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Hearing Date and Time: August 13,
2015 at 9:45 a.m. EST

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[**complete list of represented defendants listed in Appendix A*]

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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

**OPPOSITION OF AD HOC GROUP OF TERM LENDERS¹ TO MOTION OF
MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST FOR AN
ORDER FURTHER EXTENDING TIME TO SERVE SUMMONS AND
AMENDED COMPLAINT**

The plaintiff in this adversary proceeding—the Motors Liquidation Company Avoidance Action Trust (together with its predecessor in interest, the Official Committee of Unsecured Creditors, “Plaintiff”)—has asked the Court for yet another extension of the deadline in which to complete service on the various Term Lenders.² As a result of numerous extensions of the service deadline agreed to by Plaintiff and JPMorgan Chase Bank, N.A. (“JPMorgan”), Plaintiff has had over six years to take the steps necessary to complete service on the Term Lenders. Plaintiff now seeks to prolong the deadline for another ten weeks, to September 30, 2015. This request should be denied or, in the alternative, modified to require Plaintiff to complete service by August 31, 2015.

Due to the lengthy delay in effecting service, the Term Lenders face a multitude of challenges in defending this six-year-old case.³ At the most basic level, a case with hundreds of defendants requires organization and coordination. Efforts to structure the forthcoming proceedings in this case are underway in earnest among the defendants that were served in May and June of 2015. That coordination effort would be daunting under any circumstances, and is not assisted by the lack of clarity created by the current delays in service.

¹ The parties submitting this Opposition are a group of Term Lenders affiliated with or managed by various large financial institutions holding at least \$500 million in Term Loan debt. We will refer to this group as the “Ad Hoc Group of Term Lenders.” The Ad Hoc Group of Term Lenders is represented by Jones Day and Munger, Tolles & Olson LLP. For conflicts reasons, the two firms will handle different parts of the case.

² “Term Lenders” refers to the defendants other than JPMorgan.

³ The Ad Hoc Group of Term Lenders specifically reserves all rights and defenses that relate to the prejudice and other harms they have suffered due to the six-year delay that has occurred in bringing the Term Lenders into this litigation.

On the one hand, it is in the interest of the parties and the Court that the case move forward expeditiously. On the other hand, fundamental principles of due process mandate that a judicial determination is not binding on a party who has not been served, and the as-yet-un-served defendants in this matter may well expect to have a say in how discovery and other matters in this case proceed. Yet Plaintiff's motion raises the possibility of adding additional parties some two months from now.

Even in the absence of these concerns, Plaintiff's motion should be denied. "Good cause" requires proof that Plaintiff's need for additional time was caused by factors outside its control. Here, however, Plaintiff has had over six years in which to identify and locate the relevant defendants, to make preparations for serving them, and to make provision for the likelihood that, over this extended period, defendants would relocate or close down. Plaintiff's present difficulties are a result of Plaintiff's voluntary decision to delay undertaking these tasks. No further extensions are justified.

If any further delay is appropriate, Plaintiff should be required to complete service as quickly as possible. Plaintiff has made no showing that September 30 is the earliest possible date on which it could complete service.

I. BACKGROUND

The newly served Term Lenders are hard at work organizing themselves and ramping up to litigate this matter—a contest in which Plaintiff has had a six-year head start. Plaintiff now proposes to delay even further an orderly effort by the Term Lenders to defend their rights, asking the Court to extend the deadline to complete service another ten weeks to September 30, 2015. In its request, Plaintiff states that it already completed service on 498 of 541 Term Lenders in a two-week span from May 27 to June 8, leaving 43 (whom Plaintiff does not identify) on whom service "may not have been

accomplished.”⁴ See Mot. at ¶¶ 1-3. Plaintiff also states that on July 9, it made a second attempt at mailing a summons to that last group of 43. See Mot. at ¶¶ 13-14. Plaintiff has not reported any other efforts at service, nor has it reported how its second mailing fared, or what it proposes to do if allowed the requested additional ten weeks. Similarly, Plaintiff’s motion does not say what additional research it must complete to locate and identify the relevant defendants, or why such a task could not have been undertaken at some point in the last six years.

II. ARGUMENT

Plaintiff’s motion for a “good cause” extension of the service deadline to September 30 is inequitable and unwarranted. If the Court grants an extension, it should be only until August 31.

The party seeking a good cause extension “bears a heavy burden of proof.” *Beauvoir v. U.S. Secret Serv.*, 234 F.R.D. 55, 56 (E.D.N.Y. 2006) (quoting *Alvarado v. Am. Freightways, Inc.*, No. 04 CIV. 9536JCF, 2005 WL 1467893, at *5 (S.D.N.Y. June 21, 2005)). In deciding a request to extend a service deadline, a court evaluates “whether good cause is present” and “how long an extension would be appropriate.” *Zapata v. City of New York*, 502 F.3d 192, 197 (2d Cir. 2007). Such a determination requires a court to “weigh[] the impact” of an extension on all the parties. *Id.*⁵ “Good cause is generally found only in exceptional circumstances where the plaintiff’s failure to serve

⁴ The Ad Hoc Group of Term Lenders does not concede that Plaintiff effectively completed service as to any Term Lender. The group assumes the truth of Plaintiff’s allegations only for the purpose of contesting Plaintiff’s service deadline extension request. The group, having not yet answered or moved with respect to the complaint, reserves all rights, defenses, and objections, including objections to service and jurisdiction, in submitting this document, none of which are waived.

⁵ In its motion, Plaintiff relies on language from Fed. R. Civ. P. 4(m) to suggest that the Court “must” grant their extension request for good cause. See Mot. at ¶ 18. Even if Plaintiff could show good cause, its suggestion would be wrong. See *Zapata*, 502 F.3d at 197. In the Second Circuit, service deadline extensions always are within the district court’s discretion. See *id.*

process in a timely manner was the result of circumstances beyond its control.” *E. Refractories Co. v. Forty Eight Insulations, Inc.*, 187 F.R.D. 503, 505 (S.D.N.Y. 1999) (internal quotation marks and citation omitted). Plaintiff cannot carry its burden.

First, a further extension of time would risk prejudice to the Term Lenders and interfere with the orderly management of this case. It is hornbook law that a proceeding cannot bind a defendant until service of process has been completed. *See, e.g., Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999) (service of process is “fundamental to any procedural imposition on a named defendant”). Newly served defendants—many of whom are undoubtedly unaware that this lawsuit even exists, much less that they had any exposure in it—rightfully will be entitled to pursue their own discovery, and must be able to do so before substantial discovery has been completed and the other parties get even further ahead.

At the same time, those Term Lenders who have recently been served face an already difficult task in catching up on litigation that is now six years old, and should not be required to delay doing so any further. If the Term Lenders’ catch-up efforts are to happen in an orderly fashion and without further delay, the parties collectively must be able to reach agreement on discovery protocols, scheduling issues, and other case management matters. Equally, the Term Lenders must be free to begin litigating this matter and taking discovery without fear that, months from now, late-added parties will seek to re-take discovery or contest rulings already reached in the case. It is in the interests of both the litigants and the Court that this case move forward in an orderly manner. Plaintiff’s suggestion that they should be permitted to continue to add new parties to this case for another two months—and the concomitant need to make accommodation for the likelihood that those parties quite reasonably will demand a say in the management of the case and a role in discovery—is inconsistent with that goal.

AD HOC GROUP OF TERM LENDERS’ OPP. TO PLTF’S MOTION FOR AN
ORDER FURTHER EXTENDING THE TIME FOR SERVICE

Given the long delay and the lengthy list of defendants, case management is difficult enough without the further uncertainty brought on by extending the service deadline.

Second, even were there no unfairness to the Term Lenders, Plaintiff's motion should be denied. As noted above, an extension of time is appropriate only if the inability to complete service is due to factors beyond a plaintiff's control. *See E. Refractories*, 187 F.R.D. at 505. It was entirely predictable that, over the course of six years, defendants would relocate, change their names, close down, or otherwise prove challenging to track down. Plaintiff should have and could have anticipated such difficulties, and offers no explanation why it was not capable of undertaking the necessary investigation prior to the summer of 2015. Alternatively, Plaintiff could have solved this problem years ago by actually completing service, rather than agreeing with JPMorgan to litigate this case without the participation of the Term Lenders. Indeed, even if one considers only the six months that have elapsed since the Second Circuit issued its decision, Plaintiff had ample time to make the necessary preparations. In short, Plaintiff's difficulties with service are the predictable result of its own decisions, not the consequence of "circumstances beyond its control." *See E. Refractories*, 187 F.R.D. at 505. The motion should be denied.

Third, if the Court does find that some extension is justified, it should not permit service to drag out until September 30. Given the already lengthy delay in completing service, Plaintiff should be required to complete service as expeditiously as conceivably possible. And Plaintiff has offered no explanation why it requires fully ten additional weeks to complete service. An extension until August 31 should be more than sufficient.

III. CONCLUSION

The Ad Hoc Group respectfully requests that the Court deny the request for a further extension of the service deadline to September 30. If the Court grants an

extension at all, it should grant a further extension of the service deadline to no later than August 31, 2015, and should take into account Plaintiff's delay and six-year head start when it discusses with the parties a schedule for the discovery and related proceedings.

Dated: August 6, 2015

Respectfully submitted,

/s/ John W. Spiegel

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AD HOC GROUP OF TERM LENDERS' OPP. TO PLTF'S MOTION FOR AN
ORDER FURTHER EXTENDING THE TIME FOR SERVICE

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[*complete list of represented defendants listed in
Appendix A]

AD HOC GROUP OF TERM LENDERS' OPP. TO PLTF'S MOTION FOR AN
ORDER FURTHER EXTENDING THE TIME FOR SERVICE

APPENDIX A

Ares IIIR/IVR CLO Ltd.; Ares VR CLO Ltd.; Ares VIR CLO Ltd.; Ares XI CLO Ltd.; Ares Enhanced Loan Investment Strategy IR, Ltd.; Avery Point CLO, Limited; Chatham Light II CLO, Limited; Katonah III, Ltd., Katonah IV, Ltd.; Nash Point CLO, Race Point II CLO; Limited, Race Point III CLO Limited; Race Point IV CLO, Ltd.; Sankaty High Yield Partners III Grantor Trust as successor in interest to Sankaty High Yield Partners III, L.P.; Black Diamond International Funding, Ltd.; Black Diamond CLO 2005-1 Ltd.; Black Diamond CLO 2005-2 Ltd.; Black Diamond CLO 2006-1 Ltd.; Castle Garden Funding; Credit Suisse Syndicated Loan Fund n/k/a Bentham Wholesale Syndicated Loan Fund; Eaton Vance CDO VIII, Ltd.; Eaton Vance CDO IX, Ltd.; Eaton Vance CDO X PLC; Eaton Vance Floating Rate Income Trust; Eaton Vance Grayson & Co; Eaton Vance Institutional Senior Loan Fund; Eaton Vance Limited Duration Income Fund; Eaton Vance Loan Opportunities Fund, Ltd.; Eaton Vance Medallion Floating Rate Income Portfolio; Eaton Vance Senior Debt Portfolio; Eaton Vance Senior Floating Rate Trust; Eaton Vance Senior Income Trust; Eaton Vance Short Duration Diversified Income Fund; Eaton Vance Variable Trust Floating Rate Income Fund; Fidelity Advisor Series I: Fidelity Advisor Floating Rate High Income Fund; Fidelity Advisor Series I: Fidelity Advisor High Income Advantage Fund; Fidelity Advisor Series I : Fidelity Advisor High Income Fund; Fidelity Advisor Series II: Fidelity Advisor Strategic Income Fund; Fidelity Central Investment Portfolios LLC: Fidelity Floating Rate Central Fund; Fidelity Central Investment Portfolios LLC: Fidelity High Income Central Fund 1; Fidelity Central Investment Portfolios LLC: Fidelity High Income Central Fund 2; Fidelity Puritan Fund; Fidelity School Street Trust: Fidelity Strategic Income Fund; Fidelity Summer Street Trust: Fidelity Capital & Income Fund; Fidelity Summer Street Trust: Fidelity High Income Fund; Fidelity Total Bond Fund; Variable Insurance Products Fund: Strategic Income Portfolio; Variable Insurance Products Fund: High Income Portfolio; Pyramis Floating Rate High Income Commingled Pool; Pyramis High Yield Bond Commingled Pool; Pyramis High Yield Fund, LLC; General Electric Capital Corporation; General Electric Pension Trust; GoldenTree Loan Opportunities III, Ltd.; GoldenTree Loan Opportunities IV, Ltd.; MFS Charter Income Trust; MFS Series Trust XIII on behalf of MFS Diversified Income Fund; MFS Meridian Funds on behalf of Global High Yield Fund f/k/a MFS Meridian Funds on behalf of MFS Floating Rate Income Fund; MFS Variable Insurance Trust II on behalf of MFS High Yield Portfolio f/k/a High Yield Variable Account; MFS Intermarket Income Trust I; MFS Intermediate High Income Fund; MFS Multimarket Income Trust; MFS Series Trust III on behalf of MFS High Income Fund f/k/a MFS Series Trust X on behalf of MFS Floating Rate High Income Fund; MFS Series Trust III on behalf of MFS Global High Yield Fund f/k/a MFS Series Trust II on behalf of MFS High Yield Opportunities Fund; MFS Series Trust III on behalf of MFS High Income Fund; MFS Series Trust VIII on behalf of MFS Strategic Income Fund; MFS Special Value Trust; MFS Variable Insurance Trust II on behalf of MFS Strategic Income Portfolio; MFS Variable Insurance Trust II on behalf of MFS High Yield Portfolio; MFS Variable Insurance Trust II on behalf of MFS High Yield Portfolio f/k/a MFS Variable Insurance Trust on behalf of MFS High Income Series;

AD HOC GROUP OF TERM LENDERS' OPP. TO PLTF'S MOTION FOR AN
ORDER FURTHER EXTENDING THE TIME FOR SERVICE

MFS Variable Insurance Trust II on behalf of MFS Strategic Income Portfolio f/k/a MFS Variable Insurance Trust on behalf of MFS Strategic Income Series; Jersey Street CLO, Ltd.; Marlborough Street CLO, Ltd.; Oaktree High Yield Fund, L.P.; Oaktree High Yield Fund II, L.P.; Oaktree High Yield Plus Fund, L.P.; Oaktree Senior Loan Fund, L.P.; OCM High Yield Trust; Metropolitan West High Yield Bond Fund; Crescent Senior Secured Floating Rate Loan Fund LLC (formerly known as TCW Senior Secured Floating Rate Loan Fund L.P.); TCW Senior Secured Loan Fund L.P.; Mt. Wilson CLO II, Ltd.; Legg Mason Partners Capital and Income Fund; Western Asset Floating Rate High Income Fund, LLC; Foothill Group, Inc.; Evergreen Core Plus Bond Fund (Wells Fargo Advantage Income Funds: Income Plus Fund); Evergreen High Income Fund; Evergreen High Yield Bond Trust; Evergreen Income Advantage Fund (Wells Fargo Advantage Income Opportunities Fund); Evergreen Multi Sector Income Fund (Wells Fargo Advantage Multi-Sector Income Fund); Evergreen Utilities & High Income Fund (Wells Fargo Advantage Utilities & High Income Fund); Evergreen VA High Income Fund; Wells – 13702900; Wells & Company Master Pension Trust: DBA Wells Capital Management – 12222133; Water and Power Employees' Retirement, Disability and Death Benefit Insurance Plan.

AD HOC GROUP OF TERM LENDERS' OPP. TO PLTF'S MOTION FOR AN
ORDER FURTHER EXTENDING THE TIME FOR SERVICE