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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 the 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., individually and as Administrative Agent for various lenders party to the Term Loan Agreement described herein, *et al.,*	
Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF THE MOVING TERM LOAN LENDERS' MOTION FOR JUDGMENT ON THE PLEADINGS

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PRELIMINARY STATEMENT

The undersigned Moving Term Loan Lenders join the request of certain "Term Loan Lenders" for Judgment on the Pleadings, ECF No. 377, (the "**Term Lenders' Motion**") under Fed. R. Civ. P. 12(c) and Fed. R. Bankr. P. 7012(c).[1]

Claims against the Moving Term Loan Lenders should be dismissed for two distinct reasons. First, Plaintiff's failure to serve the Moving Term Loan Lenders—and hundreds of other defendants—for over six years was improper and has irreparably prejudiced them. Although Plaintiff may have proceeded this way for the sake of "efficiency," neither the Federal Rules of Civil Procedure nor the case law contemplates that service can be deferred for many years. To the contrary, Rule 4 requires that "a summons must be served with a copy of the complaint" on each defendant and Rule 19 requires joinder of all parties whose interests may be impaired by an action (subject to an exception not relevant here). Fed. R. Civ. P. 4, 19(a)(1).

This situation was avoidable: Plaintiff could have served the Moving Term Loan Lenders soon after the complaint was filed six years ago and then negotiated a stipulation or scheduling order to litigate threshold issues efficiently and offer any defendant the opportunity to participate. Alternatively, Plaintiff could have sought certification of a defendant class action pursuant to Rule 23, subject to the procedural safeguards and strictures of the Rule. But Plaintiff did none of these things, instead repeatedly asking the bankruptcy court for extensions without showing "good cause" as it litigated critical issues in the case, including the effectiveness of the unauthorized UCC-3 filing, without the involvement of hundreds of defendants with more than $1 billion at stake in the litigation. There was simply no valid basis for the bankruptcy court to

[1] Fed. R. Civ. P. 4, 12, 19, and 23 are made applicable to adversary proceedings under Fed. R. Bankr. P. 7004, 7012, 7019, and 7023. References to the Federal Rules of Civil Procedure incorporate a reference to the corresponding Federal Rule of Bankruptcy Procedure.

grant such extensions without requiring the Plaintiff to formally notify and involve the hundreds of defendants in the case.

Moreover, the extensions granted here were not typical service extensions intended to address logistical difficulties in service. Rather, the service extensions were designed to enable the litigation to proceed with nearly all of the defendants sitting on the sidelines—and so undermined the foundation of the adversarial system by allowing issues affecting the Moving Term Loan Lenders' rights to be adjudicated without notice and without providing them with an opportunity to be heard. Those service extensions, like all interlocutory orders, "may be revised at any time before the entry of" final judgment, Fed. R. Civ. P. 54(b), Fed. R. Bankr. P. 7054(a), and they should be reviewed and reversed because they were issued without good cause. *McCrae v. KLLM Inc.*, 89 F. App'x 361, 363–64 (3d Cir. 2004); *see also* ECF No. 377, Points I.A & I.B. Once this Court reverses those orders, Plaintiff's lawsuit should be dismissed as to the defendants it failed to timely serve. Fed. R. Civ. P. 12(b)(5), (b)(7); *Point-Dujour v. U.S. Post. Serv.*, No. 02 Civ. 6840(JCF), 2003 WL 1745290, at *3 (S.D.N.Y. Mar. 31, 2003) (granting motion to dismiss for failure to serve); *Global Discount Travel Servs., L.L.C. v. Trans World Airlines, Inc.*, 960 F. Supp. 701, 710 (S.D.N.Y. 1997) (granting motion to dismiss for failure to join an indispensable party) (Sotomayor, J.).

Plaintiff's failure to timely serve significantly prejudiced the Moving Term Loan Lenders. They were unable to participate in the litigation (if they were even aware of it); unable to brief and argue critical issues when they were first presented to the trial and appellate courts; unable to influence settlement discussions or other strategic choices that attend any major litigation; and unable to prepare for the significant litigation that is currently before the Court. No "good cause" existed to outweigh this prejudice—and the Moving Term Loan Lenders were

afforded no opportunity to oppose Plaintiff's plan to delay service. Accordingly, the bankruptcy court's prior orders extending the deadline were impermissible exercises of discretion.

Second, for the reasons set forth in the Term Lenders' Motion, Plaintiff's preference claims must be dismissed because these claims were released by the DIP Order (as defined in the Amended Complaint). The DIP Order preserved only claims "with respect only to" and that are "based upon" perfection of a lien securing repayment of the Term Loan. The preference claims are neither, and so must be dismissed. The Moving Term Loan Lenders incorporate by reference the factual background explained in the Term Lenders' Motion, ECF No. 377, pages 5-9.[2]

ARGUMENT

I. PLAINTIFF'S ACTION SHOULD BE DISMISSED FOR INSUFFICIENT SERVICE OF PROCESS

Plaintiff's failure to serve the Moving Term Loan Lenders for many years deprived the Moving Term Loan Lenders of the basic procedural protections of notice and an opportunity to be heard—and contravenes Rules 4, 19, and 23 of the Federal Rules of Civil Procedure. As an initial matter, "[s]ervice of process . . . is fundamental to any procedural imposition on a named defendant." *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 349 (1999). "The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) . . . ." Fed. R. Civ. P. 4(c)(1). Rule 4(m) requires that a Court dismiss an action if a defendant is not served within 90 days after the filing of a complaint, unless "the plaintiff shows good cause for the failure" to timely serve. Fed. R. Civ. P. 4(m).

[2] In accordance with the stipulation between JPMorgan Chase Bank, N.A. ("**JPMorgan**"), the Moving Term Loan Lenders and other Defendants, ECF No. 188, "Stipulation and Order Regarding Extension of the Deadline for the Undersigned Defendants to File Cross-Claims Between and Among Themselves," which defers the deadline to file any cross-claims against JPMorgan, the Moving Term Loan Lenders defer any factual or legal argument with respect to JPMorgan's involvement in the delay in serving the Moving Term Loan Lenders with the complaint, and reserve their rights in connection thereto.

Here, Plaintiff sought repeated extensions of the service deadline and kept hundreds of defendants out of the action for years while it litigated critical issues against a single party. Plaintiff failed to show good cause to justify such an extreme departure from the strictures of Rule 4(m). As set forth in the Term Lenders' Motion, Plaintiff advised the Court that such extensions were warranted because it was unnecessary to "involve" the term loan lender defendants at this stage and because these defendants were unlikely to possess "meaningful discovery." To offer the most charitable interpretation, Plaintiff wished to litigate threshold issues in the case—the effectiveness of the UCC-3 termination statement—without undertaking the burdensome step of serving hundreds of parties and involving them in a litigation that might have been dismissed (and was initially dismissed by the bankruptcy court) at an early stage. But these parties, from whom up to $1.5 billion is being sought, had every right to be "involved" in the litigation from the start and to be served within a period of time that would allow them to participate.

The Plaintiff may argue that the extensions were nonetheless proper because even absent good cause, a court "*may* grant an extension" under certain circumstances. *Zapata v. City of New York*, 502 F.3d 192, 197 (2d Cir. 2007) (emphasis in original). While that may be true as far as it goes, no circumstances were present here to weigh in favor of those extensions. In considering a request for an extension, courts generally 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.*, No. 13-CV-1982 (JPO), 2015 WL 4877298, at *3 (S.D.N.Y. Aug. 14, 2015). Of

most importance to this case, and as explained *infra* at 7-8, *see also* ECF No. 377, Points I.B.1 & I.B.2.c, the numerous service extensions have irreparably prejudiced the Moving Term Loan Defendants' positions in this litigation. Moreover, the Moving Term Loan Defendants never "attempted to conceal" the defect in service, as at Plaintiff's request service was never even attempted until the middle of 2015. While Plaintiff's claims would be time-barred if filed today, that is a problem of Plaintiff's own making. *Eastern Refractories Co., Inc. v. Forty Eight Insul., Inc.*, 187 F.R.D. 503, 506 (S.D.N.Y. 1999); *Davis v. City of New York*, No. 07 Civ. 1395(RPP), 2008 WL 2511734, at *4 (S.D.N.Y. June 19, 2008). Finally, scores of defendants may have had no knowledge whatsoever that they were named in this action, and any knowledge defendants may have had of the general matters giving rise to the complaint cannot excuse noncompliance with Rule 4(m) "unless plaintiff has diligently attempted to complete service." *Smith v. Bray*, No. 13–cv–07172–NSR–LMS, 2014 WL 5823073, at *5 (S.D.N.Y. Nov. 10, 2014). No attempt to serve was made here. In short, the service extensions were supported neither by good cause nor by the equities, were improper, and should be reversed.

Indeed, service is so basic to procedural due process that the Federal Rules of Civil Procedure forbid prosecuting an action unless a plaintiff joins any person that "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." Fed. R. Civ. P. 19(a)(1)(B)(i). Even if the Moving Term Loan Lenders were not named in the complaint, they would be "persons required to be joined" in this litigation, as they have an "interest relating to the subject of the action"—the more than $100 million that Plaintiff seeks to recover from them—and resolving the action in their absence "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 a contract which is the subject of the litigation is considered a necessary party.") (internal quotation marks omitted). Simply naming the Moving Term Loan Lenders as defendants does not satisfy Rule 19's mandate that necessary parties be *joined* in the litigation. The joinder rule exists to provide an opportunity to "be heard," Fed. R. Civ. P. 19, Advisory comm. note, and an opportunity to be heard means being brought into the litigation *via proper service* of the summons and complaint. As the Advisory Committee note makes 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 Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (referring to having "been made a party by service of process").

The current situation could have been avoided. Plaintiff could have served the Moving Term Loan Lenders (and all other defendants) as required by Rule 19, and then negotiated a stipulation or moved for a scheduling order that provided for threshold litigation issues to be addressed first. That process would have complied with Rules 4 and 19, provided the Moving Term Loan Lenders with notice of the case, and invited them to participate if they so chose, while also affording them the possibility of knowingly relying on other defendants to preserve their rights and defenses. Plaintiff's failure to serve the Moving Term Loan Lenders, and all defendants but JPMorgan, made any such plan an impossibility.

Alternatively, Plaintiff could have attempted to bring a class action against all defendants under Rule 23. *See* Fed. R. Civ. P. 19(d); Fed. R. Civ. P. 23. Rule 23 permits the prosecution of an action against a representative of the defendant group, but subject to additional procedural safeguards such as notice to all putative class members, assessment of whether a class should be certified, and "appropriate notice to some or all class members" of developments in the case.

Fed. R. Civ. P. 23(d)(1)(B). These procedural requirements are meant to protect class members' due process rights. *Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218, 222 (2d Cir. 2012). And due process further requires that putative class members of a Rule 23(b)(3) class be provided with the opportunity to opt out of the class and represent their own interests if they so choose. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Unlike members of a putative Rule 23 class, the Moving Term Loan Lenders were never given the right to participate in the litigation and preserve their own interests. Such failures would not be permitted under Rule 23 and should not be permitted here.[3]

The improper delay in joining the Moving Term Loan Lenders prejudiced their ability to defend themselves from the outset of this case. Plaintiff and JPMorgan have already engaged in extensive discovery, but that discovery focused only on certain defenses, to the exclusion of others. Both Plaintiff and JPMorgan moved for summary judgment and the Court issued decisions on those motions. Appellate courts subsequently reviewed those decisions and reversed the Court's order dismissing Plaintiff's claim—a decision that while not formally preclusive against the Moving Term Loan Defendants, may create serious practical obstacles to their defense. And the Moving Term Loan Lenders are now required to litigate this case against a plaintiff that has been actively litigating it since 2009 and has surely spent years considering how to best proceed against the Defendants. Moreover, due to the passage of time, a large number of documents that may have been relevant to the Moving Term Loan Lenders' defenses may no longer be available, while deposition testimony is less likely to be fruitful given the

[3] To be sure, the Moving Term Loan Lenders do not concede that Plaintiff would have satisfied the requirements of Rule 23 or that class action treatment is appropriate here. The point is, Plaintiff failed even to try.

fading of memories that has taken place over the past several years. The Moving Term Loan Defendants now have to mount a defense in the face of all of these obstacles.

Had the Moving Term Loan Lenders been served in 2009, as they should have been, the entire posture of this case may have been different. Discovery regarding a number of the Moving Term Loan Lenders' defenses could have been taken and relied upon in a motion for summary judgment; settlement discussions could have been informed by that same discovery and motion practice (at the very least, the Moving Term Loan Lenders could have engaged in settlement discussions with Plaintiff over the past several years); the parties may have presented the appellate courts with different arguments that could have resulted in more favorable decisions; and the Moving Term Loan Lenders, or any other defendant, may have requested that the Supreme Court of the United States grant a writ of certiorari and reconsider the decision of the United States Court of Appeals for the Second Circuit that reinstated Plaintiff's claims against the Moving Term Loan Lenders. It is patently unfair now to require that the Moving Term Loan Lenders begin to mount a defense after six years of litigation. Their absence from this case—a violation of their due process rights and circumvention of Federal Rules of Civil Procedure 4, 19, and 23—is grounds for dismissal. *Global Discount Travel Servs.*, 960 F. Supp. at 710; *Point-Dujour*, 2003 WL 1745290, at *3. The Moving Term Loan Lenders incorporate by reference the arguments made in ECF No. 377, Points I.B and I.C, as if fully set forth herein.

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

Plaintiff's preference claims should be dismissed because they were released by a final order of the Bankruptcy Court. The DIP Order broadly released all claims that the Debtor (and so, Plaintiff as successor in interest) may have against the Moving Term Lenders. DIP Order

¶ 19(d) (No. 09-50026, Dkt. 2529). The only claims preserved were those "with respect only to the perfection of first priority liens . . . ," which the Committee was empowered to bring actions "based upon." The preference claims are not "with respect" to the "perfection" of first priority liens or "based upon" an alleged lack of such perfected liens. In the interest of economy, the Moving Term Loan Lenders incorporate by reference the arguments made in the Term Lenders' Motion, ECF No. 377, Point II, as if set forth fully herein, for a more extended discussion of the DIP Order's release of Plaintiff's preference claims.

CONCLUSION

For all the foregoing reasons, Plaintiff's claims should be dismissed in their entirety for insufficient service of process, and Plaintiff's Third Claim for Relief should be dismissed for the independent reason that it was released by the final DIP Order.

Dated: New York, New York
January 27, 2016

Respectfully submitted,

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[4] Nonparty Global Fund Trust Company, solely in its capacity as the former trustee of MacKay Short Duration Alpha Fund, has previously moved to dismiss the above-captioned case against MacKay Short Duration Alpha Fund on the ground that MacKay Short Duration Alpha Fund lacks capacity to be sued. That motion has not yet been fully briefed. To preserve its rights in the event that the Court denies that motion to dismiss and rules that MacKay Short Duration Alpha Fund may be sued, MacKay Short Duration Alpha Fund joins this motion for judgment on the pleadings.

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 the Wilmington Trust Company, solely in its capacity as Trust Administrator and Trustee,	Adversary Proceeding
Plaintiff,	Case No. 09-00504 (MG)
vs.	
JPMORGAN CHASE BANK, N.A., individually and as Administrative Agent for various lenders party to the Term Loan Agreement described herein, *et al.,*	
Defendants.	

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

Upon the motion dated January 27, 2016 (the "Motion") of the Moving 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