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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

--x
In re:

Chapter 11

MOTORS LIQUIDATION COMPANY, f/k/a
GENERAL MOTORS CORPORATION, *et al.*,

Case No. 09-50026 (MG)
(Jointly Administered)

Debtors.
--x
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)

against

JPMORGAN CHASE BANK, N.A., *et al.*,

Defendants.
--x

OMNIBUS MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANTS' MOTIONS TO DISMISS AND
FOR JUDGMENT ON THE PLEADINGS

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PRELIMINARY STATEMENT

At the outset of these bankruptcy proceedings, approximately $1.5 billion of debtor-in-possession financing was paid to JPMorgan, as administrative agent on a term loan made to the debtors in 2006. JPMorgan then transferred those proceeds to a consortium of over 500 lenders. In addition to its role as administrative agent, JPMorgan was collateral agent, as well as the single largest beneficiary of the payment, receiving approximately $120 million to pay off the portion of the loan owned by JPMorgan. JPMorgan and the other term lenders were paid in full, ahead of other creditors, on the provisional premise that the term loan was fully secured.

Because the Bankruptcy Court authorized the payment under circumstances where the secured status of the term loan was already in question due to a UCC termination statement that had been filed in Delaware with respect to the term loan's main lien, the Court's order authorizing payment expressly carved out the creditors' committee's standing to challenge the perfection of the liens related to the term loan and to bring claims based upon any such challenges. Pursuant to the Court's order, by accepting the postpetition payment of the term loan, JPMorgan and all term lenders consented to the Court's jurisdiction over any such action. Just weeks after the payment to JPMorgan was made, the creditors' committee sued. Its action challenged the perfection of the main lien securing the term loan and sought to avoid and recover the $1.5 billion postpetition payment, as well as a $28 million prepetition interest payment made within the 90 days before the bankruptcy petition was filed, on the ground that, due to the unperfected main lien, the term loan lenders were substantially undersecured. (Upon confirmation of the debtors' plan of reorganization, the action was transferred to the Trust, which succeeded to the creditors' committee as plaintiff and continues to prosecute the action.)

Soon after the action was commenced, JPMorgan, as administrative agent, proposed – and the creditors' committee agreed – to bifurcate the action. As agreed by the parties and approved by the Court, Phase I of the action would involve the question of whether the main lien had been terminated and would be litigated by JPMorgan, as agent for the term lenders; and Phase II, which would be necessary only if JPMorgan lost Phase I, would involve the question of the extent to which the term loan was undersecured. As administrative agent and collateral agent, JPMorgan was authorized to, and did, litigate Phase I on behalf of the group of term lenders. JPMorgan regularly updated the term lenders about the litigation through correspondence, postings to a website and telephone calls.

In order to allow Phase I to proceed against JPMorgan, as agent, and avoid the need for any of the more-than-500 term lenders to individually answer, move or otherwise respond to the complaint during Phase I, the Court, at the request of JPMorgan and plaintiff, entered a series of orders extending plaintiff's time to serve the complaint on the term lenders until after the conclusion of Phase I.

By August 2010, approximately one year after commencement of the Avoidance Action, the Trust and JPMorgan had completed Phase I discovery, and fully briefed cross-motions for summary judgment. On March 1, 2013, the Court denied the Committee's motion for partial summary judgment and granted summary judgment in favor of JPMorgan. It was not until January 2015 that the Second Circuit reversed the Court's decision, after certifying a UCC question to the Delaware Supreme Court, ruling that the main lien was not perfected and summary judgment on the Phase I issue should be entered in favor of plaintiff. A few months later, following an unsuccessful petition by JPMorgan for rehearing *en banc*, the Second Circuit remanded the case to the Court to proceed with Phase II.

Following remand to the Court, consistent with the previous extension orders, plaintiff filed an amended complaint and served the large group of term lender defendants. In response to service of that amended complaint, many term lenders filed motions to dismiss and for judgment on the pleadings raising common issues. This brief responds to those motions. As explained in detail herein, the arguments raised by the movants are all without merit.

Movants argue in error that the Court's orders, extending plaintiff's time to serve until after the conclusion of Phase I, should be vacated and the complaint, accordingly, dismissed due to untimely service. The various attacks on the Court's extension orders are meritless. First, those orders were entered upon the joint request of JPMorgan, acting as agent for the term lenders, and plaintiff. Second, there was good cause for entry of the orders. Third, even in the absence of good cause, the orders are justified based on the Court's exercise of its discretion. Finally, the extension orders are law of the case.

Movants also contend that their due process rights have been violated due to the long delay in service caused by the Court's extension orders. This argument fails because movants have not been deprived of any process that is due or suffered prejudice. JPMorgan represented their interests in Phase I of the case, and the term lenders will have a full opportunity to participate in the remainder of the case. It is telling that the movants chose to stay silent about this litigation for years and began to complain about the conduct of the case only after they lost Phase I before the Second Circuit.

Further, movants argue that plaintiff lacks standing to prosecute its claim challenging the payment made during the preference period. This argument should be rejected based on the plain language of the order that carved out plaintiff's standing to sue and the subsequent orders and opinions that confirmed the scope of that standing. One of the movants goes so far as to

argue that plaintiff lacks standing to sue to recover the postpetition payment to the term lenders. This argument even more flatly contradicts the carve-out language in the relevant order.

Movants' argument that the interest payment made during the preference period is insulated from attack under the section 546(e) safe harbor is premature, and, in any event, fails as a matter of law.

Last, movants' argument based upon the defense of "mere conduit" should be rejected as unsupported and premature.

FACTUAL BACKGROUND

I. THE TERM LOAN AGREEMENT AND THE COLLATERAL AGREEMENT

General Motors Corporation ("**Old GM**") obtained a syndicated secured term loan (the "**Term Loan**") of approximately $1.5 billion pursuant to a term loan agreement, dated as of November 29, 2006, as amended on March 4, 2009 (the "**Term Loan Agreement**"). Bankr. Dkt. No. 64 ¶¶ 75-78[1]; Declaration of Eric B. Fisher ("**Fisher Decl.**") Ex. B (Term Loan Agreement). The Term Loan was funded up front by a group of six bank lenders (the "**Bank Lenders**"). JPMorgan Bank, N.A. ("**JPMorgan**"), was the Administrative Agent under the Term Loan Agreement. Fisher Decl. Ex. B (Term Loan Agreement). The Bank Lenders subsequently assigned some or all of their interests in the Term Loan, and ultimately more than 500 sophisticated entities became lenders under the Term Loan Agreement (the "**Term Lenders**"). In addition to being the Administrative Agent, JPMorgan was itself a Term Lender. *Id.* (Term Loan Agreement, sched. 2.01). The Term Lenders agreed to be bound by the terms of the Term Loan Agreement. *Id.* (Term Loan Agreement § 10.06).

[1] All references to the Bankruptcy Docket are to *In re: Motors Liquidation Company f/k/a General Motors Corporation*, Case No. 09-50026. All references to the Adversary Docket are to *Motors Liquidation Company Avoidance Action Trust v. JPMorgan Chase Bank, N.A.*, Adv. Pro. No. 09-00504.

To secure repayment of the Term Loan, the Bank Lenders took security interests in a large number of Old GM's assets, including all of Old GM's equipment and fixtures at forty-two facilities throughout the United States (the "**Collateral**"). Fisher Decl. Ex. C (Collateral Agreement Article II, sched. 1). The Term Loan Agreement provided that the Collateral was defined as "all property of the Loan Parties, now owned or hereafter acquired, upon which a Lien is created *in favor of [JPMorgan]* for the benefit of the Secured Parties by any Security Document." Fisher Decl. Ex. B (Term Loan Agreement) (emphasis added). The Term Loan Agreement incorporated the terms of an accompanying collateral agreement between JPMorgan, Old GM, and Saturn, dated as of November 29, 2006 (the "**Collateral Agreement**"). Fisher Decl. Ex. C (Collateral Agreement at 9, 11). Pursuant to the Collateral Agreement, JPMorgan, as Administrative Agent, took a first priority security interest in the Collateral. *Id.* (Article II); Adv. Pro. Dkt. No. 91 ¶ 572. Therefore, JPMorgan was responsible for the Collateral, including filing UCC-1 financing statements to perfect the Term Lenders' security interests.

The Term Loan Agreement set forth the scope of JPMorgan's role and responsibilities as Administrative Agent with respect to the Bank and Term Lenders and the Collateral. Pursuant to the Term Loan Agreement

> Each Lender hereby irrevocably designates and appoints the Agent [JPMorgan] as the agent of such Lender and each such Lender irrevocably authorizes the Agent, as the agent for such Lender, to take such action on its behalf under the provisions of this Agreement and the other Loan Documents and to exercise such powers and perform such duties as are expressly delegated to the Agent by the terms of this Agreement and the other Loan Documents, together with such other powers as are reasonably incidental thereto.

Fisher Decl. Ex. B (Term Loan Agreement § 8.01). The parties to the Term Loan Agreement also agreed that in the event Old GM commenced a bankruptcy proceeding JPMorgan "shall take such action . . . as shall be reasonably directed by the Majority Lenders; provided that unless and until the Agent shall have received such directions, the Agent may (but shall not be obligated to) take

such action, or refrain from taking such action, with respect to [the bankruptcy] as it shall deem advisable in the best interests of the Lenders." *Id.* (Article VII(e) & § 8.05).

The Collateral Agreement set forth additional duties assumed by JPMorgan. The Collateral Agreement provided that JPMorgan's "sole duty with respect to the custody, safekeeping and physical preservation of the Collateral in its possession . . . shall be to deal with it in the same manner as the Agent deals with similar property for its own account." Fisher Decl. Ex. C (Collateral Agreement § 6.02). The Collateral Agreement also spelled out the authority granted to JPMorgan with respect to the Collateral, including that JPMorgan "shall be conclusively presumed to be acting as agent for the Secured Parties with full and valid authority so to act or refrain from acting, and no Grantor [Old GM and Saturn] shall be under any obligation, or entitlement, to make any inquiry respecting such authority." *Id.* (§ 6.04). Accordingly, the Term Lenders agreed that GM could rely on JPMorgan's authority to act on behalf of the Term Lender Defendants.[2]

JPMorgan, as Administrative Agent, thereafter caused the filing of twenty-eight UCC-1 financing statements throughout the United States to perfect the Term Lenders' security interests in the Collateral. Fisher Decl. Ex. B (Term Loan Agreement, sched. 3.12). One of the twenty-eight UCC-1 financing statements covered all the equipment and fixtures at the forty-two Old GM facilities and was filed with the Delaware Secretary of State and designated as file number 6416808 4 (the "**Main Lien**"). *Id.*

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[2] The Trust has stepped into Old GM's shoes with respect to rights related to the Collateral. *See* Fisher Decl. Ex. P (Avoidance Action Trust Agreement § 2.3) (transferring to the Trust rights under section 1123(b)(3)(B) of the Bankruptcy Code); *see also Complete Mgmt., Inc. v. Anderson, LLP (In re Complete Mgmt., Inc.)*, No. 02 Civ. 1736 (NRB), 2003 WL 21750178, at *1 (S.D.N.Y. July 29, 2003) (stating that under the Bankruptcy Code, a creditor's committee, like a trustee, stands in the shoes of the bankrupt corporation).

II. THE GENERAL MOTORS BANKRUPTCY AND THE DIP ORDER

Beginning on June 1, 2009 (the "**Petition Date**"), Old GM and certain of its subsidiaries (the "**Debtors**") filed voluntary Chapter 11 petitions in the United States Bankruptcy Court for the Southern District of New York. Bankr. Dkt. No. 1. On June 3, 2009, the Office of the United States Trustee for the Southern District of New York appointed the Official Committee of Unsecured Creditors of Motors Liquidation Company f/k/a General Motors Corporation (the "**Committee**").

On the Petition Date, the Debtors also filed a motion seeking authority from the Bankruptcy Court to obtain in excess of $33 billion in post-petition financing (the "**DIP Financing**") from the United States Department of the Treasury and Export Development Canada (collectively referred to as the "**DIP Lenders**"). Bankr. Dkt. No. 64. The motion requested authority to use a portion of the DIP Financing to repay the Term Loan in full.

However, days before entry on June 25, 2009 of the *Final Order Pursuant to Bankruptcy Code Sections 105(a), 361, 363, 364 and 507 and Bankruptcy Rules 2002, 4001 and 6004 (A) Approving a DIP Credit Facility and Authorizing the Debtors to Obtain Post-Petition Financing Pursuant Thereto, (B) Granting Related Liens and Super-Priority Status, (C) Authorizing the Use of Cash Collateral and (D) Granting Adequate Protection to Certain Pre-Petition Secured Parties* (the "**DIP Order**"), Fisher Decl. Ex. G, which provided for the final approval of the DIP Financing, the Committee learned that the Term Lenders' security interests, in fact, may not all have been perfected as of the Petition Date due to the filing of a termination statement relating to the Main Lien (the "**2008 Termination Statement**") months before the Petition Date. *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.)*, 755 F.3d 78 (2d Cir. 2014).

Therefore, the DIP Order, while conditionally approving Old GM's repayment of the Term Loan, expressly preserved the right of the Committee to investigate and bring actions based upon the purported perfection of the security interests related to the Term Loan. Fisher Decl. Ex. G (DIP Order ¶ 19(d)). Specifically, the DIP Order provided a general release from the Debtors to the Term Lenders with the exception of certain "Reserved Claims," defined to include "the perfection of first priority liens" in connection with the Term Loan.[3] *Id.* The DIP Order further provided that "[t]he Committee shall have automatic standing and authority to both investigate the Reserved Claims and bring actions based upon the Reserved Claims against the Prepetition Senior Facilities Secured Parties not later than July 31, 2009." *Id.* The DIP Order also stated that the Committee's grant of "automatic standing shall be without any further order of this Court or any requirement that the Committee file a motion seeking standing or authority to file a motion seeking standing or authority before prosecuting any such challenge." *Id.* Thus, while the DIP Order allowed payment in full to the Term Lenders under the provisional assumption that their security interest was perfected, it expressly carved out the authority of the Committee to bring an action to seek relief if it was discovered that the security interest was not in fact perfected.

Following entry of the DIP Order, Old GM repaid the Term Lenders in full, ahead of other creditors of Old GM. At the time of payment, pursuant to the express terms of the carve out in the DIP Order, it was clear that there was a likelihood that the Committee would later bring an action if it determined that the security interest was not perfected. Bankr. Dkt. No. 64. ¶¶ 75-78. After Old GM paid JPMorgan the full amount due under the loan, JPMorgan, as

[3] The DIP Order uses the term "Prepetition Senior Facilities," which is defined to include the "Prepetition Term Loan Agreement." Fisher Decl. Ex. G (DIP Order at 5-6).

Administrative Agent, transferred the payment to the Term Lenders. Adv. Pro. Dkt. No. 225 ¶¶ 15-568, 595, 606.

III. JPMORGAN'S NOTICE TO TERM LENDERS REGARDING THE POTENTIAL LITIGATION IN JUNE 2009

JPMorgan, as Administrative Agent, set up an Intralinks site to communicate with the Term Lenders regarding the loan and the GM Bankruptcy proceedings. *See* Fisher Decl. Ex. F (JPMCB-2-00004307); *id.* Ex. I (JPMCB-2-00006070); *id.* Ex. D (JPMBC-2-00007174). On June 25, 2009, the date the DIP Order was approved, JPMorgan wrote to the Term Lenders, explaining that the Committee had reserved the right to investigate the liens. Specifically, JPMorgan notified the Term Lenders that

> The Official Creditors Committee requested and received until July 31, 2009 to investigate and challenge the perfection of the liens securing the Term Loan and Revolving Credit Facilities . . . . The Order also provides that, subject to the rights reserved by the Committee regarding the investigation of liens, upon payment of the secured facilities, the Lenders receive a release of all claims that the bankruptcy estates have or might have against the Lenders.
>
> We have posted to Intralinks the most recent versions of the DIP and adequate protection orders and will post the final versions upon entry by the court.

Id. Ex. H (JPMCB-2-00009369).

IV. THE COMMITTEE'S INVESTIGATION AND COMMENCEMENT OF THE AVOIDANCE ACTION

Pursuant to the authority conferred upon it in the DIP Order, the Committee commenced an investigation and thereafter determined that JPMorgan, as Administrative Agent, had authorized the filing of the 2008 Termination Statement, and that, as a result, the Term Lenders' security interest with respect to the collateral secured by the Main Lien was not perfected as of the Petition Date. Therefore, according to the Committee, the claims of the Term Lenders arising under the Term Loan Agreement were substantially undersecured. *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (In re Motors*

Liquidation Co.), 777 F.3d 100, 102-03 (2d Cir. 2015).

Following its investigation, and only a few weeks after entry of the DIP Order and payment to the Term Lenders, the Committee filed an adversary proceeding seeking to recover amounts alleged to have been improperly paid by Old GM to the Term Lenders after the Petition Date (the "**Postpetition Transfers**") and during the ninety-day prepetition preference period (the "**Preferential Transfers**") (the Post-Petition Transfers and the Preferential Transfers collectively referred to as the "**Transfers**"), based on the erroneous assumption that the Term Lenders' security interests were perfected, and their claims fully secured. *See Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.)*, Adv. Pro. No. 09-00504 (Bankr. S.D.N.Y. July 31, 2009) (the "**Avoidance Action**"); Adv. Pro. Dkt. No. 1 (July 31, 2009).

The complaint named JPMorgan, as Administrative Agent and as Term Lender, as well as all other Term Lenders that the Committee was able to identify. Before filing the Avoidance Action, the Committee diligently attempted to identify all possible Term Lenders to be named as defendants in the action ("**Term Lender Defendants**"). *See* Adv. Pro. Dkt. No. 91 ¶ 9. For example, on August 5, 2009, the Committee wrote to JPMorgan requesting information regarding the identity of the Term Lender Defendants:

> As you are aware, this past Friday, July 31, 2009, we filed the Complaint commencing this action. Due to the number of defendants named in the Complaint, the Clerk of the Bankruptcy Court is still in the process of preparing and issuing the summonses. We will arrange for service of those summonses once they are issued by the Clerk . . . . While we prepared our Complaint based upon the best and most recent information available to us, we would not be surprised to learn that our list of defendants is not entirely accurate. To that end, we request that JPMorgan, as administrative agent to the lenders under the Term Loan Agreement (as defined in the complaint), provide us with a complete list of the proper names of all entities that received payment under the Term Loan Agreement (i) during the ninety days prior to the June 1, 2009 petition date, and (ii) on or after June 1, 2009. This information will allow us to avoid unnecessarily

> burdening the Clerk of the Bankruptcy Court, as well as avoid needless expense to the debtors' estates.

Fisher Decl. Ex. K (August 5, 2009 letter from E. Fisher to A. Gottfried). The Committee also asked that JPMorgan take affirmative steps to notify the Term Lender Defendants of the action:

> We also ask that JPMorgan please notify all such entities about the commencement of this action, if it has not done so already. While the action has been reported by Bloomberg and is a matter of public record, we wish to ensure that all potential defendants have notice of the action.

Id.

V. JPMORGAN'S PROPOSAL FOR PHASING THE CASE AND EXTENDING THE TIME TO SERVE THE TERM LENDER DEFENDANTS

JPMorgan, as Administrative Agent, proposed to litigate the threshold issue of whether the 2008 Termination Statement terminated the security interest in the Collateral covered by the Main Lien ("**Phase I**"), before litigating any other issues in the case. The Committee agreed with JPMorgan's proposed approach, in part because it understood that JPMorgan was acting on the Term Lenders' behalf on all issues related to the Collateral, pursuant to its authority under the Term Loan Agreement and Collateral Agreement. *See, e.g.*, Fisher Decl. Ex. M (Adv. Pro. Dkt. No. 13, Tr. of Oct. 6, 2009 Hr'g, at 11) (counsel for JPMorgan stating to the Court that it was "representing JPMorgan Chase both individually and as administrative agent").

On July 23, 2009, approximately a week before the Committee filed the Avoidance Action, JPMorgan hosted a conference call with over 20 entities, including Term Lenders and the investment managers and affiliates of Term Lenders. Fisher Decl. Ex. J (JPMCB-3-0001290-1292). On August 3, 2009, approximately a week after the Committee commenced the Avoidance Action, JPMorgan again hosted a conference call, this time with over fifty entities, including Term Lenders and the investment managers and affiliates of Term Lenders. *Id.*

Then on September 18, 2009, JPMorgan wrote to the Term Lenders regarding the Avoidance Action. Specifically, JPMorgan reported that in connection with the Term Loan Agreement the Committee had filed an adversary complaint on July 31, 2009, naming JPMorgan "individually and as administrative agent, along with dozens of lenders who participated in the Term Loan Agreement as defendants. The Action seeks, in part, to avoid and recover approximately $1.4 billion in post-petition payments made to lenders in connection with the Term Loan Agreement as well as approximately $28 million in pre-petition interest payments made within 90 days of General Motor Corporation's bankruptcy filing of June 1, 2009 (the 'Petition Date') on the grounds that the lenders did not have a perfected security interest in GM's assets that were securing indebtedness under the Term Loan Agreement as of the Petition Date." Fisher Decl. Ex. L (JPMCB-3-00000444).

The letter then set forth JPMorgan's assessment of the merits of the Committee's action and discussed service of process, including JPMorgan's proposal to the Committee that service be delayed as to the Term Lenders:

> JPMCB considers the Committee's Action to be meritless. Accordingly, in an effort to efficiently litigate the substance of the Action, JPMCB has proposed to the Committee that it serve JPMCB with the complaint but withhold service for a substantial period of time upon the Term Loan Agreement lenders until after it takes discovery regarding the Committee's contention that the security interest related to the Term Loan Agreement was unperfected as of the Petition Date, and after that dispositive motions are heard. On September 17, 2009, the Committee accepted JPMCB's proposal.

Id.; *see also* Adv. Pro. Dkt. Nos. 393 ¶ 61 (JPMorgan averring that it "informed the Term Lenders via Intralinks of this agreement, that the Court entered a stipulation in the public record allowing the Committee to withhold service of the complaint on the Term Lenders"), 394 ¶ 62 (same), 391 ¶ 60 (same). JPMorgan also offered to answer any questions the Term Lenders had

about the status of the actions. Fisher Decl. Ex. L (JPMCB-3-00000444). No Term Lender objected to the Court's stipulation. *See* Adv. Pro. Dkt. Nos. 393 ¶ 61, 394 ¶ 62, 391 ¶ 60.

VI. PHASE I OF THE AVOIDANCE ACTION

A. The Court's First Extension Order

The Committee and JPMorgan, as both an individual lender and as the Administrative Agent for the Term Loan Lenders, appeared before the Court on October 6, 2009, to address, among other things, a case management strategy for the Avoidance Action. As JPMorgan had already proposed to the Committee and disclosed to the Term Lenders, it notified the Court that it intended to litigate the Committee's contention that the security interest was unperfected on behalf of the Term Lenders, and took the position that the Committee should delay serving the Term Lender Defendants until that first phase of the case had been decided. *See* Fisher Decl. Ex. M (Adv. Pro. Dkt. No. 13, Tr. of Oct. 6, 2009 Hr'g, at 10-12). The Committee discussed JPMorgan's proposal with the Court, highlighting the fact that JPMorgan was Administrative Agent on the loan.[4] *See id.* Counsel for JPMorgan also addressed the Court, stating that JPMorgan's position on the Main Lien had bearing on the decision to litigate the case in two phases, and asking the Court to defer service until JPMorgan had litigated the status of the

[4] Counsel for the Committee stated:

> Our game plan, Your Honor, for litigation [of] the case is 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 aside from JPMorgan. JPMorgan served as administrative agent on the loan that's really at issue here, the term loan. And the other defendants are defendants to the extent that they received payments under the loan. But neither side believes that those hundreds of other defendants have meaningful discovery. And so what we would propose to Your Honor today . . . is that the creditors' committee's time to serve the summons and complaint be extended out in total to 240 days. And that JPMorgan and the creditors' committee have proposed – will propose a schedule that allows us to essentially litigate this case from beginning through dispositive motions during that period of time and have dispositive motions briefed to Your Honor by March 2010.

Fisher Decl. Ex. M (Adv. Pro. Dkt. No. 13, Tr. of Oct. 6, 2009 Hr'g, at 10-12).

Collateral.[5] *See id.* After counsel for the parties detailed their bases for seeking an extension for the time to serve to the Court – which included the efficiency that would be gained, given that the parties did not expect the Term Lenders would have meaningful discovery – the Court then asked the Committee and JPMorgan to prepare a stipulation and stated that "if it's along the lines of what you described to me I'm not going to give you a problem with approving it. I wanted to deal with the participation of the non-Chase parties." *Id.*

The Court then entered an order (the "**First Extension Order**") that same day approving the bifurcation of the case into the first phase, which would address the perfection of the lien, and the second phase, which would address the liability (if any) of the Term Lenders. Adv. Pro. Dkt. No. 10. The Court also concluded the extension of time was warranted, and provided in the order that "[t]he Committee shall have 240 days to complete service on the other defendants, without prejudice to seek an additional extension of time to serve the summons and Complaint upon other defendants, if necessary." *Id.*

B. The Court's Second Extension Order

By January 2010, the Committee and JPMorgan were still in the discovery phase of Phase I of the Avoidance Action. Therefore, on January 20, 2010, the Court again extended the time for the Committee to serve the Term Lender Defendants. Adv. Pro. Dkt. No. 17. The Court's order (the "**Second Extension Order**") provided that "The Committee shall have until thirty (30) days after the date of entry of the Court's decision on any dispositive motion made under this modified Stipulated Scheduling Order to serve the summons and complaint upon other defendants." *Id.*

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[5] Counsel for JPMorgan stated "So as Mr. Fisher stated, 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. And it seems, even though JPMorgan is of the position – and we have provided evidence to the creditor's counsel that there was no authority for the inadvertent filing . . . ." Fisher Decl. Ex. M (Adv. Pro. Dkt. No. 13, Tr. of Oct. 6, 2009 Hr'g, at 10-12).

By August 2010, approximately one year after commencement of the Avoidance Action, the Committee and JPMorgan had completed discovery and fully briefed cross-motions for summary judgment in connection with Phase I. Adv. Pro. Dkt. Nos. 17, 20, 23. The Court heard argument on the summary judgment motions in December 2010.

C. JPMorgan's Letter To The Term Lenders On The Status Of Phase I

On March 31, 2011, JPMorgan again wrote to the Term Loan Defendants:

> The Avoidance Action Litigation remains pending before Bankruptcy Judge Gerber, who is considering cross-motions for summary judgment which were argued on December 3, 2010. We do not have any information as to when a decision on these motions will be forthcoming. The Plan also provides that any distributions that are due to Term Lenders for claims not related to the Term Loan, will be made without setoff or holdback, notwithstanding the pendency of the Avoidance Action Litigation, absent a determination by the Court that the Term Loan repayment needs to be returned.

Fisher Decl. Ex. O (JPMCB-2-00032531).

D. The Confirmation Order

On March 29, 2011, while the cross-motions for summary judgment were pending, the Bankruptcy Court entered an order (the "**Confirmation Order**") confirming the Debtors' Second Amended Joint Chapter 11 Plan (the "**Plan**"). Fisher Decl. Ex. N (Confirmation Order & Plan). The effective date of the Plan (the "**Effective Date**") was March 31, 2011. *Id.* (Plan § 1.58). The Plan provided for, among other things, the creation of the Avoidance Action Trust (the "**Trust**"). *Id.* (Plan § 1.19). The Trust was established to liquidate and distribute its assets, which consist entirely of the proceeds, if any, of the Avoidance Action. *Id.* (Plan § 6.5). Following confirmation of the Plan, the Committee was dissolved and on December 15, 2011, while cross-motions for summary judgment relating to Phase I were still pending, prosecution of the Avoidance Action was transferred to the Trust. *See id.* (Plan § 1.26); *id.* Ex. P (Avoidance Action Trust Agreement).

E. The Court's Decision And The Appeal

On March 1, 2013, the Court denied the Trust's motion for partial summary judgment and granted summary judgment in favor of JPMorgan, ruling that the filing of the 2008 Termination Statement was not effective and that the security interest covered by the Main Lien was therefore perfected as of the Petition Date. Adv. Pro. Dkt. No. 71. The Court held that because JPMorgan did not intend to terminate the security interest in the Term Loan, it did not authorize the filing of the UCC-3 termination statement. *Id.* The Court certified its ruling for a direct appeal to the Second Circuit, and the motion for a direct, expedited appeal to the Second Circuit was granted. The Trust then appealed to the Second Circuit. Adv. Pro. Dkt. No. 74.

F. JPMorgan's Letter To The Term Lenders Regarding The Court's Decision And The Appeal

On March 8, 2013, JPMorgan again wrote to the Term Lenders:

> As you may recall, subsequent to the repayment in full in July 2009 of the GM Term Loan by the debtor-in-possession in GM's Chapter 11 case, the Creditors Committee in the case commenced an adversary proceeding against the former Term Loan Lenders seeking to avoid the Lenders' security interest and recapture the funds paid to the Lenders. In 2010, the Administrative Agent moved for summary judgment dismissing the complaint and the Creditors Committee cross-moved for partial summary judgment avoiding the Lenders' security interest. We are pleased to advise that on March 1, 2013, the Bankruptcy Court granted the Administrative Agent's motion for summary judgment, denied the Creditors Committee's cross-motion for partial summary judgment and dismissed the case . . . .
>
> On March 7, 2013, the Creditors Committee filed a notice of appeal. The Bankruptcy Court, in granting the Administrative Agent's motion and dismissing the case, also certified the matter for direct appeal to the United States Court of Appeals for the Second Circuit. Whether the Second Circuit takes this matter on direct appeal is a matter of the Court's discretion. If the Second Circuit does not accept a direct appeal, the Creditors Committee's appeal in the first instance will be heard by the United States District Court for the Southern District of New York.

Fisher Decl. Ex. Q (JPMCB-3-00000026).

G. The Court's Third Extension Order

Given the status of the litigation, on April 10, 2013, the Court entered an order (the "**Third Extension Order**" and, together with the First Extension Order and the Second Extension Order, the "**Extension Orders**") further extending the Trust's time to serve the summons and complaint on the Term Lender Defendants until after the conclusion of Phase I. *See* Adv. Pro. Dkt. No. 82. The order noted that "the Court, *for good cause*, has previously entered orders extending Plaintiff's time to serve the Summons and Complaint upon the Other Defendants [Docket Nos. 10 and 17]" and extended the time to serve the Term Lender Defendants to thirty days after the date of entry of a Final Order, without prejudice to the right of the Trust to seek additional extensions. *Id.* (emphasis added).

H. The Second Circuit's Decision And The End Of Phase I

The Second Circuit then considered the appeal, focusing on whether a secured lender must review and knowingly approve the filing of a UCC-3 for it to extinguish a perfected security interest, or whether the secured lender must instead intend to terminate the particular security interest that is listed on the UCC-3. *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.)*, 755 F.3d 78, 86 (2d Cir. 2014), *certified question answered sub nom. Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A.*, 103 A.3d 1010 (Del. 2014). On June 17, 2014, it certified the question to the Delaware Supreme Court, noting that "[t]he important and urgent reason for an immediate determination by the Delaware Supreme Court . . . is that the question is one of first instance in the State of Delaware." *Id.* The Delaware Supreme Court then concluded that it *was* enough for the secured lender merely to review and knowingly approve the UCC-3 filing, as JPMorgan had. *Official Comm.*, 103 A.3d at 1010.

On January 21, 2015, a little less than two years after the Court's decision, The Second Circuit held that "although JPMorgan never intended to terminate the Main [Lien], it authorized the filing of a UCC-3 termination statement that had that effect." *Official Comm.*, 777 F.3d at 101. Accordingly, the Second Circuit reversed the Court's grant of summary judgment and remanded the matter to the Court with instructions to enter partial summary judgment in favor of the Trust. *Id.*

On February 4, 2015, JPMorgan filed a petition for rehearing *en banc*, 2d Cir. Dkt. No. 149, which the Second Circuit subsequently denied on April 13, 2015, 2d Cir. Dkt. No. 179. On June 12, 2015, following issuance of the Second Circuit's mandate, the Court entered partial summary judgment in favor of the Trust as to the termination of the Main Lien. Adv. Pro. Dkt. No. 96. The mandate drew to a close Phase I of the case.

VII. THE AMENDED COMPLAINT AND THE TRUST'S EFFORTS TO SERVE THE TERM LENDER DEFENDANTS

Thereafter, the Trust commenced the second phase of the litigation, which would address the value of the Term Lenders' remaining perfected security interest in the Collateral ("**Phase II**"). In May 2015 the Trust filed an amended complaint (the "**Amended Complaint**") and began to serve the Term Lenders (with the exception of a small number of foreign defendants as to which the Trust continues to pursue service abroad). Adv. Pro. Dkt. Nos. 91, 94, 95, 163, 164. The Court entered an order on May 19, 2015 that gave the Trust sixty days to serve the Amended Complaint. Adv. Pro. Dkt. No. 90. Before filing the Amended Complaint, the Trust made further diligent attempts to identify all proper Term Lender Defendants by: (i) asking counsel to JPMorgan for a list identifying the names and addresses of all entities that received payments under the Term Loan Agreement, (ii) reviewing documents produced in the course of discovery, and (iii) researching publicly available information. Adv. Pro. Dkt. No. 91 ¶ 10.

On June 1, 2015, JPMorgan, as Administrative Agent, provided a copy of the Amended Complaint to the Term Lenders, and notified them that the Trust had requested an amended summons from the Court. JPMorgan noted that it expected the Trust to "now promptly serve the amended complaint upon the GM Term Lenders." Fisher Decl. Ex. R (JPMCB-3-00000338). It also announced that it would host a call to discuss strategy and coordinate defense efforts. *Id.*

The Court later found good cause for further extending the time to serve pursuant to Rule 9006(b) of the Bankruptcy Rules to September 30, 2015, without prejudice to the right to seek additional extensions. Adv. Pro. Dkt. No. 152. The Court's order allowed the Trust to finish the difficult task of identifying, locating, and serving the hundreds of Term Lender Defendants whose identities were not readily ascertainable.

VIII. THE TERM LENDER DEFENDANTS' CROSS CLAIMS AGAINST JPMORGAN

Several groups of Term Lender Defendants (the **"Cross Claimants"**[6]), some of whom are parties to the motions to dismiss and for judgment on the pleadings, filed cross claims against JPMorgan. The Cross Claimants allege, *inter alia*, that JPMorgan recklessly and with gross negligence filed the UCC-3 termination statement that led to the Second Circuit's decision in the Trust's favor. Adv. Pro. Dkt. No. 241 at 73-74.

The Cross Claimants also make allegations about the Extension Orders. According to the Cross Claimants, JPMorgan engaged in a course of conduct that served its own interests at the expense of the Term Lenders, including litigating the first phase of this case without the participation of Cross Claimants. Adv. Pro. Dkt. Nos. 241 at 75-76, 222 at 22; *see* Adv. Pro. Dkt. No. 334 at 102-03, 114. The Cross Claimants also plead that "following the filing of the initial complaint, *JPMorgan sought and obtained* an agreement from the AAT to request that the

[6] Over 150 Term Lender Defendants have filed cross claims to date. *See, e.g.*, Adv. Pro. Dkt. Nos. 222, 241, 334.

Bankruptcy Court allow a delay of the service of process on the Term Lenders." Adv. Pro. Dkt. Nos. 241 at 95 (emphasis added), 222 at 39 (emphasis added); *accord* Adv. Pro. Dkt. No. 334 at 114. They further plead that "critically, in presenting this proposal to the Bankruptcy Court, JPMorgan's counsel made a point of telling the Bankruptcy Court that they were appearing for JPMorgan both individually 'and as administrative agent.'" Adv. Pro. Dkt. No. 241 at 95; *see* Adv. Pro. Dkt. No. 334 at 114. They also allege that in response to this proposal, the Court specifically asked JPMorgan's counsel whether JPMorgan had some of its own money in the Term Loan facility, and JPMorgan's counsel responded in the affirmative. Adv. Pro. Dkt. Nos. 241 at 95, 222 at 39. Cross Claimants assert that the clear purpose of the Court's inquiry was to obtain assurance that JPMorgan's interests were aligned with the Term Lenders who were unrepresented in the Court, that JPMorgan would act in their interests, and that the interests of the unserved parties thus would not be prejudiced by the delay in service. Adv. Pro. Dkt. Nos. 221 at 61, 241 at 95, 334 at 63-64.

IX. THE MOTIONS TO DISMISS AND MOTIONS FOR JUDGMENT ON THE PLEADINGS

Certain Term Lender Defendants answered the Amended Complaint. Others moved to dismiss the Amended Complaint under Rule 12(b) of the Federal Rules of Civil Procedure or moved for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure (together, the "**Moving Defendants**").[7] Because the motions to dismiss and motions for judgment on the pleadings raise overlapping issues, they will be addressed together.

[7] Two groups of Term Loan Defendants – one represented by the law firm Hahn & Hessen LLP (the "**Hahn Defendants**"), Adv. Pro. Dkt. No. 226, and the other represented by the law firm Kasowitz, Benson, Torres & Friedman LLP (the "**Kasowitz Defendants**"), Adv. Pro. Dkt. No. 262 – moved to dismiss. Defendant Continental Casualty Company ("**Continental Casualty**") also moved to dismiss. Adv. Pro. Dkt. No. 309. Two groups of Term Loan Defendants – one represented by Davis Polk & Wardwell LLP (the "**Davis Defendants**"), Adv. Pro. Dkt. No. 392, and the other represented by Jones Day (the "**Jones Defendants**"), Adv. Pro. Dkt. No. 377 – moved for judgment on the pleadings. These groups of defendants also, in some instances, join each other's motions. Other Term Lender Defendants filed joinders. *See* Adv. Pro. Dkt. Nos. 237 (PNC Bank), 275 (State of Connecticut), 276

ARGUMENT

I. THE EXTENSION ORDERS WERE PROPER AND SHOULD NOT BE VACATED

The Moving Defendants argue that the Court's entry of the Extension Orders was improper and violated their due process rights, and that the Extension Orders should be vacated. They further argue that upon vacatur, service will have not been timely effectuated and the Amended Complaint should therefore be dismissed. Their arguments are meritless.

JPMorgan, as Administrative Agent for the Moving Defendants under the Term Loan Agreement, sought to litigate this action in two phases and to have service of the complaint on the Term Lender Defendants delayed during the pendency of Phase I, which it litigated on the Term Lenders' behalf pursuant to a grant of authority under the Term Loan Agreement and Collateral Agreement. The Term Lender Defendants were repeatedly notified about the status of the litigation, including the Extension Orders, and none of the Moving Defendants sought to intervene. Instead, they sat on the sidelines and permitted their Administrative Agent to act for them.

Now, unhappy that JPMorgan did not secure the outcome they wanted, they improperly seek to prejudice the Trust. That is not a valid basis for seeking vacatur of the Extension Orders or claiming a violation of their due process rights. The Extension Orders were entered properly, pursuant to the applicable procedural rules, and were a valid exercise of the Court's discretion.

A. Standard Of Review

The Hahn and Kasowitz Defendants move to dismiss the Amended Complaint pursuant to Rule 12(b)(5) of the Federal Rules of Civil Procedure, made applicable by Rule 7012 of the

(Twin Lake), 281 & 384 (Alticor Inc.), 287 & 398 (DE-SEI), 293 (Ohio Police & Fire Pension Fund), 380 (Klestadt firm defendants), 383 (Wells Cap Mgmt – 13923601), 388 (Sanford funds). Hours before filing this opposition, the Illinois Funds filed a joinder that should be disregarded as untimely. *See* Adv. Pro. Dkt. No. 426.

Federal Rules of Bankruptcy Procedure, for deficient service of process. The Davis and Jones Defendants move under Rule 12(c) of the Federal Rules of Civil Procedure, made applicable by Rule 7012 of the Federal Rules of Bankruptcy Procedure, on similar grounds.

On a Rule 12(b)(5) motion, a plaintiff can meet its burden of establishing that service of process was sufficient "through specific factual allegations and any supporting material." *W. Sur. Co. v. Bykev Int'l. Inc.,* No. 14-CV-9673 (AJN), 2015 WL 5146112, at *2 (S.D.N.Y. Sept. 1, 2015) (internal quotation marks omitted); *Nationsbank, N.A. v. Macoil, Inc. (In re Med-Atlantic Petroleum Corp.)*, 233 B.R. 644, 662 (Bankr. S.D.N.Y. 1999) ("factual contentions regarding the manner in which service was executed may be made through affidavits, depositions and oral testimony") (internal quotations omitted). The Court may consider materials outside of the pleadings without converting a Rule 12(b)(5) motion into a motion for summary judgment. *Jackson v. City of New York*, No. 14-CV-5755 (GBD) (KNF), 2015 WL 4470004, at *4 (S.D.N.Y. June 26, 2015).

Judgment on the pleadings under Rule 12(c), on the other hand, "is appropriate where material facts are undisputed and where a judgment on the merits is possible merely by considering the contents of the pleadings." *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 642 (2d Cir. 1988). In deciding a Rule 12(c) motion for judgment on the pleadings, courts typically apply the same standard applicable to a motion under Rule 12(b)(6). *See, e.g. Vivaro Corp. v. Raza Commc'n, Inc. (In re Vivaro Corp.),* No. 12-01928 (MG), 2014 WL 486288, at *3 (Bankr. S.D.N.Y. Feb. 6, 2014). Therefore, a "[c]ourt must accept as true all factual allegations in the pleading and draw all reasonable inferences in favor of the non-moving party." *Overseas Private Inv. Corp. v. Furman*, No. 10 CIV. 7096 RJS, 2012 WL 967458, at *7 (S.D.N.Y. Mar. 14, 2012) (citing *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 429 (2d Cir. 2011)).

Judgment on the pleadings "focuses on the pleadings themselves, and not on matters outside of the pleadings," and thus a Rule 12(c) motion is "not well-suited" to address issues of fact. *Sears Petroleum & Transp. Corp. v Ice Ban Am., Inc.*, 217 F.R.D. 305, 307 (N.D.N.Y. 2003). Therefore, a motion under Rule 12(c) is inappropriate here, and the Davis and Jones Defendants' Rule 12(c) motions should be denied on this basis alone.

Finally, although the Hahn defendants state in an initial paragraph to their brief that they are also moving pursuant to Fed. R. Civ. P. 12(b)(2), Adv. Pro. Dkt. No. 226-1 at 3, this basis for dismissal is not properly before the Court. The brief fails to adequately present the argument because it makes no further reference to Rule 12(b)(2) as a basis for dismissal beyond the initial paragraph and includes no arguments or facts that suggest these defendants are not subject to personal jurisdiction. *See e.g.*, *Rowley v. City of New York*, No. 00 Civ. 1793 (DAB), 2005 WL 2429514, at *6 (S.D.N.Y. Sept. 30, 2005) (declining to rule on an argument mentioned only in a footnote); *Verdi v. Comm'r of Soc. Sec.*, No. 2:10-CV-135, 2001 WL 1361559, at *7 (D. Vt. Apr. 11, 2011) (favorably citing cases that deem issues mentioned in perfunctory manner to be waived).[8] Having presented no argument in support of dismissal under Rule 12(b)(2), such motion should be denied.

B. The Trust Timely Served Process In Accordance With The Court's Extension Orders

The Moving Defendants' motions should be denied because the Trust served the Amended Complaint on the Moving Defendants in accordance with the Court's Extension Orders. *U.S. Bank Nat'l Ass'n v. SMF Energy Corp. (In re Interstate Bakeries Corp.)*, 460 B.R.

[8] Even if this issue was properly before the Court, the Trust easily makes the required prima facie showing of personal jurisdiction based on the consented-to jurisdiction in the DIP order. Fisher Decl. Ex. G (DIP Order ¶ 19(d)); *see DiStefano v. Carozzi N. Am., Inc.*, 286 F.3d 81, 84 (2d Cir. 2001) (reiterating that when responding to a Rule 12(b)(2) motion, the plaintiff need only to make a prima facie showing of personal jurisdiction).

222, 229-30 (B.A.P. 8th Cir. 2011) ("Because the bankruptcy court extended the time for [debtor] to serve the defendants in the omnibus complaint, the 120-day period never started . . . . Since the 120-day period never started to run, it obviously never expired."), *aff'd*, 476 F. App'x 97 (8th Cir. 2012). Where a plaintiff requests and receives court approval for an extension of the time to serve under Rule 4(m) of the Federal Rules of Civil Procedure ("**Rule 4(m)**"), the plaintiff need not serve the complaint until the so-ordered deadline. *See Bank of Cape Verde v. Bronson*, 167 F.R.D. 370, 371-72 (S.D.N.Y. 1996) (finding that good cause existed when future events would have likely "obviated the need to serve the . . . complaint" and where plaintiff requested extension before the deadline under Rule 4(m) expired). The Trust – jointly with JPMorgan – in all instances requested and obtained court-approved extensions of the time to serve, and then complied with those court-ordered deadlines.

C. The Court's Extension Orders Were Proper

There is no basis for vacating the Extension Orders because they were entered for good cause, Adv. Pro. Dkt. No. 82, and, even if the Extension Orders were not entered for good cause, it was still within the Court's discretion to enter them, *Zapata v. City of New York*, 502 F.3d 192, 196 (2d Cir. 2007), *cert. denied,* 552 U.S. 1243 (2008).

1. The Standard For Vacating The Extension Orders

"Motions for reconsideration are disfavored, because '[c]omplete disposition of discrete issues and claims is often essential to effective case management. If a court is forced to revisit earlier interlocutory rulings, much of the advantage in making the early rulings would be lost.'" *Devon Mobile Commc'ns Corp. v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.)*, 324 B.R. 492, 494 (Bankr. S.D.N.Y. 2005) (quoting *In re Best Payphones, Inc.,* No. 01-15472 (SMB), 2003 WL 1089525, at *1 (Bankr. S.D.N.Y. Mar. 10, 2003)). In considering whether to reconsider a prior order, "courts have generally applied criteria that respect the need to grant

some measure of finality even to interlocutory orders and which discourage the filing of endless motions for reconsideration." *In re Homesteads Cmty. at Newtown, LLC*, No. 04-30417 (LMW), 2013 WL 932214, at *3 (Bankr. D. Conn. Mar. 11, 2013) (internal quotation marks omitted), *aff'd*, 526 B.R. 1 (D. Conn. 2014), *aff'd sub nom. Nuevo Pueblo, LLC v. Napolitano*, 608 F. App'x 40 (2d Cir. 2015). "Because of the interest in finality . . . courts should grant motions for reconsideration sparingly." *Id.* (internal quotation marks and citations omitted). A court may modify or vacate interlocutory orders "when it is consonant with justice to do so." *Id.* (internal quotation marks and citations omitted).

"Courts will find justification for reconsidering interlocutory orders when there is (1) an intervening change in controlling law; (2) newly discovered evidence; or (3) to correct a clear error of law or to prevent a manifest injustice." *In re Homesteads Cmty.*, 2013 WL 932214, at *3 (internal quotation marks and citations omitted). "[T]he purpose of a motion to alter or amend is not to give the moving party a second bite at the apple." *Arms v. Keybank, N.A. (In re Arms)*, 238 B.R. 259, 261 (Bankr. D. Vt. 1999). In considering a motion for relief from a prior interlocutory order, a court "may in its discretion apply general equitable principles." *Huk-A-Poo Sportswear, Inc. v. Little Lisa, Ltd.*, 74 F.R.D. 621, 623 (S.D.N.Y. 1977); *Project Strategies Corp. v. Nat'l Commc'ns Corp.*, No. CV-94-4925, 1995 WL 669655, at *2 (E.D.N.Y. 1995).

As the party seeking relief, the Moving Defendants have the burden to demonstrate that the Extension Orders should be vacated. *See In re Homesteads Cmty.*, 2013 WL 932214, at *5. For the reasons discussed herein, they have failed to carry their burden.

2. JPMorgan, The Moving Defendants' Agent, Proposed And Agreed To The Entry Of The Extension Orders

The Moving Defendants concede that JPMorgan was their designated Administrative Agent. Adv. Pro. Dkt. Nos. 262 at 4, 377 at 5, 226-1 at 3. JPMorgan was unequivocally and

irrevocably authorized to act on their behalf on all matters related to the status and perfection of the Collateral. *See* Fisher Decl. Ex. B (Term Loan Agreement § 8.01); *id.* Ex. C (Collateral Agreement § 6.02). This authority extended to acting on the Moving Defendants' behalf in the Debtors' bankruptcy proceedings. All of the Moving Defendants' arguments for dismissal are attempts to distract from this dispositive fact.

(a) The Term Lender Defendants Delegated Authority To JPMorgan To Act On Their Behalf

The Moving Defendants' delegation of authority to JPMorgan is clear from the plain language of the Term Loan Agreement and the Collateral Agreement. "Where the contract is unambiguous, courts must effectuate its plain language." *Seabury Const. Corp. v. Jeffrey Chain Corp.,* 289 F.3d 63, 68 (2d Cir. 2002) (citing *Slamow v. Del Col,* 79 N.Y.2d 1016, 1018 (1992)); *In re Metaldyne Corp.,* 409 B.R. 671, 676-77 (Bankr. S.D.N.Y.), *aff'd*, 421 B.R. 620 (S.D.N.Y. 2009)). Under the terms of the Term Loan Agreement, JPMorgan was appointed as Administrative Agent, and each Term Lender Defendant irrevocably designated and authorized JPMorgan to "take such action on its behalf" and to "exercise such powers and perform such duties as are expressly delegated to [JPMorgan] by the terms of the [Term Loan Agreement] and other Loan Documents, together with such other powers as are reasonably incidental thereto." Fisher Decl. Ex. B (Term Loan Agreement § 8.01). That authority extended to all actions related to the Collateral, including the perfection of the Term Lenders' security interests in the Collateral, as well as taking actions with respect to the Collateral that it deemed advisable and in the best interests of the Lenders in the event that Old GM sought bankruptcy protection. *Id.* (Term Loan Agreement Article VII(e) & § 8.05); *id.* Ex. C (Collateral Agreement § 6.02).

Bankruptcy courts have repeatedly recognized administrative agents' authority to act on behalf of a group of lenders in situations like this one. *See, e.g., In re Metaldyne*, 409 B.R. at

678-79 (agreement authorized agent to act on lenders' behalf); *In re Rosewood at Providence, LLC,* 470 B.R. 619, 625 (Bankr. M.D. Ga. 2011) (administrative agent authorized to vote on bankruptcy plan on behalf of lenders). The court's decision *Mizuho Corporate Bank, Ltd. v. Enron Corp. (In re Enron Corp.)* is particularly instructive. 302 B.R. 463 (Bankr. S.D.N.Y. 2003), *aff'd sub nom. Bank of Tokyo-Mitsubishi Ltd. v. Enron Corp.*, No. 04 Civ. 1367 (NRB), 2005 WL 356985 (S.D.N.Y. Feb. 15, 2005). There, a group of lenders irrevocably appointed JPMorgan as Administrative and Collateral Agent "to take such action on its behalf and to exercise such powers as are delegated to the [a]dministrative [a]gent by the terms hereof, together with such actions and powers as are reasonably incidental thereto." *Id.* at 471-72. The court concluded that a lender lacked standing to bring an adversary proceeding individually against the debtor, and that such action must be taken by the administrative or collateral agent. *Id.* at 472-73 ("When dealing with such lending arrangements, the purpose of contracting in advance to restrict enforcement to a single agent is to prevent the chaos that would ensue if multiple lawsuits were initiated by each lending bank with, possibly, divergent interests."); *see also In re Chrysler LLC*, 405 B.R. 84, 103 (Bankr. S.D.N.Y.) ("Restricting enforcement to a single agent to engage in unified action for the interests of a group of lenders, based upon a majority vote, avoids chaos and prevents a single lender from being preferred over others."), *aff'd*, 576 F.3d 108 (2d Cir. 2009), *appeal vacated by* 558 U.S. 1087 (2009), *dismissing appeal as moot*, 592 F.3d 370 (2d Cir. 2010) (per curiam).

JPMorgan, acting as the Term Lender Defendants' Administrative Agent – and not the Trust – proposed extending the time to serve the Term Lender Defendants. JPMorgan signed the stipulations to extend the time to serve, and advocated for their entry. Moreover, JPMorgan

continuously communicated with the Term Loan Lenders on the progress it made as their Administrative Agent.

(b) JPMorgan Had No Conflict Of Interest

There was no conflict of interest that interfered with JPMorgan's ability to serve as Administrative Agent for the Term Lender Defendants. JPMorgan vigorously defended the Term Lender Defendants' rights with respect to the Collateral during the first phase of the litigation. It took advantage of every procedural avenue and appeal (save a petition for certiorari, which would have lacked any prospect of being granted because it both involved a state law issue and did not involve a federal circuit split) over the course of several years.

The Moving Defendants, having stood by for years allowing JPMorgan to continue to represent their interests, now argue that JPMorgan acted in its self-interest to protect itself from liability related to errors in filing the 2008 Termination Statement. However, JPMorgan not only acted as Administrative Agent but also holds the largest interest of any Term Lender under the Term Loan Agreement. Its interests were fully aligned with the Term Lender Defendants during the first phase of the litigation. As a lender with its own stake and as Administrative Agent with a duty to protect the interests of the Term Lenders, JPMorgan could not possibly have been more incentivized to attempt to establish that its filing of the termination statement had no effect.[9]

(c) JPMorgan Acted With Apparent Authority At All Times

Even if the Term Loan Agreement did not authorize JPMorgan to litigate Phase I of this adversary proceeding on the Term Lender Defendants' behalf, the Moving Defendants agreed

[9] The Jones Defendants' contention that the Trust did not make full disclosure to the Court regarding JPMorgan's role, *see* Adv. Pro. Dkt. No. 378 at 1-2, is wholly without merit. The parties repeatedly disclosed and the Court was well aware of the allegation that JPMorgan had terminated the Term Lender Defendants' interest in the Collateral. That is why the DIP Order – approved by the Bankruptcy Court – contained the carve out for this litigation and why the Court split the proceedings into two phases in the First Extension Order.

when they entered into the Term Loan that the Trust was required to accept JPMorgan's assertion that it was acting as agent for the Term Loan Lenders. The Collateral Agreement provided that the Trust may in all events rely on JPMorgan's apparent authority to act on the Term Lender's behalf. *See* Fisher Decl. Ex. C (Collateral Agreement § 6.04) ("[JPMorgan is] conclusively presumed to be acting as agent for the Secured Parties with full and valid authority so to act or refrain from acting," and Old GM and Saturn shall not "be under any obligation, or entitlement, to make any inquiry respecting such authority").

The Trust did exactly that and relied on JPMorgan's representations that it was acting pursuant to delegated authority at all times, and JPMorgan continuously held itself out as having the proper authority to pursue Phase I of the proceedings. For example, the day following the entry of the First Extension Order, JPMorgan answered the Committee's complaint.[10] Adv. Pro. Dkt. No. 12. JPMorgan's answer (and, later, its amended answer) provided that JPMorgan was answering "in its individual capacity and as administrative agent . . . as defined in the Term Loan Agreement . . . for lenders under a term loan agreement, dated as of November 29, 2006." Adv. Pro. Dkt. Nos. 12 at 1-2, 225 at 1-2. As the Jones Defendants concede, *see* Adv. Pro. Dkt. No. 377 at 7, the Court also acted with the apparent expectation that JPMorgan was an appropriate representative for the interests of the Term Lender Defendants.

The Court should not punish the Trust by vacating the Extension Orders because of JPMorgan's alleged failures as Administrative Agent. JPMorgan had actual authority to act for the Term Lenders, but even if it did not, the Term Lenders *agreed* that Old GM (and now the Trust) had the right to rely on JPMorgan's representations that it was acting as the Term

[10] JPMorgan later filed an amended answer. *See* Adv. Pro. Dkt. No. 225.

Lenders' agent.[11] The Collateral Agreement, which was among the loan documents the Term Loan Agreement incorporated, and to which the Term Lenders are bound, expressly provides the right for such reliance. The Moving Defendants should not have been permitted to stand on the sidelines and watch JPMorgan litigate Phase I on their behalf (which they presumably thought they would win), only to step forward now, after they are unhappy with the result, and claim that JPMorgan was not authorized to do so.

3. The Federal Rules Authorize The Extension Orders

"The time for service in an adversary proceeding may be extended under two different rules: Rule 4(m) of the Federal Rules of Civil Procedure, and Bankruptcy Rule 9006(b)." *Oyama v. Sheehan (In re Sheehan)*, 253 F.3d 507, 511 (9th Cir. 2001); *see Global Crossing Estate Rep. v. Alta Partners Holdings LDC (In re Global Crossing Ltd.)*, 385 B.R. 52, 60 (Bankr. S.D.N.Y. 2008). Rule 4(m), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7004, governs the enlargements of time for a plaintiff to serve the summons and complaint. "If service of the summons and complaint is not made upon a defendant within 90 days after the filing of the complaint, the court . . . shall . . . direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period." Fed. R. Civ. P. 4(m).[12] Additionally, Rule 6(b)(1)(A) of the Federal Rules of Civil Procedure provides that "[w]hen an act may or must be done within a specified time, the court may, for good cause, extend the time . . . with or without motion or notice if the court acts, or if a request is made,

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[11] The Term Loan Agreement was amended in 2009, and the amendment kept these terms in place. *See* Fisher Decl. Ex. B (Term Loan Agreement).

[12] Rule 4(m) was amended in December 2015. The prior version of the rule, which was in force during the time period in question, provided 120 days for service, not 90 days.

before the original time or its extension expires." Similarly, Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure ("**Rule 9006(b)(1)**") states that when the rules provide a specific time for an act to be completed, a court "for cause shown may at any time in its discretion . . . with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order."

Therefore, where there is good cause for an extension of the time to serve under Rule 4(m), no notice to the parties is necessary. *See Galdi v. Jones*, 141 F.2d 984, 992 (2d Cir. 1994) (affirming trial court's *ex parte* order enlarging defendant's time to move or plead); *Boston Post Rd. Med. Imaging, P.C. v. Allstate Ins. Co.*, 221 F.R.D. 410, 414 n.20 (S.D.N.Y. 2004) (permitting *ex parte* application for extension of time when "made before the expiration of the period originally prescribed"); *Dayton Monetary Assoc. v. Donaldson, Lufkin & Jenrette Sec. Corp.,* No. 91 Civ. 2050, 1992 WL 204374, at *8 n.8 (S.D.N.Y. Aug. 11, 1992) ("Rule 6(b)(1) explicitly provides that such applications are properly made without notice.").

4. The Court Properly Extended The Trust's Time To Serve The Term Lender Defendants

The Court entered the Extension Orders "for good cause." *See* Adv. Pro. Dkt. No. 82. "Good cause is measured against '(1) the plaintiff's reasonable efforts to effect service, and (2) the prejudice to defendant from the delay.'" *Redtail Leasing, Inc. v. Thrasher (In re Motel 6 Sec. Litig.),* No. 93 Civ. 2183 (JFK), 1995 WL 649930, at *1 (S.D.N.Y. Nov. 6, 1995) (quoting *Nat'l Union Fire Ins. Co. v. Barney Assocs.,* 130 F.R.D. 291, 293 (S.D.N.Y. 1990)). Courts will consider whether the plaintiff moved for an extension of time to effect service of process in making this determination. *AIG Managed Mkt. Neutral Fund v. Askin Capital Mgmt., L.P.*, 197 F.R.D. 104, 108 (S.D.N.Y. 2000). Good cause "is construed to further the purpose of

finding personal jurisdiction in cases in which the party has received actual notice." *Savage & Assocs., P.C. v. Williams Commc'ns (In re Teligent Servs., Inc.)*, 324 B.R. 467, 472 (Bankr. S.D.N.Y. 2005), *aff'd*, 372 B.R. 594 (S.D.N.Y. 2007) (internal quotation marks omitted).

The Court is permitted to extend the time to serve even in the absence of good cause. *See Zapata*, 502 F.3d at 196-97; *Mejia v. Castle Hotel, Inc.*, 164 F.R.D. 343, 345 (S.D.N.Y. 1996). Four factors inform a court's decision to extend the time to serve in the absence of good cause: "(1) whether the statute of limitations would bar a re-filed action, (2) whether the defendant had attempted to conceal the defect in service, (3) whether the defendant would be prejudiced by excusing the plaintiff from the time constraints of the provision, and (4) whether the defendant had actual notice of the claims asserted in the complaint." *Savage & Assocs., P.C. v. 1201 Owner Corp. (In re Teligent Inc.)*, 485 B.R. 62, 70-71 (Bankr. S.D.N.Y. 2013). These factors overlap with those pertaining to good cause, and a court is not required to bifurcate or engage in a two-step inquiry. *Id.* 70-71. All of the factors do not have to point in the same direction. *Id.*

(a) The Trust Acted In Good Faith At All Times

The Trust here effected service on JPMorgan as Administrative Agent, and then the Trust and JPMorgan jointly requested extensions of the time to serve, always in advance of the expiration of the time to serve. The Trust continuously acted diligently and in good faith in doing so and consistently complied with the Court's Extension Orders. The Court's Extension Orders were entered after the Court heard from JPMorgan and the Trust regarding the reasons the time to serve the Term Lender Defendants should be extended, including the fact that JPMorgan was acting as Administrative Agent, the Term Lender Defendants were not likely to have discovery relevant to the issues to be addressed during Phase I, and the efficiencies that would come from litigating the case in two phases.

The Trust was at all times forthcoming and transparent regarding the reasons for jointly seeking extension of the time to serve pursuant to Rule 9006(b)(1). *See In re Interstate Bakeries Corp.*, 460 B.R. at 231 ("While the three-year delay was 50% longer than the statute of limitations, [debtor] was so completely candid about its motivation for the request, the propriety of the procedure in which the enlargement was granted, and the benefits gained by all parties of interest, including the judicial economy achieved by the court."). The Court understood and ultimately agreed that the bases advanced by the Trust and JPMorgan warranted entry of the Extension Orders.

(b) The Term Lender Defendants Were On Notice Of The Litigation

"A defendant suffers prejudice when he or she does not receive notice of the suit with sufficient time to mount an effective defense." *Yordan v. Am. Postal Workers Union, AFL-CIO,* 293 F.R.D. 91, 96 (D.P.R. 2013). The Term Lender Defendants were on notice of the litigation. JPMorgan continuously communicated with the Term Lender Defendants – including in writing and by telephone – regarding the adversary proceeding and developments in the litigation, from the filing of the initial complaint through the end of Phase I. The Trust's counsel even requested that JPMorgan provide this notice. *See* Fisher Decl. Ex. K (August 5, 2009 Letter).

JPMorgan established and maintained an Intralinks site that it used to communicate with the Term Lender Defendants. *See e.g.*, *id.* Ex. F (JPMB-2-00004307) (email noting that Intralinks site "went live to the lenders"); *id.* Ex. D (JPMB-2-00007174) (email noting that Term Lenders preferred communication via Intralinks "as does the market at large").[13] JPMorgan

[13] Moreover, any claim that the Term Lender Defendants were not on notice of the litigation because they no longer tracked the loan on Intralinks following repayment is meritless. Even if not affirmatively checked by the Term Lender Defendants, "ilalerts" were sent to them notifying that information had been posted to Intralinks. *See e.g.*, Fisher Decl. Ex. I (JPMCB-2 00006070).

regularly wrote to the Term Lenders regarding developments in Phase I, including regarding the Court's Extension Orders. Adv. Pro. Dkt. No. 393 ¶ 61 (JPMorgan "made available to the Term Lenders extensive information regarding the adversary proceeding, in addition to the extensive information that was publicly available to them"); Fisher Decl. Ex. H (JPMCB-2-00009369); *id.* Ex. L (JPMCB-3-00000444); *id.* Ex. O (JPMCB-2-00032531); *id.* Ex. Q (JPMCB-3-00000026); *id.* Ex. R (JPMCB-3-00000338). JPMorgan even hosted phone calls with the Term Lenders both immediately before and immediately after the Trust commenced the Avoidance Action. *See id.* Ex. J (JPMCB-3-0001290-1292).

In addition, the complaint was publicly filed, and was also available on the Motors Liquidation Company website, http://www.motorsliquidationdocket.com. *See Cordell v. Unisys Corp.*, 299 F.R.D. 411, 412 (W.D.N.Y. 2014) (discretionary extension of time to serve was warranted where the statutes of limitations had expired, defendant had notice of the claims, and the complaint had been electronically filed).

Even though they were on notice, no Term Lender Defendants at any time attempted to intervene. Standing on the sidelines was their strategy, and they cannot now claim to have suffered prejudice just because their strategy did not yield the desired result.

(c) The Moving Defendants Have Not Been Prejudiced

Moving Defendants' argument that they have suffered prejudice because they were uninvolved in the first phase of the litigation is inaccurate. As discussed above, they delegated their authority to their agent, who then litigated Phase I. The Trust was permitted to accept that apparent authority, even if not actually delegated, under the Collateral Agreement. In any event, there was no conflict of interest between JPMorgan and the Moving Defendants regarding

whether JPMorgan's filing of the termination statement was effective. Therefore, any alleged prejudice the Moving Defendants suffered was of their own making by taking no action.[14]

Moving Defendants also argue in error that they have been prejudiced because they were unable to take proper reserves and have materially changed their financial positions. *See* Adv. Pro. Dkt. No. 262 at 20. This contention is undermined by the fact that they delegated authority to JPMorgan and were on notice of the litigation.[15]

(d) The Trust Will Be Prejudiced By Vacatur Of The Extension Orders Because The Action Will Be Time Barred

A plaintiff suffers prejudice when it will be unable to refile a claim because it is time barred. *See* Fed. R. Civ. P. 4 advisory committee's notes. A newly filed action would be barred here because the statute of limitations has run and the time period specified for filing the action under the DIP Order has expired. *See* Fisher Decl. Ex. G (DIP Order). Therefore, the Trust would be prejudiced and justice not served if the Extension Orders were vacated.[16]

(e) The Term Lender Defendants Did Not Attempt To Conceal A Defect In Service Because Service Had Not Been Effectuated

Under the Extension Orders, the Trust was not required to effectuate service during the first phase of the litigation and thus the factor concerning concealment of service defects is irrelevant.

[14] To the extent that Moving Defendants claim to have suffered prejudice due to JPMorgan having acted as their agent, their remedy, if any, is against JPMorgan. And, of course, many Term Loan Defendants are actively pursuing such remedies.

[15] In fact, it is the Trust that has been prejudiced to the extent that any Moving Defendants have failed to reserve for liability in this action, and the Trust expressly reserves all rights in that regard.

[16] Given the nature of this case, judgment against a single defendant (JPMorgan) would not suffice. *See Yordan v. Am. Postal Workers Union, AFL-CIO,* 293 F.R.D. 91, 96 (D.P.R. 2013) (prejudice is mitigated if a plaintiff can still pursue a claim against other defendants). The Trust may have also been prejudiced because certain Term Lender Defendants have allegedly dissolved and transferred assets out of their funds during the pendency of this action. *See* Adv. Pro. Dkt. Nos. 239, 266, 270.

(f) The Extension Orders Promoted Efficiency

The effectiveness of JPMorgan's filing of the termination statement was a discrete, gating issue that focused entirely on the actions of JPMorgan in its capacity as Administrative Agent. If the termination was deemed to be ineffective, and the security interest in the Term Loan therefore duly perfected, there would be no need to litigate any other issues and the action would have come to an end. The efficiencies gained by this approach were more than merely saving costs for the Trust. *See* Adv. Pro. Dkt. No. 226-1 at 18. Rather, because JPMorgan was acting as the Term Lender Defendants' agent, the litigation was simplified, more efficient, and less complex than it otherwise would be. By separating the case into two phases, the Court promoted efficiency. *See* Adv. Pro. Dkt. No. 82.

The Kasowitz and Jones Defendants argue that neither judicial economy nor expense to plaintiff may serve as the basis for a finding of good cause for the extension of the time to serve. *See* Adv. Pro. Dkt. Nos. 262 at 16, 377 at 16 n.5.[17] However, courts have recognized that such pragmatic litigation considerations are a relevant factor in a Rule 4(m) inquiry. *See In re Interstate Bakeries Corp.*, 460 B.R. at 231 (finding delay in service reasonable due to complexity of the case and benefit to parties from resolution of threshold questions).

[17] The cases cited by the Kasowitz Defendants are distinguishable. *See, e.g.*, *Mann v. Castiel*, 681 F.3d 368 (D.C. Cir. 2012) (affirming district court's dismissal under Rule 4(m) where plaintiffs were on notice of service deficiencies but made no service attempts, there was no showing that plaintiffs would be prejudiced if claim dismissed, and there was no obvious judicial economy benefits from delay in service); *Viking Offshore (USA), Inc. v. Bodewes Winches, B.V. (In re Viking Offshore (USA), Inc.)*, Adv. No. 08-3234, 2009 WL 1066240 (Bankr. S.D. Tex. Apr. 17, 2009) (dismissing complaint *sua sponte* when plaintiff stated it did not wish to proceed against the unserved defendants and had not served due to cost considerations); *Parker v. John Doe*, No. 02-CV-7215, 2003 WL 21294962 (E.D. Pa. Jan. 21, 2003) (limited financial means did not excuse failure to timely identify and serve 100 unnamed defendants because such costs were inevitable and unavoidable). In *Artificial Intelligence Corp. v. Casey (In re Casey)*, cited by the Kasowitz Defendants, the bankruptcy court dismissed the action under Rule 4(m) because the lack of timely service was due to a tactical decision on the part of the plaintiff. 193 B.R. 942, 949 (Bankr. S.D. Cal. 1996). Tellingly, in finding that the potential avoidance of litigation costs did not provide good cause, the bankruptcy court noted that plaintiffs "could have taken other steps, such as a stipulated extension of time." *Id*. at 946. Here, where the Trust in fact took such "other steps" by stipulating with JPMorgan, litigation expense is a proper factor to consider.

For the foregoing reasons, the Extension Orders were a proper exercise of the Court's discretion. The Court had good cause to enter the Extension Orders, and even if it did not, the four-factor test for a discretionary extension weighs heavily in the Trust's favor. *See Zapata*, 502 F.3d at 197 ("Where, as here, good cause is lacking, but the dismissal without prejudice in combination with the statute of limitations would result in a dismissal *with* prejudice, we will not find an abuse of discretion . . . so long as there are sufficient indications on the record that the district court weighed the impact that a dismissal or extension would have on the parties."); *Coram Healthcare Corp. v. Cigna*, No. 00 CIV. 2677 (RMB), 2002 WL 32910044, at *9 (S.D.N.Y. July 24, 2002) (granting extension of time to serve); *Paden v. Testor Corp.*, No. 03-C50057, 2004 WL 2491633, at *1-2 (N.D. Ill. Nov. 2, 2004) (upholding bankruptcy court's grant of additional time for service of process).[18]

5. The Moving Defendants' Due Process Rights Have Not Been Violated

In alleging that their due process rights have been violated, the Moving Defendants simply rehash the same arguments discussed above. The Moving Defendants' due process claims are not well founded, and the conduct at issue does not rise to the level of a constitutional deprivation of any kind. Notably, the Moving Defendants cite no cases in support that address a situation analogous to this one.[19]

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[18] Cases cited by the Moving Defendants are not to the contrary. *See, e.g.*, *Gurvey v.* Cowan, No. 06-Civ.-1202, 2013 WL 3940858 (S.D.N.Y. July 31, 2013) (refusing to grant an extension in a § 1983 action where no service attempts had been made or a valid reason given for more than seven-year delay); *Efaw v. Williams*, 473 F.3d 1038 (9th Cir. 2007) (district court abused its discretion where court made no findings in support of its decision and service occurred more than 6 years after the court's last extension without explanation, a key witness had died, and defendant had no notice).

[19] For example, the Kasowitz Defendants' reliance on *Toncz v. Bank of Am., N.A.*, is misplaced. No. 3:12-1010, 2013 WL 1245746 (M.D. Tenn. Mar. 26, 2013) *report and recommendation adopted*, No. 3:12-1010, 2013 WL 1775505 (M.D. Tenn. Apr. 25, 2013). *Toncz* addressed allegations that no service of process was effected, rather than a situation where the court extended the time to serve, and then service was properly made.

The Due Process Clause proscribes the "deprivation of life, liberty or property by adjudication" without prior "notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The Moving Defendants had notice, and they now have an adequate opportunity to defend the claims against them. *See Sutera v. Transp. Sec. Admin.*, 708 F. Supp. 2d 304, 313-14 (E.D.N.Y. 2010) ("[T]he 'essential principle' of procedural due process is that a deprivation of life, liberty, or property be preceded by notice and an opportunity to be heard."). The Moving Defendants may bring cross claims against JPMorgan. They also have every opportunity to advance their position with respect to the value of the Collateral and any other remaining issues in this action. If the Trust prevails and obtains a judgment against Moving Defendants, such judgment will follow an adjudication of the case with all of the protections afforded by the Federal Rules of Bankruptcy Procedure.

6. Rules 19 And 23 Are Inapplicable

The Moving Defendants argue that the service orders violate Rule 19 because the Term Loan Defendants were "necessary parties" required to be joined under Rule 19 and that the only exception to Rule 19 – Rule 23 class actions – does not apply. *See* Adv. Pro. Dkt. Nos. 226-1 at 16-17, 262 at 21-23, 377 at 12-13, 392 at 5-7. However, these arguments miss the mark. Rule 19 is not applicable to parties who are named as original defendants in an action. *See e.g.*, *Moore v S. N.H. Med. Ctr.*, CIV A 08-11751-NMG, 2009 WL 5214879, at *9 (D. Mass. Aug. 18, 2009) ("Rule 4(k)(1)(B) applies to parties joined under either Rule 14 or 19. [Defendant] does not meet this criteria as he was named as an original defendant."); *Roscoe-Ajax Const. Co. v Columbia Acoustics & Fireproofing Co.*, 39 F.R.D. 608, 610 (S.D.N.Y. 1966) (same). Courts maintain a meaningful distinction between original defendants and Rule 19 necessary parties.

Arguments that Rule 23 applies similarly fail. The Hahn, Davis, and Jones Defendants argue, on the one hand, that the Trust should have brought this action as a Rule 23 class action, and, on the other hand, that class certification would have been "impossibl[e]." Adv. Pro. Dkt. Nos. 226-1 at 17, 377 at 14. Because "class actions are permissive, not mandatory," courts do not second-guess a plaintiff's strategic decision not to proceed under Rule 23. *Zuckman v. Monster Beverage Corp.*, 958 F. Supp. 2d 293, 306 (D.C. Cir. 2013) (quoting *Sprint Comm'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 291 (2008)). Whether class certification in this case would have been possible is simply not relevant. What is clear, however, is that given the delegation of authority to JPMorgan, a class action was not needed.

7. Law Of The Case Dictates That The Extension Orders Should Stand

Moving Defendants argue that the "law of the case" doctrine does not operate to bar their requests to vacate the Extension Orders because they were not defendants when the Extension Orders were entered, Adv. Pro. Dkt. No. 262 at 11-12, and the Extension Orders were not "battled for," Adv. Pro. Dkt. No. 377 at 10.[20] However, the doctrine is not so limited. "Under the law of the case doctrine, [a] court adheres to its own decision at an earlier stage of the litigation unless there are cogent or compelling reasons not to, such as an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Hosking v. TPG Capital Mgmt., L.P. (In re Hellas Telecomm. (Luxembourg) II SCA)*, 535 B.R. 543, 585 (Bankr. S.D.N.Y. 2015) (internal quotation marks omitted); *see also Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Young*, Case No. 91 Civ. 2923 (CSH), 1996 WL 383135, at *1 (S.D.N.Y. July 9, 1996) ("The law of the case doctrine posits that when a court

[20] In any event, had JPMorgan and the Trust not agreed and the Court not entered the Extension Orders, the Trust would have served the Term Lender Defendants at the time.

decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case unless the decision is erroneous and would work a manifest injustice.") (internal quotations omitted).

While application of the doctrine is discretionary and does not preclude further determinations of different or new issues, it should work to prevent re-litigation of the same issues. *See In re Chateaugay Corp.*, 136 B.R. 79, 84 (Bankr. S.D.N.Y. 1992); *see also Bourdeau Bros., Inc. v. Montagne (In re Montagne)*, No. 08-1024, 2010 WL 271347, at *6 (Bankr. D. Vt. 2010). Accordingly, the law of the case doctrine should be applied and bar Moving Defendants' request to vacate the Extension Orders because the propriety of extension has already been decided and is binding on the Term Lender Defendants.[21]

D. Dismissal Is Not Appropriate

Even if the Court vacates the Extension Orders, which it should not, the Court should exercise its discretion and decline to dismiss the case. *See W. Sur. Co.,* 2015 WL 5146112, at *2 (dismissal is not mandatory). There is a preference to decide cases on the merits. *See Stone v. Ranbaxy Pharm., Inc.,* No. 10-CV-08816 (JFM), 2011 WL 2462654, at *7 (S.D.N.Y. June 16, 2011) (plaintiff failed to properly serve defendant, but "in the interest of judicial efficiency" court declined to rule on Rule 12(b)(5) motion).[22]

* * *

[21] The "mandate rule" of the law of the case doctrine also applies. "[W]hen an appellate court has once decided an issue, the trial court, at a later stage of the litigation, is under a duty to follow the appellate court's ruling on that issue." *United States v. Argentina,* 260 F. App'x 344, 347 (2d Cir. 2008) (internal quotation marks omitted). The issues addressed in Phase I have been litigated fully, first before the Court, then before the Delaware Supreme Court, and, finally, before the Second Circuit. All avenues of appeal have been exhausted, and the Term Loan Defendants may not re-litigate these issues.

[22] The instant motions can be decided on the facts submitted by the Trust, but if the Court determines additional fact development is necessary, the Trust respectfully requests an evidentiary hearing. *See Rates Tech. Inc.* v. *UTT Corp.,* No. 94 CIV. 0326 (PKL), 1995 WL 16788, at *7 (S.D.N.Y. Jan. 18, 1995) (denying motion to dismiss for failure to serve based on a factual issue and scheduling a preliminary hearing); *Blue Ocean Lines* v. *Universal Process Equip., Inc.,* No. 93 CIV. 1722 (SS), 1993 WL 403961, at *4 (S.D.N.Y. Oct. 7, 1993) (convening a preliminary hearing).

At bottom, the Moving Defendants take issue with JPMorgan's actions with respect to the Collateral – not with the Trust's service in the instant case. As discussed herein, the Term Lender Defendants have a potential avenue for relief by way of cross claims against JPMorgan. The Trust, on the other hand, will have no avenue for relief if the Amended Complaint is dismissed. The Moving Defendants cannot blame JPMorgan on the one hand, and on the other hand seek to prejudice the Trust. Even if the Moving Defendants are correct that JPMorgan was not authorized to litigate Phase I on their behalf (and they are not correct), they still agreed that the Trust could rely on JPMorgan's apparent authority. If JPMorgan did not have authority to act, then both the Trust and the Moving Defendants have been harmed by JPMorgan's actions, and the Trust reserves its right to assert additional claims against JPMorgan if the Court dismisses the Amended Complaint.

II. THE TRUST HAS STANDING TO PURSUE THIS ACTION

The Committee had standing to commence this action. The DIP Order, pursuant to which the Term Lenders were paid in full as putatively secured creditors, expressly gave the Committee "automatic standing and authority" to "investigate" and "bring actions based upon" the Term Lenders' "perfection of first priority liens." Fisher Decl. Ex. G (DIP Order ¶ 19(d)). The DIP Order further dictates that the Committee's "grant of automatic standing" was "without . . . any requirement that the Committee file a motion seeking standing or authority . . . before prosecuting any such challenge." *Id.*

During Phase I, the Committee succeeded in obtaining a ruling that the filing of the 2008 Termination Statement was effective and therefore the Term Lenders' security interest covered by the Main Lien was not perfected as of the Petition Date. Adv. Pro. Dkt. No. 96; *see also Official Comm.*, 777 F.3d at 101. At the heart of Phase II of the Avoidance Action is the Trust's contention that, because the perfected security interest with respect to the Main Lien was

terminated, the Term Lenders should not have been paid as fully secured creditors, and the value of the Transfers in excess of the value of any surviving collateral should be avoided and recovered for the benefit of the estate under sections 547, 549, and 550 of title 11 of the United States Code (the "**Bankruptcy Code**").[23] For the reasons set forth below, the claims seeking recovery of Transfers pursuant to sections 549 ***and*** 547 of the Bankruptcy Code are "based upon" the Committee's successful challenge to the "perfection of the first priority lien[]" – and thus fall squarely within the grant of authority set forth in the DIP Order.

A. The Claim To Avoid Preference Payments Falls Squarely Within The Carve Out In The DIP Order

Notwithstanding their acknowledgment that the Trust has standing to seek disgorgement of the Postpetition Transfers from the Term Lenders, the Moving Defendants argue that the DIP Order "did not give the Committee the right to bring claims seeking disgorgement of prepetition preferential transfer payments under section 547 of the Bankruptcy Code." Adv. Pro. Dkt. No. 226-1 at 24.[24] Specifically, the Moving Defendants argue that the DIP Order "said nothing" about the Committee's standing to bring claims under section 547 of the Bankruptcy Code and, further, that a preference claim "is not 'based' upon the lien perfection issue." Adv. Pro. Dkt. No. 226-1 at 27; *see also* Adv. Pro. Dkt. Nos. 262 at 30, 377 at 24. The Moving Defendants' effort to draw an arbitrary distinction between the Trust's standing to pursue claims under

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[23] The Hahn Defendants' assertion that any new actions or proceedings by the Trust pursuant to sections 547 and 549 of the Bankruptcy Code would be time barred, Adv. Pro. Dkt. No. 226-1 at 27, is irrelevant because such claims were included in the initial complaint filed by the Committee in July 2009. *See generally* Adv. Pro. Dkt. No. 1.

[24] Continental Casualty is the only Moving Defendant that argues that the Trust does not have standing to pursue recovery of the Postpetition Transfers pursuant to section 549 of the Bankruptcy Code. *See* Adv. Pro. Dkt. No. 311. For the reasons set forth below in Section II.C, such arguments are meritless. All the other Moving Defendants who argue the Trust lacks standing concede that the language of the DIP Order clearly conferred standing on the Committee (and, by extension, the Trust) to seek recovery of the Postpetition Transfers from the Term Lenders. *See, e.g.*, Adv. Pro. Dkt. No. 226-1 at 27 ("The DIP Order specifically gave the Committee the right to challenge the perfection of the first priority liens of the Term Loan and, by extension, to seek disgorgement of the Postpetition Transfers under section 549 because such claim is "based upon" a finding that the lien is unperfected."); *see also* Adv. Pro. Dkt. Nos. 262 at 28-31, 377 at 22-25, 390 at 8-9.

section 549 of the Bankruptcy Code and section 547 of the Bankruptcy Code is undermined by the plain language of the DIP Order, as well as the nature of the section 547 claims.

The claim to avoid preference payments under section 547 of the Bankruptcy Code falls squarely within the carve out in the DIP Order because the claim is *based upon* "the perfection of first priority liens" of the Term Lenders. Fisher Decl. Ex. G (DIP Order ¶ 19(d)). A basic tenet of New York contract law is that courts are to interpret unambiguous words and phrases pursuant to their plain meaning and to avoid rendering any clause superfluous or meaningless. *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1199 (2d Cir. 1996). Courts interpret the phrase "based on" (or "based upon") broadly, and in accordance with its common dictionary definition, to mean "having as the foundation" or "arising from." *Environmental Defense v. U.S. E.P.A.*, 369 F.3d 193, 203 (2d Cir. 2004); *see also Two Farms, Inc. v. Greenwich Ins. Co.*, 993 F. Supp. 2d 353, 360 (S.D.N.Y. 2014) ("It is well settled that under New York law the terms 'arising out of' and 'based upon' must be construed broadly."). Here, the Trust's preference claims certainly "arise out of" the perfection of first priority liens: without a determination as to the validity of the first priority liens, the Trust could not state a claim pursuant to section 547.[25]

Notably, JPMorgan, as Administrative Agent, implicitly conceded the relationship between being a secured creditor (*i.e.*, lien perfection) and section 547 claims in its summary judgment brief during Phase I. Adv. Pro. Dkt. No. 29 at 48 ("In Count III of its Complaint, the Committee also seeks to avoid and recover certain pre-petition transfers made to JPMCB and the

[25] The Moving Defendants' argument that the general release, which includes claims "arising under the Bankruptcy Code," covers the Trust's claim under section 547 because it "arises" under the Bankruptcy Code (Adv. Pro. Dkt. No. 226-1 at 25) ignores the plain language of the carve out and would render it meaningless. *See PaineWebber Inc.*, 81 F.3d at 1199. Indeed, the Moving Defendants concede that the carve out in the DIP Order exempts from release the Trust's claim under section 549 of the Bankruptcy Code. Because the section 549 claim also "aris[es] under the Bankruptcy Code," but for the carve out, it too would be covered by the general release. The Moving Defendants cannot explain why the carve out covers section 549 but not 547, and the carve out itself makes no such distinction.

other Term Loan lenders, including a payment made to JPMCB in the amount of $28.2 million on May 27, 2009. *This claim fails because, as demonstrated above, JPMCB was a fully secured creditor to GM*.") (emphasis added). Indeed, "the plaintiff in a preference action must show that the transferee received more as a result of the preference than if the preference was never paid, and instead, the transferee received a distribution on its claim in a hypothetical chapter 7 case." *Savage & Assocs., P.C. v. A.I. Credit Corp. (In re Teligent, Inc.)*, 337 B.R. 39, 45 (Bankr. S.D.N.Y. 2005) (citations omitted). Thus, "[p]ayments to an oversecured creditor are not preferential because the creditor would receive the full value of its collateral in a chapter 7 liquidation." *Id.*; *see also Official Comm. of Unsecured Creditors v. UMB Bank, N.A. (In re Residential Capital, LLC)*, 501 B.R. 549, 619 (Bankr. S.D.N.Y. 2013); *Gallagher v. Gordon*, No. 09-CV-6425-CJS, 2010 WL 1816643, at *5 (W.D.N.Y. May 3, 2010).[26]

Thus, the Moving Defendants' argument that the language of the DIP Order "textually only encompasses claims under section 544(a), and by extension, claims under section 549," Adv. Pro. Dkt. No. 226-1 at 26, is an attempt to re-write the carve out set forth in the DIP Order, which does *not* limit the permissible claims based on specifically identified sections of the Bankruptcy Code, but rather permitted the Committee to bring claims "based upon" challenges to the "perfection of first priority liens."[27]

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[26] The Moving Defendants cite to a single case, *Industrial Distribution Services, Inc. v. Grinell Corp.*, 100 B.R. 584, 585 (Bankr. M.D. Fla. 1989), to support their argument that the section 547 claim is not based upon lien perfection. Adv. Pro. Dkt. Nos. 262 at 30, 377 at 25. *Industrial Distribution* involved the sale of certain valves, pipes, and fittings to the debtor, for which the debtor never paid the manufacturer of the goods. Prior to the bankruptcy filing, the manufacturer sought and obtained an order of prejudgment replevin, pursuant to which the sheriff took possession of the goods. The court determined that the manufacturer had to turn over the goods to the debtor, and thus dismissed as moot the section 547 claim that was based on the contention that the seizure of goods by the sheriff was a voidable preference. Thus, the court's statement, in dicta, that the moot 547 claim was not "based on the contention directly" that the manufacturer's lien could be avoided pursuant to section 544(a)(b) of the Bankruptcy Code, has no application to the facts of this case. *Indust. Distrib,* 100 B.R. at 585.

[27] The Moving Defendants' attempt to select language from other provisions in the DIP Order to diminish the Trust's standing fails. First, the Hahn Defendants argue that because the DIP Order states, with respect to junior liens, that the Committee is empowered to "contest such lien or interest . . . on any grounds, including (without

B. The Plan, And Prior Decisions Of The Court, Confirmed The Committee's Standing To Prosecute The Avoidance Action

On March 18, 2011, over a year and a half after the commencement of the Avoidance Action, Old GM's Plan was confirmed by the Bankruptcy Court. Fisher Decl. Ex. N (Confirmation Order). The Plan provided for, among other things, the creation of the Trust, which was assigned the authority to prosecute the Avoidance Action following the dissolution of the Committee. *Id*. (Plan § 6.5). Further, the plain language of the Plan defines "Avoidance Action" as "any action commenced, or that may be commenced, before or after the Effective Date pursuant to section 544, 545, ***547***, 548, ***549***, 550, or 551 of the Bankruptcy Code, except to the extent purchased by New GM under the MSPA or prohibited under the DIP Credit Agreement." *Id.* (Plan § 1.18) (emphasis added).[28] "Term Loan Avoidance Action," in turn, is defined as this adversary proceeding. *Id.* (Plan § 1.123).

Thus, the plain language of the Plan acknowledges the Trust's standing to continue prosecuting the claims that were asserted by the Committee over a year and a half earlier. The Moving Defendants, in arguing that the Trust lacks standing to prosecute this action, seek, in essence, to modify the terms of the Plan, which would require a motion to the Bankruptcy Court in accordance with section 12.9 of the Plan and applicable sections of the Bankruptcy Code.

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limitation) validity, enforceability, priority, perfection or value)," Fisher Decl. Ex. G (DIP Order ¶ 19(d)), such language "supports the reading that the DIP Order gave the Committee only the right to challenge the perfection of the Term Loan and not go back to challenge quarterly payments made prior to the Petition Date." Adv. Pro. Dkt. No. 226-1 at 24. This difference in carve-out language, however, simply acknowledges that if there is no issue with regard to the perfection of the first priority lien, then there is no issue of value to be litigated because the claim would be fully secured, whereas even if all the junior liens are perfected, the Committee may have an action based upon the value of such junior liens. Next, the Jones Defendants assert that the references to "Payment" in the DIP Order similarly limit the Trust's standing. Adv. Pro. Dkt. No. 377 at 24-25. This argument ignores that the relevant DIP Order language provides for the payment of JPMorgan's fees, as agent, "in defending any challenge to such liens ***or*** to their ability to retain any Payment." Fisher Decl. Ex. G (DIP Order ¶ 19(d)) (emphasis added). Once again, the plain language of the DIP Order belies the Moving Defendants' argument, as it indicates that the Term Lenders may face challenges *not* concerning the Payment. Any other reading would render the clause "in defending any challenge to such liens" meaningless.

[28] The Plan defines the DIP Credit Agreement to include the DIP Order. Fisher Decl. Ex. N at ¶ 1.47.

Any such motion would be baseless.

Further, almost two years after the Plan's confirmation, the Court, in its decision on the cross-motions for summary judgment in connection with Phase I, even though ruling against the Committee with regard to the effectiveness of the filing of the 2008 Termination Statement (which was later reversed by the Second Circuit), acknowledged the Committee's standing, assuming it was ultimately successful in invalidating the Main Lien, to seek the return of amounts improperly paid to the Term Lenders:

> To the extent that the Committee might be successful in this adversary proceeding, the amount paid to JPMorgan and the Lenders would be subject to recapture, as provided in the final DIP Financing Order when the payoff of the Term Loan was authorized.

Adv. Pro. Dkt. No. 71 at 21 n.54.[29] Thus, the Committee's (and Trust's) standing, which was initially conferred by the DIP Order, has been confirmed over the course of the six years this litigation has been pending by the plain language of the Plan as well as prior decisions by the Court.

Finally, the Moving Defendants' assertion that the Committee lacked standing based upon its failure to file an *STN* motion pursuant to the test articulated in *Unsecured Creditors Comm. of Debtor STN Enters., Inc. v. Noyes (In re STN Enters.)*, 779 F.2d 901, 904 (2d Cir. 1985), is unpersuasive given the current status of the case. In light of the Committee's success in invalidating the Main Lien during Phase I of this action, there can be no doubt that the claim is "colorable" and "likely to benefit the reorganized estate." *Id.*[30] Indeed, the Court previously

[29] Similarly, the district court, in connection with a dispute between the Committee and the DIP Lenders regarding the proceeds of the Avoidance Action, acknowledged the Committee's standing to pursue the claims asserted herein. *U.S. Dep't of Treasury v. Official Comm. of Unsecured Creditors*, 475 B.R. 347, 351 (S.D.N.Y. 2012) ("The Committee filed the Avoidance Action, pursuant to the authority granted to it by the Final DIP Order . . . in order to void the payment and recover for the bankruptcy estate the approximately $1.5 billion paid to the Prepetition Term Lenders.").

[30] The Hahn and Jones Defendants' reliance on *Commodore International Ltd. v. Gould (In re Commodore*

explained that, if the Committee is successful in this adversary proceeding, "after the return of the amount previously paid on what was thought to be a duly secured claim, the Lenders would still have a claim for the Term Loan debt, but would have only an unsecured claim, sharing *pari passu* with the many billions of dollars of other unsecured claims in GM's chapter 11 case." Adv. Pro. Dkt. No. 71 at 21 n.54. Thus, it is apparent that the Court had determined that this action was colorable and, if successful, would benefit the estate.

To the extent that the Court determines that a further explicit *STN* finding is necessary, notwithstanding the six-year history of this case, the Court can – and should – exercise its discretion to grant *nunc pro tunc* approval for the Committee to prosecute the Avoidance Action. *See, e.g.*, *Official Comm. of Unsecured Creditors of the Debtors v. Austin Fin. Servs., Inc. (In re KDI Holdings, Inc.)*, 277 B.R. 493, 504-05 (Bankr. S.D.N.Y. 1999) (holding that "in appropriate circumstances, however, a court may grant retroactive approval" to adversary proceedings instituted by the creditors' committee); *America's Hobby Ctr., Inc. v. Official Comm. of Unsecured Creditors of America's Hobby Ctr., Inc. (In re America's Hobby Ctr., Inc.)*, 223. B.R. 275, 281-82 (Bankr. S.D.N.Y. 1998) (granting a creditors' committee *nunc pro tunc* approval to bring adversary proceedings because there was no confusion as to who would file the adversary proceedings, the defendant had consented to the committee's authority to bring any necessary proceedings, time was of the essence because of statute of limitations, and overall fairness to the

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International Ltd.), 262 F.3d 96, 100 (2d Cir. 2001) and *Official Comm. of Unsecured Creditors of AppliedTheory Corp. v. Halifax Fund, L.P. (In re AppliedTheory Corp.)*, 493 F.3d 82, 86 (2d Cir. 2007), is misplaced. Adv. Pro. Dkt. Nos. 226-1 at 22, 377 at 22. In *Commodore International*, the Second Circuit explicitly *expanded* the grant of standing for creditor committees under *STN* to include circumstances, such as this one, when the committee has the consent of the debtor in possession or trustee. 262 F.3d at 99. *In re AppliedTheory* stands for the limited proposition that *STN* and *Commodore* are equally applicable to equitable subordination claims. Accordingly, because both the debtor's chapter 11 trustee and the bankruptcy court determined that the committee's claim in *In re AppliedTheory* would not benefit the estate, a requirement under *STN* and *Commodore*, the committee did not have a right to file the lawsuit. Here, in stark contrast, the standing of the Committee (specifically formed for the benefit of the unsecured creditors) to file the Avoidance Action was expressly provided for in the DIP Order and the Plan.

creditors whose interest would otherwise not be represented). Moreover, the Court has more than sufficient facts before it on the record to make the *STN* findings without ordering any further proceedings. *See, e.g., Official Comm. of Asbestos Claimants v. Bank of N.Y. (In re G-I Holdings, Inc.)*, No. 04-3423, 2006 WL 1751793, at *12 (D.N.J. June 21, 2006) (remanding for factual findings with respect to the factors enumerated in *STN* and specifically holding that the bankruptcy court was not required to hold an evidentiary hearing to make these findings); *In re KDI Holdings, Inc.*, 277 B.R. at 519-20 (retroactively considering the standing of a creditors' committee based on facts already before the court and finding the *STN* factors met).[31]

C. Continental Casualty's Argument That The Trust Is Not Authorized To Seek Disgorgement Of The Postpetition Transfer Is Without Merit

Continental Casualty alone argues that, contrary to the plain language of the DIP Order, the Trust is not authorized to seek disgorgement of the Postpetition Transfers pursuant to section 549 of the Bankruptcy Code. *See generally* Adv. Pro. Dkt. No. 311 at 4-5. This argument fails.

First, Continental Casualty argues that the Postpetition Transfers cannot be clawed back because they were authorized by the Court. *Id.* at 2-3. Such argument, however, ignores the plain language of the DIP Order, which, while authorizing the Postpetition Transfers, did so subject to the express condition that the Committee had "automatic standing" to investigate and challenge the perfection of the Main Lien and bring actions based upon any such challenges to perfection. *See* Fisher Decl. Ex. G (DIP Order ¶¶ 19(d), 24).

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[31] The Moving Defendants refer to various bankruptcy court orders that lay out the conditions under which a committee could in the future seek standing in the case. *See, e.g.*, Adv. Pro. Dkt. Nos. 262 at 29-30, 377 at 22-23 (citing *In re Chassix Holding, Inc.*, Dkt. 252 ¶ 27(b), No. 15-10578 (Bankr. S.D.N.Y. Apr. 10, 2015); *In re Terrestar Networks Inc.*, Dkt. 181, ¶ 17, No. 10-15446 (Bankr. S.D.N.Y. Nov. 18, 2010); *In re Relativity Fashion*, LLC, Dkt. 342, ¶ 34, No. 15-11989 (Bankr. S.D.N.Y. Aug. 27, 2015); *In re Pinnacle Airlines Corp.*, Dkt. 316, ¶ 16, No. 12-11343 (Bankr. S.D.N.Y. May 17, 2012)). Not only do none of these orders rule on whether a committee seeking to bring an action, in fact, has standing, but, in addition, the language used by other judges in other cases is simply not relevant to whether the language used in this case is sufficient to carve out the requisite standing. Adv. Pro. Dkt. No. 262 at 29-30.

Second, Continental Casualty argues that it is not bound by the DIP Order because it is "not a party" to the Order. Adv. Pro. Dkt. No. 311 at 5. Continental Casualty's argument fails because the terms of the DIP Order expressly state that immediately upon its entry, it became "valid and binding" upon, *inter alia*, "all . . . creditors of the Debtors" and further states, specifically with regard to the Term Loan Lenders, that "[a]ny Prepetition Senior Facilities Secured Party accepting Payment shall submit to the jurisdiction of the Bankruptcy Court" in connection with the prosecution of any action by the Committee. Fisher Decl. Ex. G (DIP Order ¶¶ 26, 19(d)).[32] Thus, by accepting payment of its portion of the Term Loan, Continental Casualty agreed to be bound by the terms of the DIP Order.

Next, Continental Casualty argues that it "received no notice of the claims until more than 6 years after the deadline imposed by the DIP Order." Adv. Pro. Dkt. No. 311 at 4-5. As discussed above in Section I.C.4.b, Continental Casualty had notice, and in any event such assertion creates an issue of fact not appropriately adjudicated on a Rule 12(b)(6) motion.

Finally, Continental Casualty argues that there was no "qualification on the Court's authorization for the postpetition transfers to the prepetition term lenders" because "[b]y their plain terms, these provisions do not qualify the authority granted to make the postpetition transfers." Adv. Pro. Dkt. No. 311 at 4. Such argument is contradicted by the plain language of the DIP Order.[33] Continental Casualty's argument is all the more inexplicable because it joined in the motion filed by the Hahn Defendants, who concede that the Trust has standing to seek disgorgement of the Postpetition Transfers. *Id.* at 1, Adv. Pro. Dkt. No. 226-1 at 27.

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[32] Continental Casualty's argument that it should not be bound by the DIP Order because its "interests are adverse to the interests of the agent" – are equally unavailing for the reasons set forth in Section I.C.2.b.

[33] Continental Casualty also states in its brief that there is no standing because "the AAT is not the Committee, and the Committee is not pursuing these causes of action in accordance with paragraph 19 of the DIP Order." Adv. Pro. Dkt. No. 311 at 4. This confusing statement is flatly contradicted by the Plan's creation of the Trust and its grant of authority to the Trust to continue the prosecution of the Avoidance Action.

III. THE PREFERENTIAL PAYMENTS ARE NOT PROTECTED BY THE SAFE HARBOR PROVISION UNDER SECTION 546(e) OF THE BANKRUPTCY CODE

The Hahn Defendants' argue in error for dismissal of the claim to recover the Preferential Transfers on the ground that those transfers are settlement payments within the "safe harbor" protection of section 546(e) of the Bankruptcy Code. This argument fails because the Hahn Defendants fail to meet their burden in support of their affirmative defense, and dismissal at the pleading stage would be premature. Further, they cannot show as a matter of law that the transfers qualify for safe harbor protection under 546(e).

A. The Safe Harbor Defense Is Not A Valid Basis For Dismissal At This Stage

The Hahn Defendants bear the burden of proving that section 546(e) is applicable to bar the Trust from avoiding a transfer. *Grayson Consulting, Inc. v. Wachovia Sec., LLC (In re Derivium Capital, LLC)*, 437 B.R. 798, 812 (Bankr. D.S.C. 2010), *aff'd,* 716 F.3d 355 (4th Cir. 2013). A court may dismiss a claim on the basis of an affirmative defense only if "the facts supporting the defense appear on the face of the complaint," and "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *United States v. Space Hunters, Inc.*, 429 F.3d 416, 426 (2d Cir. 2005); *S.E.C. v. Bronson*, 14 F. Supp. 3d 402, 411 (S.D.N.Y. 2014) (denying motion to dismiss where court could not "conclusively determine" defendants' status as an accredited investor as an affirmative defense, declining to infer as to its status and noting that *Twombly* "did not revise the allocation of burdens concerning affirmative defenses" and complaints "need not anticipate, and attempt to plead around, potential affirmative defenses") (quoting *Davis v. Ind. State Police*, 541 F.3d 760, 763 (7th Cir. 2008)). As a threshold matter, the Hahn Defendants' conclusory statements simply do not meet their burden to establish that dismissal is warranted at this stage. For this reason alone, the Court should reject the Hahn Defendants' argument.

At a minimum, there is an issue of fact as to whether the interest payment of $28,241,781, made on May 27, 2009, was a routine or "mandatory" payment under the Term Loan Agreement, which dictates that interest is to be paid on "the third Business Day after the last day of each [of] March, June, September and December." Fisher Decl. Ex. B (Term Loan Agreement § 1.01). Where, as here, the Trust has stated a facially plausible avoidance claim, courts routinely hold it would be premature for the Court to consider the safe harbor defense at the motion to dismiss stage. *See, e.g., Picard v. Merkin (In re Bernard L. Madoff Inv. Sec. LLC),* 440 B.R. 243, 266 (Bankr. S.D.N.Y. 2010) ("[The] invocation of the 546(e) defense is at best premature."); *Indus. Enter. of Am. Inc. v. Tabor Acad. (In re Pitt Penn Holding Co., Inc.)*, No. 09-11475 (BLS), 2011 WL 4352373, at *12 (Bankr. D. Del. Sept. 16, 2011) (denying motion to dismiss based on safe harbor affirmative defense); *Walker v. Sonafi Pasteur (In re Aphton Corp.)*, 423 B.R. 76, 94-95 (Bankr. D. Del. 2010) (same).

B. The Preferential Transfers Are Not Protected By The Safe Harbor Under Section 546(e)

But even if the Hahn Defendants' defense is properly raised at this early stage (which it is not), the Court should find the safe harbor does not apply as the Prepetition Transfers here were not "Settlement Payments," nor were they made in connection with a "Securities Contract" as required under the Bankruptcy Code. The Hahn Defendants' expansive theory of the safe harbor exception has never been recognized.

1. The Preferential Transfers Do Not Qualify As "Settlement Payments"

Under section 547 of the Bankruptcy Code, a trustee is empowered to avoid certain transfers of a debtor's property made up to 90 days prior to the filing of the petition. *See* 11 U.S.C. § 547(b)(4)(A). Section 546(e) provides, in relevant part, that notwithstanding section 547, the trustee may not avoid a transfer that is either (i) a "settlement payment, as defined in

section 101 or 741 of this title, made by or to (or for the benefit of) a . . . financial institution" or (ii) a "transfer made by or to (or for the benefit of)" a financial institution "in connection with a securities contract, as defined in section 741(7)." 11 U.S.C. § 546(e). Thus the safe harbor set forth in section 546(e), by definition, does not apply to the Trust's claim seeking disgorgement of Postpetition Transfers under section 549 of the Bankruptcy Code.

The Bankruptcy Code defines "Settlement Payment" as "a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade." 11 U.S.C. § 741(8).[34] Courts have frequently noted that "settlement payment" under 714(8) of the Bankruptcy Code "defies plain meaning" and "is circular and cryptic." *Tronox Inc. v. Kerr McGee Corp. (In re Tronox Inc.)*, 503 B.R. 239, 341 (Bankr. S.D.N.Y. 2013) (citation omitted). To be sure, the Second Circuit has declined to adopt three proposed limitations into the meaning of "settlement payments" under section 741(8) of the Bankruptcy Code, namely that the term (i) excludes all payments not common in the securities industry; (ii) applies only where title changes hands; and (iii) requires a financial intermediary to be more than a mere conduit to the transaction. *See Enron Creditors Rec. Corp.*, 651 F.3d at 335.

The Hahn Defendants' citation to a Texas District Court's observation in *Crescent Res. Litig. Trust v. Duke Energy Corp*. that certain Circuit courts "agree that the Bankruptcy Code's understanding of a settlement payment is extremely broad" is not controlling, 500 B.R. 464, 472

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[34] That the Second Circuit declined the *Enron* creditors' request to look to the Securities Act's definition of "security" in interpreting the Bankruptcy Code's "settlement payments" provision in connection with early redemption of commercial paper does not settle the question here. *See Enron Creditors Rec. Corp.*, 651 F.3d at 343 n.4. Courts often look to the securities laws in connection with their analysis of the Bankruptcy Code. *See, e.g., Picard v. Ida Fishman Revocable Trust (In re Bernard L. Madoff Inv. Sec. LLC)*, 773 F.3d 411, 420 n.2-3 (2d Cir. 2014) (noting the analysis is congruent with federal securities laws); *Jackson v. Mishkin (In re Adler, Coleman Clearing Corp.)*, 263 B.R. 406, 478, 485 (S.D.N.Y. 2001) (noting statutory construction under Bankruptcy Code a "holistic endeavor" and rejecting unreasonably broad interpretation of safe harbor at odds with "the overall framework reflected in the interconnections among the Bankruptcy Code, SIPA and the SIPC rules").

(W.D. Tex. 2013) (internal quotation marks and citation omitted), and its decision rejecting Trustee's fraudulent transfer theories and granting defendant summary judgment on safe harbor grounds involving a leveraged buyout is simply inapposite and otherwise misleading. *Id*. at 471, 474. *Enron* never held the term "settlement payment" to be "extremely broad." *Enron*, 651 F.3d at 334. The court merely noted that the Second Circuit has "not yet addressed the scope" of the term, conspicuously declined to universally adopt this language, and held that early redemption payments retiring certain commercial paper made anywhere from 26-38 days before filing constituted settlement payments within the meaning of the Bankruptcy Code. *Id.* at 334-35. Indeed, "the term is not boundless." *Official Comm. of Unsecured Creditors of Norstan Apparel Shops, Inc. v. Lattman (In re Norstan Apparel Shops, Inc.)*, 367 B.R. 68, 76 (Bankr. E.D.N.Y. 2007). And, in balancing the competing concerns addressed under the Bankruptcy Code, "Congress has repeatedly indicated that it did not enact section 546(e) to protect market stability to the exclusion of all other policies." *Weisfelner v. Fund 1 (In re Lyondell Chemical Co.)*, 503 B.R. 348, 365 (Bankr. S.D.N.Y. 2014) (quoting *In re Tribune Co. Fraudulent Conveyance Litig.*, 499 B.R. 310, 318 (S.D.N.Y. 2013)). *Global Crossing Estate Rep. v. Alta Partners Holdings LDC (In re Global Crossing Ltd.)*, 385 B.R. 52 (Bankr. S.D.N.Y. 2008), is instructive. There, the court rejected the claim that receipt of a dividend on stock previously purchased somehow constituted a "settlement payment" under the Bankruptcy Code. *Id*. at 56 n.1.

The Hahn Defendants' superficial analysis that the transfers here, made three business days before filing, were somehow "a necessary part of the completion" of the Term Lender Defendants' earlier acquisition of certain interests in the Loan should likewise not persuade the Court. Adv. Pro. Dkt. No. 226-1 at 31. The Preferential Transfers were not "settlement payments" under the Bankruptcy Code and the safe harbor does not apply.

2. The Preferential Transfers Do Not Qualify As Transfers Made In Connection With A "Securities Contract"

Moreover, as the Hahn Defendants acknowledge, neither this Circuit nor any other has addressed or extended section 546(e) safe harbor protection to the type of bank debt at issue here. *See* Adv. Pro. Dkt. No. 226-1 at 28. Instead, the Hahn Defendants take the Court on a misleading detour, ignore case law and the deal documents that actually address these transactions, and otherwise attempt to eviscerate Congressional intent.

In the leading case regarding loan participations similar to those here, the Second Circuit affirmed the district court's decision that loan participations sold by a bank to various institutional investors were not "securities" under the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (the "**Securities Act**"). *See Banco Espanol de Credito v. Sec. Pac. Nat. Bank*, 973 F.2d 51 (2d Cir. 1992). There, the court noted each purchaser was required to enter into a master participation agreement containing a disclaimer that the purchaser had not relied on seller and otherwise made its own credit analysis. *Id.* at 53. It rejected plaintiffs' argument that due to the nature of the loans being traded "through high speed telephonic sales and often pre-paid transactions" they should be characterized as securities in the nature of "notes" as enumerated in the Securities Act. *See id.* at 55. Instead, it considered the participations in light of the four factors under the "family resemblance test" articulated by the Supreme Court in *Reeves v. Ernst & Young*, 494 U.S. 56 (1990), which included (1) the motivations of buyer and seller (2) the plan of distribution of the instrument (3) reasonable expectations of the investing public, and (4) whether another regulatory scheme reduces the risk of the instrument. *Id.* The Second Circuit concurred with all of the district court's findings under the *Reeves* analysis, holding that such loan participations were not securities where the overall motivation of the parties was promotion of commercial purposes, only sophisticated financial institutions were solicited, investors were

given notice that instruments were participations and not investments in business enterprise, and that the Comptroller of the Currency had issued specific policy guidelines addressing these sales. *Id.*

Indeed, the predominant view is that syndicated loans are not securities. *See, e.g., McVay v. W. Plains Serv. Corp.*, 823 F.2d 1395 (10th Cir. 1987); *Kansas State Bank in Holton v. Citizens Bank of Windsor*, 737 F.2d 1490 (8th Cir. 1984); *Union Planters Nat'l Bank of Memphis v. Commercial Credit Bus. Loans, Inc.*, 651 F.2d 1174 (6th Cir. 1981); *United Am. Bank of Nashville v. Gunter*, 620 F.2d 1108 (5th Cir. 1980); *Am. Fletcher Mortg. Co., Inc. v. U.S. Steel Credit Corp.*, 635 F.2d 1247 (7th Cir. 1980); *see also* Anne Huber & Thomas Young, *The Trading of Bank Debt In and Out of Chapter 11*, 15 J. BANKR. L. & PRAC. 1, Article 3 (2006) (noting market participants generally assume that bank debt is not a "security" under federal securities laws). The Hahn Defendants have not cited a single case, under either the Securities Act or the Bankruptcy Code, in support of their attempt to bootstrap the loans here into "securities" under the Bankruptcy Code.

The Hahn Defendants' reading of *In re Bernard L. Madoff Inv. Sec. LLC*, 773 F.3d at 418, for the proposition that the term "securities contract" is to be construed broadly misses the point. The core issue in *Madoff* was that while the agreements in dispute *purported* to be contracts for the sale and purchase of securities, the agreements were shams and no actual sales or purchases were executed. *Id.* at 419-20. The Second Circuit merely concluded that the absence of any actual sales was of no consequence to the determination that the agreements were "securities contracts." *See id.* at 420. The *Madoff* court never had to address whether the term "securities contract" must, by its terms, be a contract for the purchase, sale, or loan of a security (or at least something similar or related), as the agreements related to brokerage accounts and

identified trading in publicly registered securities. *See id.* at 419. And *Madoff* otherwise indicates the Second Circuit's willingness to look to the Securities Act in harmonizing its interpretation of a "securities contract" under the Bankruptcy Code. *See id.* at 420 n.3 (noting their holding that a "securities contract" does not require an actual purchase or sale is congruent with holdings that such requirement is likewise unnecessary under the antifraud provisions under the Securities Act).

Lehman Bros. Holdings Inc. v. JPMorgan Chase Bank, N.A. (In re Lehman Bros. Holdings Inc.), 469 B.R. 415 (S.D.N.Y. 2012), is likewise inapposite. That case involved agreements related to clearing services of virtually all of Lehman Brothers Inc.'s securities and cash used in its trading activities, and JPMorgan's provision of tri-party repo agency services (as one of only two banks in the U.S. to provide such services) involving overnight repos of securities. *Id.* at 424-25. Such agreements, and defendants' nexus in requesting safe harbor application, are fundamentally different to the interests here.

Here, the Term Lender Defendants expressly declined to characterize their interest in the Term Loan as a "security within the meaning of applicable securities laws[.]" Fisher Decl. Ex. A (LSTA, Purchase and Sale Agreement For Distressed Trades, Standard Terms and Conditions (2009) (the "**PSA**") § 4.1(p), § 5.1(d)); *see also Tronox*, 503 B.R. at 343 (finding that plain reading of assignment agreement and assignment, assumption and indemnity agreement establishes they were not "contracts for the purchase, sale or loan of a security"). Further, the Hahn Defendants ignore the fact that, as in *Banco*, these transactions are limited to qualified sophisticated entities, even if they happen to include "non-bank investors" or "pension and retirement funds." *See* Fisher Decl. Ex. A (PSA § 5.1(f)); Adv. Pro. Dkt. No. 226-1 at 33. Such attempt to distinguish the parties here is meritless and is hardly grounds for qualifying the

interests as a "security." Moreover, each party represents they have adequate information and have conducted their own analysis in deciding to enter into the trade. Fisher Decl. Ex. A (PSA § 4.1(n) (seller), § 5.1(f) (buyer)). The buyer represents they "are able to bear the economic risk associated with the purchase" and are otherwise "aware of the risks and uncertainties inherent in the purchase of rights and assumption of liabilities of the type contemplated" in the agreement. *Id.* (PSA § 5.1(f)). Where, as here, the parties have negotiated, and priced in, the bankruptcy risks associated with the debt of distressed companies, a grant of safe harbor protection would grant the Term Lender Defendants more than they bargained for.[35]

The Hahn Defendants' final contention that these bank loans serve as a "prime example" of the type of products and market Congress intended to protect is baseless. When Congress has wanted to extend safe harbor protection to certain products and markets, it has done so. *See* 1984 Amendments to Bankr. Code, Pub. L. No. 98-353, § 393, 98 Stat. 333, 365 (1984) (adding § 546(f) to make explicit that safe harbor protection extended to repurchase agreements); 1990 Amendments to Bankr. Code, Pub. L. No. 101-311, 104 Stat. 267 (1990) (adding § 546(g) safe harbor protection to swaps transactions to promote market certainty). Congress has not acted.

IV. THE MERE CONDUIT DEFENSE IS NOT PROPERLY CONSIDERED ON A MOTION TO DISMISS OR MOTION FOR JUDGMENT ON THE PLEADINGS

The Hahn Defendants argue that the Trust's second claim for relief fails as a matter of law because "certain term loan investor defendants" were "mere conduits" who did not have an equitable interest in the Term Loan or, specifically, in the postpetition transfers they received. *See* Adv. Pro. Dkt. No. 226-1 at 34-38. At the outset, the Trust notes that the Hahn Defendants

[35] And even if the Court should find the documentation is ambiguous in defining the interests here as being subject to § 546(e), the "[c]ourt's role is not to resolve ambiguities" in the language of the contract at the pleading stage. *See DKR Capital, Inc. v. AIG Int'l W. Broadway Fund, Ltd.*, No 03 Civ.1568 (JGK), 2003 WL 22283836, at *4 (S.D.N.Y. Oct. 2, 2003).

do not identify which among them were "mere conduits." Instead, they state that the relevant defendants are "[t]hose Term Loan Investor Defendants that sold their interest in the Term Loan prior to, but settled with the buyer after, the Record Holder Date." Adv. Pro. Dkt. No. 226-1 at Definitions Table & 34. Nonetheless, the Hahn Defendants' mere conduit argument fails because a mere conduit defense – as they acknowledge – "is by its very nature fact specific and does not readily lend itself to a motion to dismiss." *Id.* at 36. The Hahn Defendants do not, and cannot, prove as a matter of law that the Amended Complaint fails to state a claim for relief against certain defendants because such defendants were mere conduits.

A "mere conduit" defense is an "equitable exception[]" to the status of the initial transferee under 11 U.S.C. § 550(a)(1). *In re Maxwell Newspapers, Inc.*, 151 B.R. 63, 70 (Bankr. S.D.N.Y. 1993). Under the mere conduit test, an entity is an "initial transferee" from whom property may be recovered under section 550 if it has dominion or control over the transferred property. *Christy v. Alexander & Alexander of N.Y. Inc. (In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey)*, 130 F.3d 52, 58 (2d Cir. 1997). Due to the fact-specific nature of the test, courts often hold that a mere conduit defense is an issue of fact that cannot and should not be determined on a motion to dismiss. *See, e.g., In re Global Crossing Ltd.*, 385 B.R. at 56 n.1; *Astropower Liquidating Trust v. Xantrex Tech., Inc., (In re Astropower Liquidating Trust)*, No. 05-50867, 2006 WL 1173853, at *1-2 (Bankr. D. Del. Apr. 19, 2006).

The Term Lender Defendants' argument is replete with factual allegations not found in the Amended Complaint. For example, the Hahn Defendants state – without a single citation – that "each Seller Conduit Defendant either (i) remitted [payment] to its buyers in its entirety or (ii) netted out the Postpetition Transfers against the amount it was owed from the sale," Adv.

Pro. Dkt. No. 226-1 at 34, and that "[a]t the time of the Postpetition Transfers, the Seller Conduit Defendants had sold their interests in the Term Loan and did not hold obligations under the Term Loan," *id.* at 35. They further allege, again without any support, that "[t]he Seller Conduit Defendants . . . were contractually obligated to remit any payments received to their respective buyers," *id.* at 36, and that "the trades of [their] interests in the Term Loan were documented utilizing the standard form of Purchase and Sale Agreement for Distressed Trades," *id.* at 34 n.12. But because these unsupported contentions are not contained in the Amended Complaint, they are improper to consider on this motion to dismiss. *See Leonard F. v. Israel Disc. Bank of N.Y.*, 199 F.3d 99, 107 (2d Cir. 1999).

Instead, the statements only emphasize – as the Term Lender Defendants recognize – that a mere conduit defense requires an evidentiary record sufficient to prove that a defendant did not have dominion and control over the transferred funds. *See* Adv. Pro. Dkt. Nos. 226-1 at 36 ("The Seller Conduit Defendants recognize that the conduit defense is by its very nature fact specific and does not readily lend itself to a motion to dismiss.") & 37 ("[T]he Court should find that the Seller Conduit Defendants, *to the extent that they prove* that they sold their interest in the Term Loan were mere conduits") (emphasis added). Of course, such a record would require, at a minimum and among other things: (1) the identity of the Term Loan Investor Defendants that assert this defense; (2) the identity of the entities claimed to have retained dominion and control over the transferred funds; and (3) details concerning the transfer of the funds from the Term Lender Defendant to such entity, including the terms of any agreement between them. All of these facts have not, and cannot, be addressed at the motion to dismiss stage.

The Hahn Defendants also appear to seek the establishment of "a streamlined procedure for granting dismissal." Adv. Pro. Dkt. No. 226-1 at 36. However, they cite no case law in

support of such request. Moreover, they fail to articulate (i) why such a procedure is proper; (ii) how such a procedure should be implemented; (iii) the nature of the evidence necessary to prove the defense; and (iv) why mechanisms for relief pursuant to the Federal Rules of Civil Procedure, including summary judgment, are insufficient. These specifics are essential where, as here, document discovery is scheduled to conclude on April 15, 2016 – a mere two weeks following the conclusion of briefing on the pending motions. Adv. Pro. Dkt. No. 153.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Trust respectfully requests that the Court enter an Order: (i) denying the Moving Defendants' motions to dismiss and motions for judgment on the pleadings in their entirety and (ii) granting such other and further relief as may be necessary.

Dated: March 4, 2016
New York, New York

Respectfully submitted,

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