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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

MOTION OF AD HOC GROUP OF TERM LENDERS FOR LEAVE TO APPEAL PURSUANT TO 28 U.S.C. § 158(a) AND FEDERAL RULE OF BANKRUPTCY PROCEDURE 8004

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Defendants, an Ad Hoc Group of Term Lenders[1] (the "**Moving Term Lenders**"), respectfully submit this Motion for Leave to Appeal Pursuant to 28 U.S.C. § 158(a) and Federal Rule of Bankruptcy Procedure 8004 the Memorandum Opinion and Order Denying Motions to Dismiss, For Judgment on the Pleadings, and to Vacate Prior Court Orders, dated June 30, 2016 (the "**June 30 Order**")[2] [Adv. Proc. Docket No. 643] in the above-captioned adversary proceeding (the "**Avoidance Action**").

PRELIMINARY STATEMENT[3]

In this action, the Avoidance Trust seeks to recover payments made to hundreds of lenders who provided GM with a $1.5 billion secured Term Loan. The Avoidance Trust seeks the return of the payments on the grounds that JPMorgan, as administrative agent for the Term Loan, erroneously approved the filing of a UCC-3 financing statement that purported to terminate the Term Lenders' security for the Term Loan in the months before the bankruptcy. After filing its complaint to claw back the repayments from all Term Lenders, the Avoidance Trust and JPMorgan agreed -- and the Bankruptcy Court approved -- that the Term Lenders would not be served while the Avoidance Trust and JPMorgan litigated. Six years after the filing of the Initial Complaint -- and after the Delaware Supreme Court and the Second Circuit issued decisions adverse to the Term Lenders' interests, the Moving Term Lenders were served and then moved to dismiss.

The Moving Term Lenders' Motion to Dismiss included a single, fundamental question of law: does a plaintiff's six-year delay in serving process violate procedural due process if the

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[1] A full list of the Ad Hoc Group of Term Lenders is set forth on Appendix A hereto.

[2] A true and correct copy of the June 30 Order is attached as Exhibit A to the Declaration of Andrew K. Glenn, dated July 14, 2016 (the "**Glenn Decl.**"). Citations to the exhibits attached to the Glenn Decl. are referred to herein as "Ex. __."

[3] Undefined capitalized terms in this Preliminary Statement shall have the meanings ascribed to them herein.

lawsuit proceeds to the detriment of the unserved defendant named at the outset of the litigation during the delay? The Bankruptcy Court held that it did not.

The Bankruptcy Court justified its holding by purporting to provide the Term Lenders an opportunity to re-litigate the issues that already have been decided against them while they were excluded from the litigation. The Bankruptcy Court's attempt to resolve this demonstrable constitutional violation fails as a matter of law. The Supreme Court has held that where, as here, a plaintiff's delay so egregiously violates a defendant's due process rights, the defendant need not show prejudice from the delay. And, even if a showing of prejudice were required, the prejudice here is manifest. Had the Moving Term Lenders been served six years ago, they would have had a wide array of options at their disposal. Now, six years later, *and four years after the expiration of the statute of limitations*, many of those options have been foreclosed by the extraordinary delay and the adverse developments that occurred during that time period in the litigation from which they were excluded.

Since the Bankruptcy Court decided this matter, the Second Circuit has issued an opinion reaffirming the overriding importance of procedural due process in GM's bankruptcy proceedings. In *Elliott v. General Motors LLC (In re Motors Liquidation Co.)*, No. 15-2844 (2d Cir. July 13, 2016) (Ex. B (the "**Ignition Switch Opinion**")), the Second Circuit held that the due process rights of the plaintiffs -- whose claims against GM were based on faulty ignition switches -- were violated because they were not served with the motion seeking approval of the sale of substantially all of GM's assets during GM's bankruptcy. There, the dispute concerned whether GM actually knew of the existence of such claimants -- in which case it had to provide direct notice -- or, if it did not, whether publication notice sufficed. The Court held that direct notice was required, and, thus, the sale order was void as to the ignition switch claimants because

they were prejudiced from the lack of notice. Here, the hundreds of Term Lenders not only were known to GM and the Committee, but they were named in the Initial Complaint.

The Committee justified the delay in service based on orders from the Bankruptcy Court (Judge Robert E. Gerber was then presiding) extending the time to serve the non-JPMorgan defendants. However, those orders were procured based on manifest error. First, the Committee justified the delay based on the purportedly substantial cost of serving all of the defendants they named while they litigated against JPMorgan. But the law is clear that cost-savings do not justify delaying service. Second, the Bankruptcy Court implicitly held that JPMorgan was authorized to represent the parties not served. However, when the Term Loan Lenders had the opportunity to contest this ruling in their Motion to Dismiss, the Bankruptcy Court (Judge Martin Glenn presiding) agreed that JPMorgan was never authorized to represent any party other than itself. Instead, the Bankruptcy Court held that the Term Lenders could re-litigate the issues previously raised, *but subject to the law of the case established by the Second Circuit and Delaware Supreme Court decisions in the Avoidance Action that the Bankruptcy Court doubted could be overturned*.

The Moving Term Lenders respectfully submit that the compelling facts of this case satisfy the standards for an interlocutory appeal. This motion clearly presents a controlling issue of law. If the Court overrules the Bankruptcy Court's denial of the motion to dismiss, the case will conclude for all parties other than JPMorgan (the only party whose due process rights were not violated). The Second Circuit's Ignition Switch Opinion -- along with Supreme Court jurisprudence that the Bankruptcy Court overlooked -- demonstrates that there is a substantial ground for disagreement about the Bankruptcy Court's decision. These authorities make clear that due process requires notice and an opportunity to be heard before a party's rights in the

litigation are determined. Because that clearly was not the case here, there is genuine doubt that the Bankruptcy Court's interpretation of due process can be upheld.

Accordingly, for all of the reasons set forth more fully herein, the Court should grant leave to appeal.

BACKGROUND

I. THE PARTIES.

Plaintiff is the Motors Liquidation Company Avoidance Action Trust (the "**Avoidance Trust**"), by and through Wilmington Trust Company ("**Plaintiff**"), solely in its capacity as Trust Administrator and Trustee. Ex. C (Am. Compl.) at 11-12, ¶¶ 8, 12-14. The Avoidance Trust is the successor in interest to the claims asserted in the Adversary Proceeding, which was commenced by the Official Committee of Unsecured Creditors (the "**Committee**").[4]

The Ad Hoc Group of Term Lenders are a group of investors and investment funds, including public and private employee pension funds, that were recipients of payments under the Term Loan Agreement, dated as of November 29, 2006, amended on March 4, 2009 (the "**Term Loan Agreement**"). *Id*. ¶¶ 9, 10; *see* Appendix A. The Moving Term Lenders are among over 500 other term lender defendants (excluding JPMorgan, the "**Term Lenders**") named in this action.

II. THE EVENTS UNDERLYING PLAINTIFF'S PURPORTED CLAIMS.

A. The Term Loan Agreement.

The $1.5 billion advanced by the Term Lenders to Motors Liquidation Company f/k/a General Motors Corporation ("**GM**") and certain of its subsidiaries (collectively, and with GM,

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[4] On March 29, 2011, in connection with the *Debtors' Second Amended Joint Chapter 11 Plan* [Docket No. 9836], the Avoidance Trust was created to hold and administer certain assets, including the Avoidance Action. Ex. C (Am. Compl.) ¶ 12. On or about December 15, 2011, the Debtors transferred the Avoidance Action to the Avoidance Trust. *Id*. ¶ 13.

the "**Debtors**") would be secured by first-priority security interests on certain assets of GM (the "**Liens**"). Ex. C (Am. Compl.) ¶ 572. JPMorgan Chase Bank, N.A. ("**JPMorgan**") acted as the Administrative Agent under the Term Loan Agreement. *See id.* ¶ 9.

The Term Lenders received a perfected security interest in the collateral when a UCC-1 financing statement (the "**Financing Statement**") was filed with the Delaware Secretary of State on November 30, 2006. The Financing Statement lists GM as "debtor" and JPMorgan as "administrative agent and secured party," and describes the collateral covered by the Financing Statement (the "**Collateral**"). *Id.* ¶ 581, Am. Compl. Ex. 1.

However, on October 30, 2008, in connection with a refinancing of an unrelated GM credit facility, GM, with JPMorgan's consent, filed a UCC-3 financing statement amendment with the Delaware Secretary of State terminating the Financing Statement "with respect to security interest(s) of the Secured Party authorizing this Termination Statement" (the "**Termination Statement**"). *Id.*, ¶ 582, Am. Compl. Ex. 2. The Termination Statement lists JPMorgan as the secured party authorizing the amendment, which released a substantial portion of the Term Lenders' collateral without their authorization. *Id*.

B. The Bankruptcy Filing.

On June 1, 2009 (the "**Petition Date**"), the Debtors filed petitions for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (the "**Bankruptcy Court**"). *Id*. ¶ 6. As of the Petition Date, the outstanding principal balance on the Term Loan Agreement was over $1.4 billion. *Id.* ¶ 573.

On June 25, 2009 the Bankruptcy Court approved the Debtors' $33 billion post-petition, debtor in possession financing (the "**DIP Order**").[5] The DIP Order, among other things, approved a $1,481,656,507.70 payment to discharge the indebtedness due under the Term Loan Agreement subject to a reservation of rights by the Committee to contest the repayment based on any issues with respect to the "perfection" of the Term Lenders' security interests. Ex. C (Am. Compl.) ¶¶ 577-78.

C. The Adversary Proceeding Is Commenced And Litigated Without The Involvement Of Term Lenders Other Than JPMorgan.

On July 31, 2009, the Committee commenced the Avoidance Action, alleging that the Termination Statement caused the Liens securing the Term Loan Agreement to be unperfected and demanding disgorgement of the money repaid to the Term Lenders ("**Initial Complaint**").[6] Despite the fact that there were hundreds of Term Lenders named in the Initial Complaint, the Committee served only JPMorgan. Ex. D (Oct. 6, 2009 Scheduling Order), ¶ 1. In July 2011, two years following the Petition Date and four years before the Term Lenders were served, the statute of limitations expired on the last of the claims alleged in the Avoidance Action. *See* 11 U.S.C. §§ 546(a), 549(d).

Following the filing of the Initial Complaint, over the course of six years, and without providing notice to the Term Lenders, the Bankruptcy Court issued *five* extension orders (collectively, the "**Extension Orders**") granting Plaintiff extensions to serve the Term Lenders:

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[5] *Final Order Pursuant to Bankruptcy Code Sections 105(a), 361, 362, 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* [Docket No. 2529].

[6] *Adversary Complaint for (1) Avoidance of Unperfected Lien, (2) Avoidance and Recovery of Postpetition Transfers, (3) Avoidance and Recovery of Preferential Payments, and (4) Disallowance of Claims by Defendants* [Adv. Proc. Docket No. 1].

- On October 6, 2009, the Bankruptcy Court granted the Committee a 240-day extension to serve the Initial Complaint on all non-JPMorgan defendants without prejudice to seek an additional extension if necessary. *See* Ex. D (Oct. 6, 2009 Scheduling Order), at 2, ¶ 1.

- On January 20, 2010, the Bankruptcy Court granted the Committee a further extension of time to serve the Term Lenders "until thirty (30) days after the date of entry of the Bankruptcy Court's decision on any dispositive motion made under this modified Stipulated Scheduling Order . . . ." Ex. E (Jan. 20, 2010 Modified Scheduling Order), at 2, ¶ 4.

- On April 10, 2013, the Bankruptcy Court, finding that "*the avoidance of substantial expenses by the Plaintiff which ultimately may not have to be incurred constitutes good cause for further extending Plaintiff's time to serve [the Term Lenders]*," permitted Plaintiff, pursuant to Bankruptcy Rule 9006(b), to serve its summons and Initial Complaint within 30 days of "entry of a final, non-appealable order resolving the Cross-Motions for Summary Judgment[.]" *See* Ex. F (the "Apr. 10, 2013 Extension Order"), at 2 (emphasis added).

- On May 19, 2015, the Bankruptcy Court permitted Plaintiff to serve the Amended Complaint on the Term Lenders "60 days following the filing of the Amended Complaint." *See* Ex. G (May 19, 2015 Stipulation and Order), at 2, ¶ 2.

- On August 13, 2015, on the Avoidance Trust's motion, the Bankruptcy Court further extended the Avoidance Trust's time to serve the Amended Complaint until September 30, 2015. *See* Ex. H (Aug. 13, 2015 Extension Order), at 2.

The purported predicate for the Extension Orders was (i) JPMorgan was acting either implicitly as agent for the Term Lenders or with their consent to litigate on their behalf; and (ii) that service of the complaint would be unduly burdensome and costly. Ex. I (Oct. 6, 2009 Transcript) at 11:14-15; Ex. F (April 10, 2013 Extension Order), at 2. Thus, the case was litigated for nearly six years without the involvement of the Term Lenders. The statute of limitations for the claims against the Term Lenders ended in July 2011. *See* 11 U.S.C. § 546(a) (claims under Sections 544 and 547 of the Bankruptcy Code must be commenced before the two-year anniversary of the petition date); 11 U.S.C. § 549(d).

After extensive discovery, the Committee filed a motion for partial summary judgment, and JPMorgan filed a motion for summary judgment on July 1, 2010, nearly five years before the

Term Lenders were served with process in the Avoidance Action. The Bankruptcy Court granted summary judgment for JPMorgan, denied the Committee's motion, and concluded that the UCC-3 Termination Statement did not terminate the perfection of the Liens (the "**Summary Judgment Decision**"). *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JP Morgan Chase Bank, N.A.* (*In re Motors Liquidation Co.*), 486 B.R. 596, 605-06 (Bankr. S.D.N.Y. 2013). Judge Gerber, recognizing the "importan[ce]" of the "underlying legal issues" as well as that "an immediate appeal from the judgment in this adversary proceeding is likely to advance the progress of the GM case" certified the Summary Judgment Decision for direct appeal to the Second Circuit. *Id.* at 647.

The Second Circuit, noting that the question presented in the Avoidance Action was one of first impression -- specifically whether, under the Delaware version of the Uniform Commercial Code, to release a security interest it is enough that a secured lender intends to file a UCC-3 financing statement or must the secured lender subjectively intend to terminate the particular security interest listed in the UCC-3 -- certified the question to the Delaware Supreme Court. *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JP Morgan Chase Bank, N.A.* (*In re Motors Liquidation Co.*), 755 F.3d 78, 86 (2d Cir. 2014). On October 17, 2014, the Delaware Supreme Court answered the certified question, holding that for a termination statement to be effective upon filing, it is enough under Delaware law that the secured party of record authorized the UCC filing; subjective intent to release the particular security interest is not necessary. *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A.*, 103 A.3d 1010, 1017-18 (Del. 2014).

The Second Circuit, relying on the Delaware Supreme Court's decision, reversed and remanded, holding that JPMorgan "authorized the filing of a UCC-3 termination statement" that

had the effect of terminating the Term Lenders' security interest in the Collateral, and ordered the Bankruptcy Court to enter partial summary judgment against defendants, including the Term Lenders. *See Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JP Morgan Chase Bank, N.A.* (*In re Motors Liquidation Co.*), 777 F.3d 100, 104-06 (2d Cir. 2015). Again, the appeal proceeded without the involvement of the Term Lenders who, although named in the Initial Complaint, were not served with process until after this decision.

Following the remand, on May 20, 2015, the Avoidance Trust filed an amended complaint seeking to: (i) avoid the Lien on the Collateral pursuant to Bankruptcy Code Section 544(a) (Ex. C (Am. Compl.) ¶¶ 586-89); (ii) avoid and recover post-petition transfers pursuant to Bankruptcy Code Section 549 (*id.* ¶¶ 590-603); (iii) avoid and recover preferential payments pursuant to Bankruptcy Code Section 547 (*id.* ¶¶ 604-15); and (iv) disallow any defendants' claim until disgorgement, pursuant to Bankruptcy Code Section 502(d) (*id.* ¶¶ 616-18) (the "**Amended Complaint**").

D. The Moving Term Lenders File A Motion To Dismiss.

Six years after the commencement of the lawsuit and four years after the statute of limitations expired, the Moving Term Lenders were served with the Amended Complaint. On November 19, 2015, the Moving Term Lenders moved to dismiss the adversary proceeding (the "**Motion to Dismiss**"), arguing, amongst other things, that: (i) the Extension Orders should be vacated because the Bankruptcy Court erred in granting them pursuant to Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"); (ii) there was no "good cause" for them; (iii) the Term Lenders were prejudiced by the extensive delay in service of process; (iv) the Extension Orders circumvented the procedures set forth in Rules 19 and 23 of the Federal Rules of Civil Procedure (the "**Federal Rules**") for multi-party litigation; and (v) the Extension Orders violated the Term Lenders' due process rights because they were entered *ex*

parte and extended the time for service for *six years* and until after a dispositive judgment was issued on the merits.[7] Moreover, because the Extension Orders should be vacated and the statute of limitations had expired, the Moving Term Lenders argued, the Avoidance Trusts' claims should be dismissed for untimely service.

Denying the motion, the Bankruptcy Court held, among other things, that: (i) the Term Lenders were bound by the Extension Orders and therefore timely served; Ex. A June 30 Order at 32-35, (ii) "[e]ven if the Term Loan Defendants had been served with the Initial Complaint at the outset of the case and participated in the Phase I litigation, . . . based on the Second Circuit and Delaware Supreme Court decisions, [] the outcome would have been the same, at least on the issues addressed on Phase I," *Id.* at 37; and (iii) despite the Avoidance Trust's assertions to the contrary, that JPMorgan was not acting as the Term Lender's agent in defending Phase I of the Avoidance Action. *Id.* at 36.[8]

QUESTIONS PRESENTED

The Moving Term Lenders anticipate that, if granted leave to appeal, the questions for this Court to resolve are:

1) whether it is a violation of due process for a bankruptcy court to allow service of a named defendant six years after commencement of the action and after a dispositive motion has been decided; and

2) was it error for the Bankruptcy Court to grant an *ex parte* indefinite extension of time to serve a named defendant pursuant to Bankruptcy Rule 9006.

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[7] *Motion of Ad Hoc Group of Term Lenders (1) To Vacate Certain Prior Orders of the Court; and (2) To Dismiss the Adversary Proceeding* [Adv. Proc. Docket No. 262].

[8] In Phase I, JPMorgan and the Avoidance Trust litigated the effectiveness of the erroneously-filed UCC-3 statement.

ARGUMENT

Appeals from interlocutory orders of a bankruptcy court are permitted "with leave of the court." 28 U.S.C. § 158(a). In determining whether to entertain an appeal from an interlocutory bankruptcy court order, district courts may grant an interlocutory appeal under 28 U.S.C. § 1292(b) where, as here: (1) such an order involves a controlling question of law, (2) over which there is substantial ground for difference of opinion, and (3) if an immediate appeal would materially advance the ultimate termination of the litigation." *In re MacInnis*, 235 B.R. 255, 263 (S.D.N.Y. 1998) (noting that "the majority of courts in this district have applied the standard set forth in 28 U.S.C. § 1292(b) in the context of appeals from bankruptcy courts"); *see also Urban Retail Props. v. Loews Cineplex Entm't Corp.*, 01 Civ. 8946 (RWS), 2002 WL 535479, at *4 (S.D.N.Y. Apr. 9, 2002). Principally underlying these factors is the notion that an interlocutory appeal should "have the potential for substantially accelerating the disposition of the litigation." *Chemical Bank v. Slaner (In re Duplan Corp.)*, 591 F.2d 139, 148 n.11 (2d. Cir. 1978).

As set forth below, because each of the three Section 1292(b) factors is satisfied, the Term Loan Lenders respectfully submit that the Court should grant interlocutory review.

I.

THE MOVING TERM LENDERS' MOTION FOR LEAVE PRESENTS PURE CONTROLLING QUESTIONS OF LAW.

The Moving Term Lenders' motion for leave to appeal the June 30 Order indisputably presents a controlling question of law: whether the Moving Term Lenders' due process rights were violated as a result of the extraordinary delay of six years in service of process while their substantive rights were determined in the same litigation. This is a pure question of law that does not require a determination of factual issues. *See Enron Corp. v. Springfield Assocs., L.L.C. (In re Enron Corp.)*, No. 01-16034, 2006 WL 2548592, at *4-5 (S.D.N.Y. Sept. 5, 2006) (the

first prong is satisfied where "there is no need to make any factual determinations in order to decide whether the rulings are correct"). Because the long-delayed service of the Amended Complaint violated the Term Lenders' due process rights, and because, absent the improper Extension Orders, the Amended Complaint was filed four years after the statute of limitations for the claims brought by the Avoidance Trust had expired, the Amended Complaint should be dismissed in its entirety.

The Bankruptcy Court concluded that the Term Lenders' due process rights were not violated because the Term Lenders were timely served (based solely on the Bankruptcy Court's holding that the Extension Orders spanning six years were valid). Ex. A (June 30 Order) at 32-38. Specifically, the Bankruptcy Court based this holding on its conclusion that the Term Lenders could re-litigate the issues decided during the six-year delay in Plaintiff's service of process,[9] *while at the same time noting that the Term Lenders would be bound by the precedent established by the Second Circuit's decision that was obtained without their involvement*. *Id*. at 36-37. If this Court disagrees with the Bankruptcy Court and finds that the delay in service of process on the Term Lenders violated their due process rights, the Amended Complaint should be dismissed with prejudice as to the Moving Term Lenders. *See, e.g.*, Ex. B (Ignition Switch Opinion), at 66 (voiding Section 363 order as against plaintiffs -- as opposed to allowing plaintiffs to re-litigate objections to order -- and allowing claims to proceed where plaintiffs were not provided notice and opportunity to be heard prior to entry of order). Further, pursuant to Section 546(a) of the Bankruptcy Code, in relevant part, claims brought under Sections 544 and 547 of the Bankruptcy Code (*see* Ex. C (Am. Compl.) ¶¶ 1, 586-89, 604-15), must be

[9] As discussed in more detail *infra*, the Bankruptcy Court noted, however, that it "remained to be seen" whether the Term Lenders "have meritorious legal or factual defenses to liability or damages on so far untested theories." Ex. A (June 30 Order) at 36.

commenced within two years of the Petition Date -- here, by June 1, 2011. *See* 11 U.S.C. § 546(a). Under Section 549(d) of the Bankruptcy Code, as applicable, claims to recover post-petition transfers must be asserted within two years of any such transfers, which purportedly occurred here in July of 2009 (*see* Ex. C (Am. Compl.), at Am. Compl. Ex. 3). *See* 11 U.S.C. § 549(d). Thus, while the Initial Complaint was timely *filed*, the statute of limitations on the claims in the Avoidance Action would have expired in July 2011, years before service was actually effected.

Because reversal of the Bankruptcy Court's June 30 Order would terminate this action against the Moving Term Lenders, the question presented is "controlling," which satisfies the first prong of Section 1292(b). *See Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministazione Straordinaria*, 921 F.2d 21, 24 (2d Cir. 1990) ("It is clear that a question of law is 'controlling' if reversal of the district court's order would terminate the action."); *see also Traub v. Cornell Univ.*, 94-CV-502 (HGM) (GJD), 1999 WL 224804, at *2 (N.D.N.Y. Apr. 12, 1999) ("A controlling question of law includes issues that would terminate an action if the district court's order were reversed. . . ."); *Kuzinski v. Schering Corp.*, 614 F. Supp. 2d 247, 249 (D. Conn. 2009) (interlocutory review granted because "if this Court's Ruling were to be reversed on appeal, the case would be ended"). As set forth below, because the Extension Orders should be vacated, the statute of limitations of the claims asserted against the Term Lenders has long expired, and the case should be dismissed as a result.

II.

THERE IS SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION ON THE QUESTION PRESENTED.

The Ignition Switch Opinion and other relevant authority make clear that there is a substantial ground for difference of opinion with respect to the Bankruptcy Court's decision. A

substantial ground for difference of opinion exists where "(1) there is conflicting authority on the issue, or (2) the issue is particularly difficult and of first impression for the Second Circuit." *In re Lloyd's Am. Tr. Fund Litig.*, No. 96 CIV. 1262 (RWS), 1997 WL 458739, at *5 (S.D.N.Y. Aug. 12, 1997) (certifying decision for appeal) (*citing Klinghoffer*, 921 F.2d at 25); *Lehman Bros. Special Fin Inc. v. Bny Corp. (In re Lehman Bros. Holdings Inc.)*, No. 08-13555 JMP, 2010 WL 10078354, at *6 (S.D.N.Y. Sept. 23, 2010). Moreover, a question of law warranting interlocutory review is one where there is genuine doubt that the underlying decision is correct. *See, e.g.*, *In re Enron Corp.*, 2006 WL 2548592, at * 4 (granting leave to appeal where court found there existed "genuine doubt as to whether the Bankruptcy Court applied the correct standard"). Here, in addition to there being substantial grounds to believe that another court addressing the same issues would come to a different conclusion, the issues presented in the June 30 Order are matters of first impression in the Second Circuit.

A. <u>There Is Genuine Doubt That The June 30 Order Is Correct.</u>

1. The Delay In Service Is A *Per Se* Due Process Violation.

The June 30 Order improperly denied the Term Lenders their constitutionally-protected due process rights. As a result of the June 30 Order, the Term Lenders are subject to a judgment (whether by law of the case or otherwise) that was entered in their absence during an extraordinary -- if not unprecedented -- six-year delay in serving process. The denial of the Term Lenders' constitutional rights is particularly egregious, given that the justification provided for excusing the failure to serve the Term Lenders was that doing so would be expensive and difficult for the Plaintiff. Courts have repeatedly rejected the cost and burden of service as a justification for delay. Clearly, a decision to avoid expenses can never outweigh a defendant's right to due process.

As the Supreme Court has made abundantly clear, "[a]n elementary and fundamental requirement of due process in any proceeding . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). When a party is a named defendant, due process requires nothing less than formal service of process. Indeed, the Supreme Court has held that it is a "bedrock principle" of due process that "[a]n individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, *and brought under a court's authority, by formal process*." *Murphy Bros., Inc. v. Michetti Pipe Stringing*, 526 U.S. 344, 347-48 (1999) (emphasis added).

Here, it is undisputed that the Term Lenders were not served with process for six years following the commencement of the Avoidance Action. The June 30 Order attempts to resolve this constitutional deficiency by providing the Term Lenders an opportunity to re-litigate the issues raised in Phase I of this litigation.[10] However, the Supreme Court has rejected such *ex post facto* attempts to remedy insufficient service of process as inadequate. In *Peralta v. Heights Med. Ctr.*, the Court held that, because a litigant's options are far broader than winning or losing, a litigant cannot be forced to prove that the outcome of the litigation would have been different but for the due process violation. *See* 485 U.S. 80, 85 (1988) (noting that "had [the defendant] had notice of the suit, he might have impleaded the employee whose debt had been guaranteed, worked out a settlement, or paid the debt."); *see generally* Ex. B (Ignition Switch Opinion), at

[10] It is not clear from the June 30 Order that this opportunity to re-litigate is meaningful. The Bankruptcy Court's attempt to address this issue by stating that the Term Lenders "are no worse off than they would be if the Phase I litigation and decisions had been reached in totally unrelated litigation," Ex. A (June 30 Order) at 36, is an artifice. An "unrelated litigation" does not include the same parties, the same caption, and the same transaction -- the Bankruptcy Court's reasoning draws a distinction without meaning.

56-66 (holding that the appellants were unquestionably prejudiced because, regardless of whether Section 363 sale would have been approved as it was, appellants were denied opportunity to be heard at the time and options such as settlement were limited by lack of opportunity to be heard). Thus, the proper remedy is dismissal.

The June 30 Order's suggestion that depriving the Term Lenders of the full panoply of options available to them did not present a manifest injustice because "[e]ven if the Term Loan Defendants had been served with the Initial Complaint at the outset of the case and participated in the Phase I litigation, the Court concludes, based on the Second Circuit and Delaware Supreme Court decisions, *that the outcome would have been the same, at least on the issues addressed in Phase I*," Ex. A (June 30 Order) at 37 (emphasis added), directly contradicts the Ignition Switch Opinion. In the Ignition Switch Opinion, the Second Circuit rejected the Bankruptcy Court's suggestion that "the outcome would have been the same with adequate notice." Ex. B (Ignition Switch Opinion) at 52. Instead, the Second Circuit held that it could not "say with fair assurance that the outcome of the . . . proceedings would have been the same" had the plaintiffs been given an opportunity to be heard, because, as the court noted, "it is difficult to evaluate in hindsight" what any party might have done given the options available to them at the time that were foreclosed by the failure to provide their constitutionally-protected right to an opportunity to be heard. *Id*. at 56-57. For instance, had the Term Lenders been served at the commencement of the Avoidance Action, perhaps they would have chosen to settle, rather than incur the costs associated with litigating a $1.5 billion claim, and had they been given the opportunity to do so before adverse judgments were entered against them, might have been able to do so on favorable terms. *See e.g.*, Ex. B (Ignition Switch Opinion), at 59-60 (noting that "opportunities to negotiate are difficult if not impossible to recreate"). The logic of this is clear:

a party denied due process should not be put to the burden of proving a different outcome when its adversary could have served process to avoid the need for the Court to speculate on a different outcome. This is because it is the plaintiff's burden to serve the complaint, not the defendants' burden to justify why the complaint should have been served.

JPMorgan's litigation position against the Term Lenders demonstrates further prejudice to the Term Lenders unrelated to the outcome of the Phase I litigation. JPMorgan is arguing that the statute of limitations for the Term Lenders' claims against it has lapsed due to the passage of time even though it acceded to the Plaintiff's request to delay serving the Term Lenders. Ex. J (JPMorgan Answer) at 20 (stating that "[t]he claims asserted in the Kasowitz Term Lender Cross-Complaint are barred by applicable statutes of limitations").

Along the same lines, the Supreme Court held in *Peralta* that, where a defendant's due process rights have been violated, "it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense on the merits." *Peralta*, 485 U.S. at 86-87 (reversing grant of summary judgment denying challenge to entry of default judgment and noting that "only wiping the slate clean would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place") (internal quotation marks and modifications omitted). Like the Second Circuit in the Ignition Switch Opinion, the Supreme Court justified this holding on the basis of strategic litigation options that do not necessarily involve the merits. *Id.* at 85 (noting non-litigation options available to defendant foreclosed by failure to serve process); Ex. B (Ignition Switch Opinion) at 57 ("Perhaps they would have tried to identify some legal defect in the Sale Order, asked that economic losses or pre-closing accidents arising from the ignition switch defect be

exempted from the 'free and clear' provision, or requested greater priority in any GUC Trust distribution.").

Here, the slate "cannot be wiped clean" because, according to the Bankruptcy Court, the Avoidance Action has advanced to the point that there is binding law on the issues that the Term Lenders would have litigated had they been served. Because the Term Lenders cannot be restored to the position as if no litigation had ever occurred, the adversary proceeding should be dismissed against the Moving Term Loan Lenders.

2. The Extensions Of The Deadline To Serve The Term Lenders For Six Years Were Manifestly Wrong.

The Bankruptcy Court (Judge Gerber presiding) granted several extensions -- *ex parte* to all defendants other than JPMorgan -- pursuant to Bankruptcy Rule 9006 resulting in an indefinite delay of the time to serve process. The Bankruptcy Court did so because of concerns of the cost of service, and because it believed that JPMorgan had the requisite authority to litigate on behalf of all Term Lenders. The grant of the extension orders, which are subject to *de novo* review, was clearly erroneous in any event.

As a threshold matter, cost is not a basis to delay service. *See, e.g.*, *Mann v. Castiel*, 681 F.3d 368, 375-77 (D.C. Cir. 2012) ("Plaintiffs offer no 'valid reason' [for delay] but suggest an institutional consideration, namely that the district court should have granted . . . additional time because postponing this litigation until the close of the bankruptcy proceedings was in the interests of all parties and judicial economy[]"; affirming the district court's finding that plaintiffs lacked good cause for untimely service and holding that discretionary extension of time to effect service was not warranted); *Viking Offshore (USA), Inc. v. Bodewes Winches, B.V. (In re Viking Offshore (USA) Inc.)*, No. 08-31219-H3-11, 2009 WL 1066240, at *3 (Bankr. S.D. Tex. Apr. 17, 2009) ("In the instant case, the only argument raised by Plaintiffs in support of

maintaining suit against Defendants . . . is that it would cost money to serve them. *The rationale stated does not constitute good cause for failure of service in the instant case*.") (emphasis added); *Parker v. John Doe # 1*, No. CIV.A. 02-CV-7215, 2003 WL 21294962, at *2 (E.D. Pa. Jan. 21, 2003) ("*[T]he financial difficulty of initiating a suit that names up to 100 unidentified defendants does not suffice as good cause, as these financial burdens should be anticipated when pursuing litigation of the magnitude contemplated by Plaintiff*.") (emphasis added); *Artificial Intelligence Corp. v. Casey (In re Casey)*, 193 B.R. 942, 946 (Bankr. S.D. Cal. 1996) ("Avoiding costs has been rejected as good cause for failure to serve in connection with an attempt to save costs pending settlement negotiations."). Nor, for that matter, was JPMorgan authorized to represent the Term Lenders in the Avoidance Action. *See* Ex. A (June 30 Order) at 36.

Recognizing these faults, the June 30 Order justified the Extension Orders on the grounds that the delay was a "reasonable case management decision," and any resulting prejudice to the Term Lenders as a result of the Extension Orders was "entirely speculative." *Id.* at 32-35. However, as recently made clear by the Second Circuit, expedience cannot justify a violation of due process. Ex. B (Ignition Switch Opinion) at 51 (noting that "the need for speed [does not] obviate basic constitutional principles"). And, as set forth above, the prejudice suffered by the Term Lenders was anything but speculative.

No court has ever sanctioned a delay in service akin to the six-year delay at issue here. Indeed courts that have considered extensions of similarly significant time have held that such lengthy delays are improper. *See* Ex. K (*Forman v. Mentor Graphics Corp. (In re Worldspace)*, Adv. Proc. No. 10-53286 (Bankr. D. Del. June 5, 2014) [Docket No. 94], at 11-12) (granting motion to dismiss for, *inter alia*, lack of service of process and finding that while there is "nothing inherently improper concerning the use of extension motions in a bankruptcy

context[,]" there are real concerns where "four years after the original complaint was filed, service [is] made for the first time. . . .")); *see also, e.g.*, *Savage & Assocs., P.C. v. 1201 Owner Corp. (In re Teligent, Inc.)*, 485 B.R. 62, 70-72 (Bankr. S.D.N.Y. 2013) (vacating time-barred judgment and dismissing all claims where process was not properly served for lack of due process and refusing to grant extension order to further serve process). Clearly, the June 30 Order creates the additional untenable precedent that there are *no* Constitutional time limitations to Bankruptcy Rule 9006 or Federal Rule 4(m). Research has revealed no cases where such a lengthy -- and indefinite -- extension order has been granted.

For the foregoing reasons, genuine doubt exists as to whether the June 30 Order is correct.

B. <u>The Issue is Particularly Difficult And Of First Impression In The Second Circuit.</u>

The Moving Term Lenders have been unable to find any cases in which the question presented here -- whether a bankruptcy court, pursuant to Bankruptcy Rule 9006, can extend the time to serve a named defendant for six years and until after a dispositive motion has been decided -- has been addressed by the Second Circuit, nor any other court. Likewise, the Moving Term Lenders have been unable to locate a single case, holding that a six-year delay in service of a named defendant is permissible under the law and in accord with due process considerations.

Indeed, the June 30 Order does not cite to a single court that has approved the granting of an *ex parte* six-year extension of time to serve process, especially where the extension order itself explicitly envisions service after a "final non-appealable order" on the merits has been issued. Ex. F (April 10, 2013 Extension Order) at 2. Tellingly, the Avoidance Trust was similarly unable to locate such a case, citing only two cases in support of approving the

Extension Orders, neither of which deal with the extraordinary circumstances presented here.[11] As such, the issues presented are conclusively ones of first impression for the Second Circuit. *See In re Lehman Bros. Holdings Inc.*, 2010 WL 10078354, at *6 (noting that "[w]hen a controlling question of law presents an issue of first impression, permission to appeal is often granted.")

Moreover, as demonstrated by the absence of relevant case law allowing extensions of time to serve a complaint for six years and the genuine doubt as to whether the Term Lenders' due process rights were violated, there are critical, dispositive questions of law, the resolution of which will aid other courts in the Second Circuit and elsewhere in granting extension orders.

Accordingly, the questions presented here are ones over which there is substantial ground for a difference of opinion, and for this independent reason, the second factor in Section 1292(b) is satisfied.

III.

AN IMMEDIATE APPEAL MAY MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THIS LITIGATION AGAINST THE MOVING TERM LENDERS.

Finally, permitting the Moving Term Lenders to immediately appeal the June 30 Order may "materially advance the ultimate termination" of this litigation. 28 U.S.C. § 1292(b). As set forth *supra* in the discussion of the first prong of Section 1292(b), reversal of the June 30 Order would result in the immediate termination of this litigation as against the Moving Term Lenders. This fact similarly satisfies the third element of Section 1292(b). *See Mullins v. City of*

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[11] The only two cases cited by the Avoidance Trust in its opposition to the Motion to Dismiss are inapposite. In *Bank of Cape Verde v. Bronson*, 167 F.R.D. 370 (S.D.N.Y. 1996), the district court approved an extension of less than two months for the plaintiff to serve process, while plaintiff engaged in settlement negotiations that would have obviated the need for service on the unserved parties. *Id.* at 371. While in *U.S. Bank National Ass'n v. SMF Energy Corp. (In re Interstate Bakeries Corp.)*, 460 B.R. 222 (B.A.P. 8th Cir. 2011), the court affirmed a grant of a three-year service extension, and all named defendants were mailed copies of plaintiff's motion to extend time for service. *Id.* at 225, 229-30.

N.Y., 04 Civ. 2979 (SAS), 2008 WL 118369, at *2 (S.D.N.Y. Jan. 10, 2008) (an immediate appeal will "materially advance the ultimate termination of the litigation" because "if the Court of Appeals reverses this Court . . . the litigation will end"); *In re Enron Corp.*, 2006 WL 2548592, at *8 ("The third prong is easily met, because granting leave to appeal . . . may result in the disposition of the Adversary Proceedings in their entirety.").

The third Section 1292(b) factor is satisfied even though JPMorgan would remain as a defendant because a reversal of the June 30 Order would "advance the time for trial or [] shorten the time for trial." *Id.* at *4; *see also Ret. Bd. of Policemen's Annuity & Ben. Fund of City of Chi. v. Bank of N.Y. Mellon*, No. 11 CIV. 5459 WHP, 2013 WL 593766, at *5 (S.D.N.Y. Feb. 14, 2013) (certifying issue for interlocutory appeal, where, *inter alia*, action would be "considerably streamlined if the claims involving [certain defendants] are dismissed"); Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3930 (3d ed Rev. 2015). It is indisputable that the dismissal of hundreds of defendants, leaving only a single defendant (the only party whose due process rights were not violated) against which Plaintiff's claims are to be tried, would significantly reduce the time for trial.

CONCLUSION

For the foregoing reasons, the Moving Term Lenders respectfully request that the Court grant them leave to appeal the June 30 Order denying the Motion to Dismiss.

Dated: July 14, 2016
New York, New York

By: /s/ Andrew K. Glenn

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Counsel for Ad Hoc Group of Term Lenders listed in Appendix A

Appendix A

Fire and Police Employees' Retirement System of the City of Baltimore
BBT Fund, L.P.
SRI Fund, L.P.
BBT Master Fund, L.P. (f/k/a Cap Fund, L.P.)
BlackRock Corporate High Yield Fund, Inc.
BlackRock Debt Strategies Fund, Inc.
BlackRock Floating Rate Income Strategies Fund, Inc.
BlackRock Funds II - High Yield Bond Portfolio
BlackRock Global Investment Series: Income Strategies Portfolio
BlackRock Fixed Income Portable Alpha (Offshore) Fund
BlackRock Senior Income Series II
BlackRock Senior Income Series IV
R3 Capital Partners Master, L.P.
The Galaxite Master Unit Trust
BlackRock High Yield Bond Portfolio, a series of BlackRock Funds II
High Yield Bond Portfolio
California State Teachers' Retirement System
Delaware Diversified Income Fund, a series of Delaware Group Adviser Funds
Delaware Enhanced Global Dividend and Income Fund
Delaware Extended Duration Bond Fund, a series of Delaware Group Income Funds
Delaware Dividend Income Fund, a series of Delaware Group Equity Funds V
Delaware Core Plus Bond Fund, a series of Delaware Group Government Fund
Delaware Corporate Bond Fund, a series of Delaware Group Income Funds
Delaware High-Yield Opportunities Fund, a series of Delaware Group Income Funds
Delaware Investments Dividend and Income Fund, Inc.
The High-Yield Bond Portfolio, a series of Delaware Pooled Trust
Delaware VIP Diversified Income Series, a series of Delaware VIP Trust
Delaware VIP High Yield Series, a series of Delaware VIP Trust
The Core Plus Fixed Income Portfolio, a series of Delaware Pooled Trust
Optimum Fixed Income Fund, a series of Optimum Fund Trust
Drawbridge Special Opportunities Fund Ltd.
Drawbridge Special Opportunities Fund LP
Fortress Credit Investments I Ltd.
Fortress Credit Investments II Ltd.
FOUR CORNERS CLO II, LTD.
FOUR CORNERS CLO III, LTD.
Freescale Semiconductor Inc., 401(k) Retirement Savings Plan
GENESIS CLO 2007-1 LTD.
Guggenheim Portfolio X, LLC
Guggenheim High Yield Fund
Illinois Municipal Retirement Fund
John Hancock Variable Insurance Trust Floating Rate Income Trust
John Hancock Variable Insurance Trust High Yield Trust
John Hancock Funds II Floating Rate Income Fund

John Hancock Funds II High Yield Bond Fund
The Lincoln National Life Insurance Company Separate Account 12
The Lincoln National Life Insurance Company Separate Account 20
LVIP Delaware Bond Fund, a series of Lincoln Variable Insurance Products Trust
LVIP Delaware Foundation® Conservative Allocation Fund, a series of Lincoln Variable Insurance Products Trust (and the successor to LVIP Delaware Managed Fund as of June 15, 2009).
Golden Knight II CLO, Ltd.
Lord Abbett Investment Trust – Lord Abbett High Yield Fund
Lord Abbett Investment Trust – Lord Abbett Floating Rate Fund
Teachers' Retirement System of Oklahoma
Houston Police Officers' Pension System
Mason Capital, L.P.
Mason Capital, Ltd.
The Missouri State Employees' Retirement System
Neuberger Berman High Income Bond Fund
Neuberger Berman High Yield Strategies Fund Inc.
MacKay New York Life Insurance Company (Guaranteed Products)
New York Life Insurance Company Guaranteed Products
New York Life Insurance Company (Guaranteed Products)
New York Life Insurance Company GP - Portable Alpha
MacKay Shields Core Plus Alpha Fund Ltd.
New York Life Insurance Company
North Dakota State Investment Board
Fairway Loan Funding Company
PIMCO Income Strategy Fund
PIMCO Income Strategy Fund II
Red River HYPi, L.P.
PIMCO Cayman Trust: PIMCO Cayman Bank Loan Fund
StocksPLUS, L.P. Fund B
PIMCO Funds: PIMCO Total Return Fund
PIMCO Funds: Private Account Portfolio Series High Yield Portfolio
PIMCO Funds: Global Investors Series plc, Global Investment Grade Credit Fund
Portola CLO, Ltd.
Mayport CLO, Ltd.
Plumbers & Pipefitters National Pension Fund
Putnam 29X-Funds Trust Floating Rate Income Fund
SHIPROCK FINANCE, SPC, on behalf of SF-3 Segregated Portfolio
Russell Investment Company plc on behalf of its sub-fund The Global Strategic Yield Fund, and its successor funds, and Multi-Style, Multi-Manager Fund plc on behalf of its sub-fund, The Global Strategic Yield Fund
Russell Institutional Funds LLC Russell Core Bond Fund
Russell Trust Company Russell Multi-Manager Bond Fund
Russell Investment Company Russell Strategic Bond Fund
Russell Investment Company plc Russell U.S. Bond Fund
Solus Core Opportunities Master Fund Ltd

Sola Ltd
Ultra Master Ltd
Taconic Capital Partners 1.5 L.P.
Taconic Market Dislocation Fund II L.P.
Taconic Market Dislocation Master Fund II L.P.
Taconic Opportunity Fund L.P.
Thrivent Financial for Lutherans
Thrivent High Yield Fund, a series of Thrivent Mutual Funds
Thrivent Income Fund, a series of Thrivent Mutual Funds
Thrivent High Yield Portfolio, a series of Thrivent Series Fund, Inc.
Thrivent Income Portfolio, a series of Thrivent Series Fund, Inc.
Virginia Retirement System