'good cause,'" and "district courts have discretion to grant extensions even in the absence of good cause." *Zapata v. City of New York*, 502 F.3d 192, 196-97 (2d Cir. 2007).[4]

(a) The extension orders were not supported by good cause.

"Good cause is deemed to exist in exceptional circumstances where the plaintiff's failure to serve process in a timely manner was the result of circumstances beyond its control." *Tieman v. City of Newburgh*, 2015 WL 1379652, at *9 (S.D.N.Y. Mar. 26, 2015); *see Mann v. Castiel*, 681 F.3d 368, 374 (D.C. Cir. 2012) (good cause exists "when some outside factor . . . prevented service"). Historically, good cause has involved "difficulties in serving a named defendant with process—including such things as difficulties in finding the defendant, or a defendant's ducking service." *Global Crossing Ltd. Estate Rep. v. Credit Suisse First Boston LLC*, 385 B.R. 52, 82 (Bankr. S.D.N.Y. 2008) (Gerber, J.). Thus, for example, a "desire to delay litigation" is not good cause, *Stephens v. Metro. Transp. Auth. Inspector Gen.'s Office*, 1991 WL 84540, at *2 (S.D.N.Y. May 14, 1991), nor is a tactical decision not to serve defendants, *see Scarola Ellis LLP v. Skyworks Ventures, Inc.*, 2010 U.S. Dist. LEXIS 90721, at *8 (S.D.N.Y. Sept. 1, 2010).

Here, Plaintiff's initial proposed extension orders did not even attempt to establish good cause. Plaintiff did not assert that it was having "difficulties in finding" the term lenders or that they were "ducking service," *Global Crossing*, 385 B.R. at 82—nor could it have credibly done so, given how readily it served over 90% of the defendants once it finally tried in 2015. Rather, Plaintiff's six-year delay in effecting service was part of an open strategy to litigate without the

[4] Similarly, Rule 6(b)(1)(A) states generally that, "[w]hen an act may or must be done within a specified time," the court "may" extend the time "for good cause," if requested "before" the specified time expires. *See also* Fed. R. Bankr. P. 9006. The two "discretionary standards" in Rules 6(b) and 4(m) are "essentially the same." *Paden v. Testor Corp.*, 2004 WL 2491633, at *1 (N.D. Ill. Nov. 2, 2004).

involvement of hundreds of defendants from which it sought clawbacks—the opposite of circumstances beyond its control. In virtually all cases, plaintiffs would rather avoid the involvement of—yet preserve claims against—defendants who would attack the plaintiff's claims, particularly where, as here, the unserved defendants were innocent of any underlying wrongdoing and would be the victims of the windfall that the Plaintiff seeks through its complaint based on the actions of the only other appearing party, JPMorgan. If a desire to exclude one's adversary were good cause, the requirement would be meaningless.

Plaintiff's articulated excuse for wanting to exclude the term lenders defendants—that they were unlikely to have "meaningful discovery"—does not change the analysis. Among other things, the term lenders had an interest in *taking* discovery, both in their defense and to support crossclaims against JPMorgan. In any event, acceptance of the plaintiff's extraordinary argument—that service may, and should, be delayed based only on its self-interested representation that absent defendants lack "meaningful discovery"—appears to be unprecedented. *Cf. Mann*, 681 F.3d at 375 ("postponing . . . litigation until the close of the bankruptcy proceedings . . . in the [alleged] interests of all parties and judicial economy" is not good cause).[5]

(b) For two threshold reasons, no further discretionary analysis is warranted to find the extension orders improper.

Where good cause is lacking, and "a party [has] fail[ed] to take any affirmative step to serve its adversary," a court "should" dispense with further analysis and dismiss. *E.g.*, *Point-*

[5] As noted above, Plaintiff submitted in 2013, after the summary judgment ruling, a stipulation, which the Court entered, reciting that "the avoidance of substantial expenses by Plaintiff which ultimately may not have to be incurred constitutes good cause" for *further* delaying service. This rationale—offered solely with respect to the appeal—even more obviously could not justify the extensions. In any event, avoiding the routine costs of one's own litigation (including the relatively trivial cost of service by first-class mail) is not cause for delaying service—particularly in litigation seeking a ten-figure recovery. *See Fimbres v. United States*, 833 F.2d 138, 139 (9th Cir. 1987) (good cause absent where plaintiffs decided not to effect service because it lacked funds to prosecute the action, and service would have triggered pre-trial and discovery deadlines); *Parker v. John Doe #1*, 2003 WL 21294962, at *2 (E.D. Pa. Jan. 21, 2003) (claimed burden of litigation expense properly measured against "magnitude" of the proposed litigation).

Dujour v. U.S. Post. Serv., 2003 WL 1745290, at *3 (S.D.N.Y. Mar. 31, 2003). If the court nonetheless decides to conduct further discretionary analysis of whether an extension is warranted, it must consider "the impact a dismissal or extension would have on the parties." *Davis v. City of New York*, 2008 WL 2511734, at *4 (S.D.N.Y. June 19, 2008). Where the court fails to consider this question of prejudice, any resulting extension is improper. *See Emerald Asset Advisors, LLC v. Schaffer*, 895 F. Supp. 2d 418, 427 (E.D.N.Y. 2012); *accord Finkelman v. New York State Police*, 2008 WL 821833, at *3 (S.D.N.Y. Mar. 26, 2008).

Under these threshold principles, the extension orders were improper. The Court need not, and should not, ask whether the orders would have been authorized under a further discretionary analysis—a test that is meant for the ordinary case, where elusive defendants or run-of-the-mill errors by counsel or *pro se* parties have impeded service. For six years, Plaintiff "fail[ed] to take any affirmative step to serve its adversary." *Point-Dujour*, 2003 WL 1745290, at *3. And residual discretion could not rescue the orders when the record here, far from showing "'sufficient indications'" of the required "weigh[ing] [of] the impact that a dismissal or extension would have on the parties," reveals that Plaintiff *led the Court to omit this inquiry* as to the absent defendants. *Zapata*, 502 F.3d at 197; *Davis*, 2008 WL 2511734, at *4. At no time did Plaintiff (or JPMorgan) disclose JPMorgan's conflict that prevented it from representing the other term lenders' interests, and at no time before August 2015 did the Court consider the impact of the requested extensions on the absent term-lender defendants—including that merits issues affecting them would be decided in their absence. These threshold failings, along with the absence of good cause, suffice to invalidate the extension orders.

(c) Even if a further discretionary analysis were warranted, it would confirm that the extension orders were improper.

Even if a discretionary analysis had been conducted despite the absence of good cause,

any "weighing of . . . equitable considerations" would have compelled denial of the extensions. *Zapata*, 502 F.3d at 197. "[I]n addition to the considerations underlying the good cause analysis," courts commonly consult four factors to guide their balancing of the equities: "(1) whether any applicable statutes of limitations would bar the action once refiled; (2) whether the defendant had actual notice of the claims asserted in the complaint; (3) whether defendant attempted to conceal the defect in service; and (4) whether defendant would be prejudiced by extending plaintiff's time for service." *Etheredge-Brown v. American Media, Inc.*, 2015 WL 4877298, at *3 (S.D.N.Y. Aug. 14, 2015) (citation omitted).

These considerations weigh heavily against the extension orders. The term lenders at no point evaded service, and, although the statutes of limitation would bar Plaintiff from refiling this action, that fact "does not require [courts] to exercise [their] discretion in favor of plaintiff," particularly where, as here, the plaintiff showed "a surprising attitude of insouciance as to the strictures of Rule 4(m)." *Eastern Refractories Co. v. Forty Eight Insulations*, 187 F.R.D. 503, 506 (S.D.N.Y. 1999). Indeed, any prejudice to Plaintiff from the statute of limitations stems from its own strategic decision to exclude the term lenders. *See Davis*, 2008 WL 2511734, at *4 (denying extension where claims would be time-barred, because "these consequences are attributable in large part to Plaintiff and his counsel's neglect and failure to prosecute"). And the *term lenders* would be prejudiced if the late-served complaint were to toll the limitations periods beyond the time of service. *Zapata*, 502 F.3d at 198; *see also Vaher v. Town of Orangetown*, 916 F. Supp. 2d 404, 421 (S.D.N.Y. 2013) (extension beyond limitations period "imposes a corresponding prejudice on defendants"). This is true irrespective of any knowledge the term lenders may have had of the proceedings or the complaint, because such knowledge does not excuse noncompliance with Rule 4(m) "unless plaintiff has diligently attempted to complete

service." *Smith v. Bray*, 2014 WL 5823073, at *5 (S.D.N.Y. Nov. 10, 2014).[6]

Finally, and most important, the extension orders had clear potential to prejudice the absent term lenders in several inter-related ways—a potential that has been borne out.

First, Plaintiff devised, and persuaded Judge Gerber to adopt, a structure under which the case would proceed through orders on summary judgment and, eventually, through appeal—apparently hoping that the rulings somehow would bind the absent term lenders. Of course, the facts not disclosed to the Court made that a due-process impossibility; not only was JPMorgan not authorized to represent the interests of the term lenders, but it was not even in a position where it could do so, given the conflict flowing from its potential liability to those same lenders. But now that the proposed plan has gone into effect, with irreversible adverse rulings from two appellate courts, the prejudice to the absent term lenders is real. Although they cannot be bound by these rulings, the rulings undoubtedly would create significant practical obstacles if the claims against them were allowed to proceed.

It is egregious for service extensions to reach beyond summary judgment and even appeal. In a less extreme case in which a plaintiff *sought* such an extension, *Gurvey v. Cowan, Liebowitz & Latman, P.C.*, 2013 WL 3940858 (S.D.N.Y. July 31, 2013), a motion to dismiss had been litigated and decided before certain defendants were served. After the defendants were served, the court granted their motion to dismiss, noting that "this litigation has been going on for more than [six] years" and that plaintiff's delay had deprived defendants "of the ability to meaningfully participate . . . in the resolution of the many issues that have already arisen." *Id.* at

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[6] Indeed, the rationale for considering actual notice—that it may mitigate a defendant's prejudice from the mere passage of time—has little or no force where, as here, a principal source of prejudice is the adjudication of dispositive motions and appeals without the unserved parties. In this context, actual notice would matter only if a defendant could be faulted for not voluntarily appearing and waiving its inadequate-service defense. But no fault could be found, because "a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process." *Murphy*, 526 U.S. at 347.

*4, *report and rec. adopted*, 2013 WL 4437190 (S.D.N.Y. Aug. 19, 2013).

Second, the Court never was told, across multiple requests for extensions in which JPMorgan joined, that JPMorgan might try to use the delay to run out the clock on any crossclaims that the innocent lenders might file against it based on its assent to the filing of the improper UCC-3. But JPMorgan now is threatening to do just that: It has advised the other term lenders that it intends to claim that any crossclaims against it are time-barred based on the very delay that Plaintiff, with its agreement, procured from the Court. *E.g.*, Dkt. 188, at 3. Although JPMorgan's position is meritless at a number of levels—including because the crossclaims are timely under the "relation back" provision of New York's CPLR § 203(d)—the mere fact that the other term lenders must respond to such an argument underscores the prejudice from the extension orders.

Third, the absent term lenders have been prejudiced in ways that are unknowable but no less real. One cannot recreate how the litigation would have proceeded had interested defendants not been excluded for years from discovery, strategy, and briefing on dispositive issues. As one example, given the myriad complex issues surrounding the improper UCC-3 filing, the absent term lenders might not have joined JPMorgan's go-for-broke strategy of staking its case on summary judgment at the outset of the litigation, instead of pursuing settlement. More generally, the case might have been presented (and seen) differently had it centered on a plaintiff seeking a windfall from innocent defendants uninvolved in the UCC-3 filing, rather than the one large bank that reviewed and assented to the filing. That would have included, as the crossclaims show, *see* Dkt. 241, developing, through depositions and other discovery, different facts bearing upon the effectiveness of the UCC-3, and different arguments—unburdened by the incentive JPMorgan had to "pull punches" to avoid any focus on its own error.

Fourth, the sheer length of the delay has damaged the absent term lenders' ability to protect their rights—a factor that weighs heavily in favor of dismissal. *See Carl v. City of Yonkers*, 2008 WL 5272722, at *6 (S.D.N.Y. Dec. 18, 2008) (dismissal proper where requested extension "would require defendants to defend a lawsuit based on actions taken more than seven years ago"), *aff'd*, 348 F. App'x 599 (2d Cir. 2009).[7] Among other things, the Term Loan Lenders now are being told by JPMorgan that some documents requested under Rule 34 may no longer exist. Similarly, the term lenders may be forced to prove, seven years after the fact, the value of numerous fixtures (collateral unaffected by the UCC-3) in 2009. *See* Am. Compl. ¶ 601. Lost evidence, in addition to faded memories and absent witnesses, is a basic form of prejudice. *De La Rosa v. N.Y.C. 33 Precinct*, 2010 WL 1737108, at *7 (S.D.N.Y. Apr. 27, 2010) (passage of time may prejudice defendants because "evidence may be lost and recollections can grow weak"); *Gurvey*, 2013 WL 3940858, at *4 ("Documents and witnesses, which might have been readily available to defendants were they served sooner, might now be irretrievably lost."). The cost to the Term Loan Lenders of their exclusion is both real and irreversible.

C. The Court should dismiss for untimely service.

Once the Court sets aside the extension orders, service is untimely, and dismissal is the proper remedy. *See Efaw v. Williams*, 473 F.3d 1038, 1041 (9th Cir. 2007) (vacating extension order and remanding "with instructions to dismiss"); *McCrae*, 89 F. App'x at 364 (affirming order setting aside service extension and dismissing). As detailed above, the prejudice to the term lenders cannot be undone, and there is no other remedy. Accordingly, having set aside the prior service extensions, the Court should dismiss Plaintiff's claims for insufficient service.

[7] *See also Efaw v. Williams*, 473 F.3d 1038, 1041 (9th Cir. 2007) (vacating extension, in part due to "extraordinary" 7-year delay); *Gordon v. Hunt*, 116 F.R.D. 313, 323-24 (S.D.N.Y. 1987) (court finds no case finding good cause for service delay of more than 4 years), *aff'd*, 835 F.2d 452 (2d Cir. 1987); *Ortiz v. N.Y. Dep't of Corr.*, 2010 WL 3199851, at *6 (S.D.N.Y. July 23, 2010) (prejudice to defendants may be presumed for "lengthy and inexcusable" delay), *report and rec. adopted*, 2010 WL 3199697 (S.D.N.Y. Aug. 11, 2010).

II. PLAINTIFF FAILS TO STATE A PREFERENCE CLAIM, BECAUSE THE RELEASE IN THE DIP ORDER DID NOT AUTHORIZE SUCH A CLAIM.

Plaintiff's third cause of action—which invokes § 547 of the Bankruptcy Code to avoid as preferential transfers certain prepetition payments made under the Term Loan Agreement—should be dismissed for the additional reason that it fails to state a claim. Plaintiff would have standing to bring a preference claim only if the DIP Order authorized it upon certain findings. But the DIP Order, which broadly *released* claims against the Term Loan Lenders, did not do so.

Unlike a trustee or debtor-in-possession, a creditors' committee may assert claims in adversary proceedings only where authorized by court order. *In re AppliedTheory Corp.*, 493 F.3d 82, 85-86 (2d Cir. 2007) (per curiam). Such authorization is limited by the plain language of any such order. *See, e.g.*, *In re Dynegy Inc.*, 486 B.R. 585, 591 (Bankr. S.D.N.Y. 2013). When authorization appears as an exception to a general *release*, courts must avoid over-reading it. *See United States v. William Cramp & Sons Ship & Engine Bldg. Co.*, 206 U.S. 118, 128 (1907) (intent to exclude matters from a general release "should be made manifest."); *Tromp v. City of New York*, 465 F. App'x 50, 52 (2d Cir. 2012) (general release language "is to be construed most strongly against the releasor"). That is especially true when the claimed authorization is for a creditors' committee to bring preference claims, because a committee may bring such claims only where the court has made certain required findings. *See Unsecured Cred. Comm. of STN Enters., Inc. v. Noyes*, 779 F.2d 901, 904, 905 (2d Cir. 1985); *Commodore Int'l v. Gould*, 262 F.3d 96, 100 (2d Cir. 2001); *AppliedTheory*, 493 F.3d at 86-87. Thus, even an order purporting to authorize a preference action is ineffective if the requisite findings are not made. *See, e.g.*, *In re G-I Holdings, Inc.*, 2006 WL 1751793, at *12 (D.N.J. June 21, 2006).

In this Court, the practice is to be clear when granting standing for preference claims. The order in *In re Chassix Holdings, Inc.* authorized the committee to file adversary proceedings

challenging prepetition obligations or liens on prepetition collateral, or "otherwise asserting or prosecuting any avoidance actions or any other claims . . . in connection with any matter related to" prepetition obligations or collateral. Dkt. 252, ¶ 27(b), No. 15-10578 (Bankr. S.D.N.Y. Apr. 10, 2015). The order in *In re Terrestar Networks Inc.* authorized the committee to challenge "the validity, enforceability, priority or extent of the Prepetition Obligations or the liens on the Prepetition Collateral securing such Prepetition Obligations," or "otherwise asserting or prosecuting any claims or causes of action arising under Sections 542-553 of the Bankruptcy Code . . . in connection with any matter related to the Prepetition Obligations or the Prepetition Collateral." Dkt. 181, ¶ 17, No. 10-15446 (Bankr. S.D.N.Y. Nov. 18, 2010). In other cases, the Court expressly authorized actions "for preferences." Dkt. 342, ¶ 34, *In re Relativity Fashion, LLC*, No. 15-11989 (Bankr. S.D.N.Y. Aug. 27, 2015); Dkt. 316, ¶ 16, *In re Pinnacle Airlines Corp.*, No. 12-11343 (Bankr. S.D.N.Y. May 17, 2012) (Gerber, J.).

Here, the DIP Order contained no such authorization. After allowing GM to pay off the outstanding amounts of the Term Loan (DIP Order ¶ 19(a)), it broadly released all claims that the Debtor might have against the lenders—including "any and all actual or potential demands, claims, actions, causes of action . . . and all other forms of liability whatsoever, in law or equity, whether asserted or unasserted, known or unknown, foreseen or unforeseen, arising under the Bankruptcy Code, state law, or otherwise now existing or hereafter arising, directly or indirectly related to the Prepetition Senior Facilities . . . ." *Id.* ¶ 19(d). The sole exception, in Paragraph 19, stated that "such release shall not apply to the Committee *with respect only* to the perfection of first priority liens of the Prepetition Senior Facilities Secured Parties (it being agreed that if the Prepetition Senior Facilities Secured Parties, after Payment, assert or seek to enforce any right or interest in respect of any junior liens, the Committee shall have the right to contest such

right or interest in such junior lien on any grounds, including (without limitation) validity, enforceability, priority, perfection or value) (the 'Reserved Claims')." *Id.* (first emphasis added; bold omitted). In the next sentence, the DIP Order gives the Committee standing to bring actions "based upon" the Reserved Claims against the Prepetition Senior Facilities Secured Parties. *Id.*

This language does not authorize claims to avoid prepetition transfers under § 547. It certainly does not do so expressly, as in *Relativity Fashion* and *Pinnacle Airlines*. Nor does it otherwise directly do so, unlike *Terrestar Networks*' specification of a range of sections of the Bankruptcy Code including 547, or *Chassix Holdings*' broad authorizations of "*any* avoidance actions or *any* other claims" "*related to*" prepetition obligations or collateral. Indeed, the DIP Order broadly mentions claims "arising under the Bankruptcy Code" in the *release*.

Nor does the exception grant standing for preference claims, which do not "respect only" and are not "based upon" the "perfection of first priority liens." DIP Order ¶ 19(d). The preference claim does not challenge the perfection of the Lien, nor is it based on the "Payment" authorized by the DIP Order—the only payment with which Paragraph 19(d) and its authorization to sue are concerned. After lifting the automatic stay for the "repayment of the Prepetition Senior Facilities as detailed in paragraph 19 below," *id.* ¶ 14(D), the DIP Order defines the "Payment" as the *yet-to-be-made* satisfaction "of all obligations under the Prepetition Senior Facilities," *id.* ¶ 19(b), and then specifies the conditions of any authorized challenge to that Payment. One condition makes the Debtor responsible for the costs of agents of the Prepetition Senior Facilities "in defending any challenge to such liens or their ability to retain any Payment." *Id.* ¶ 19(c). And Paragraph 19(d) provides that, if, "after Payment," the Prepetition Senior Facilities Secured Parties assert a right "in respect of any junior liens," the Committee may contest it. These terms confirm that the DIP Order did not exclude from the

general release, and thus authorize, any suit challenging a transfer that was not part of the "Payment," including a suit over prepetition payments. Confirming this reading, this Court wrote that, "as authorized under the DIP Financing Order, the amount then outstanding under the Term Loan . . . was repaid," but "would be subject to recapture, as provided in the final DIP Financing Order when the payoff of the Term Loan was authorized." 486 B.R. at 615 & n.54.

Plaintiff's preference claim challenges not any of the Payment, but a transfer that predates the DIP Order and the petition and is not addressed in the DIP Order. That claim, although it mentions the alleged secured status of the Lien, "respect[s]" far more and is "based upon" the distinct elements of a claim under § 547(b)—such as the insolvency of the debtor, the potential recovery to the creditor in a Chapter 7 litigation, and whether payment was in the ordinary course. *See Indus. Distrib. Servs., Inc. v. Grinnell Corp.*, 100 B.R. 584, 585 (Bankr. M.D. Fla. 1989) (§ 547(b) claim challenging prepetition transfer of certain goods was not "based on" alleged invalidity of lien securing goods, and thus was moot where goods had been returned).

Finally, any doubt as to the effect of the release is eliminated by the absence of the required findings under *STN* and *Commodore*. The DIP Order did not determine, "on affidavit and other submission, by evidentiary hearing or otherwise," that "the trustee or debtor in possession unjustifiably failed to bring suit or abused its discretion in not suing to avoid a preferential transfer"; much less did it weigh whether the claim was colorable. *STN*, 779 F.2d at 904, 905. Nor did it certify that a Committee-initiated preference action was "necessary and beneficial to the fair and efficient resolution of the bankruptcy proceedings." *Commodore*, 262 F.3d at 100. Accordingly, Plaintiff lacks authority to bring preference claims.

CONCLUSION

This Court should dismiss the complaint in its entirety for insufficient service of process. The Court also should dismiss the Third Claim for Relief for failure to state a claim.

Dated: January 26, 2016

Respectfully submitted,

/s/ Bruce S. Bennett

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[8] Northern Trust Investments, Inc., as Named Fiduciary to the Central States, Southeast, and Southwest Areas Pension Fund, is represented for all purposes by Munger, Tolles & Olson LLP and not by Jones Day.

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Attorneys for Term Loan Lenders

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11 Case
MOTORS LIQUIDATION COMPANY *et al.*,	Case No. 09-50026 (MG)
Debtors.	(Jointly Administered)
MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST, by and through Wilmington Trust Company, solely in its capacity as Trust Administrator and Trustee,	Adversary Proceeding
	Case No. 09-00504 (MG)
Plaintiff,	
vs.	
JPMORGAN CHASE BANK, N.A., *et al.*,	
Defendants.	

[PROPOSED] ORDER GRANTING THE TERM LOAN LENDERS' MOTION FOR JUDGMENT ON THE PLEADINGS

Upon the motion dated January 26, 2016 (the "Motion") of the Term Loan Lenders for judgment on the pleadings under Rule 7012(b) of the Federal Rules of Bankruptcy Procedure and Rule 12(c) of the Federal Rules of Civil Procedure incorporated therein, Dkt. ___; and upon all of the proceedings had before the Court; and after due deliberation and finding sufficient cause, it is hereby

ORDERED that the Motion is granted; and it is further

ORDERED that Plaintiff's First Amended Complaint in its entirety be, and hereby is, dismissed.

Dated: ________________, 2016
New York, New York

SO ORDERED

____
THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY JUDGE