Hearing Date: TBD
Objection Deadline: January 20, 2016
Reply Deadline: February 15, 2016

Marc E. Kasowitz (mkasowitz@kasowitz.com)
Andrew K. Glenn (aglenn@kasowitz.com)
Paul M. O'Connor III (poconnor@kasowitz.com)
Michele L. Angell (mangell@kasowitz.com)
Michelle G. Bernstein (mgenet@kasowitz.com)
KASOWITZ, BENSON, TORRES
& FRIEDMAN LLP
1633 Broadway
New York, New York 10019
Telephone: (212) 506-1700
Facsimile: (212) 506-1800

Counsel for Ad Hoc Group of Term Lenders

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: MOTORS LIQUIDATION COMPANY, et al., Debtors.	Chapter 11 Case No. 09-50026 (REG) (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 (REG)

MOTION OF AD HOC GROUP OF TERM LENDERS
(1) TO VACATE CERTAIN PRIOR ORDERS OF THE COURT;
AND (2) TO DISMISS THE ADVERSARY PROCEEDING

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

The Ad Hoc Group of Term Lenders (collectively, the "**Moving Term Lenders**")[2], submit this memorandum of law in support of their motion (the "**Motion**") (i) to vacate the Extension Orders (defined herein); and (ii) to dismiss the *First Amended 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*, dated May 20, 2015 (the "**Amended Complaint**") in this adversary proceeding (the "**Avoidance Action**") pursuant to Rules 12(b)(2), (5), and (6) of the Federal Rules of Civil Procedure (the "**Federal Rules**"), made applicable hereto by Rule 7012 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**").

PRELIMINARY STATEMENT[3]

Plaintiff's claims in this Avoidance Action fail as a matter of law because the Moving Term Lenders were not timely served with process. The Initial Complaint in this action was filed on July 31, 2009 and named over 500 defendants, but was served only on one defendant, JPMorgan. By agreement between the Plaintiff and JPMorgan -- which agreement was repeatedly so-ordered by the Court -- JPMorgan litigated the case for years without the participation of any of the other defendants, including the Moving Terms Lenders. Nearly six years later, following extensive discovery, summary judgment briefing, and appeals, the Avoidance Trust filed its Amended Complaint on May 20, 2015 and commenced serving the Amended Complaint thereafter.

During the time between the initial commencement of this Avoidance Action in July 2009 and the filing of the Amended Complaint in May 2015, the Court entered a series of orders

---

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

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

extending Plaintiff's time to serve the Initial Complaint, including the open-ended April 10, 2013 Extension Order extending the service deadline indefinitely until 30 days following "entry of a final, non-appealable order resolving Cross-Motions for Summary Judgment."[4] That order was entered after the expiration of the statute of limitations on Plaintiff's claims, and improperly provided an indefinite and multi-year extension of time to serve process on hundreds of defendants, including the Moving Term Lenders.

The April 10, 2013 Extension Order, as well as the other Extension Orders, should be vacated. The Court ostensibly justified the Extension Orders on the ground that avoiding the bankruptcy estates' expense and burden in serving process on the Term Lenders constituted "good cause."[5] This was error as a matter of law. Indeed, it is well-settled that neither expense to the plaintiff, nor judicial economy, constitutes "good cause" for extensions of time for service of process. Instead, the proper focus should be the efforts made by the plaintiff to effectuate service and the need for more time to complete service based on such efforts.

The Extension Orders have demonstrably prejudiced the rights of the Moving Term Lenders and eviscerated their due process rights. First, the Extension Orders sidelined the Moving Term Lenders from years of litigation that directly and negatively impacted their rights, without affording them any opportunity to take or participate in discovery, shape the factual record for the initial summary judgment motions, or present arguments in the Bankruptcy Court or on appeal. Indeed, the Term Lenders must contend with an adverse appellate court ruling and are now at risk of facing a judgment requiring the disgorgement of hundreds of millions of dollars in connection with the payoff of a loan that occurred over six years ago. Second,

---

4 *See* [Adv. Proc. Docket No. 82].

5 *Id.*

JPMorgan -- which stipulated with the Committee to circumvent the participation of the Term Lenders from this litigation -- is now asserting that any claims that the Moving Term Lenders may have against JPMorgan in connection with the unauthorized filing of the UCC-3 Termination Statement terminating the Term Lenders' liens are time-barred.

The Term Lenders are therefore now in a quagmire: they were served long after the customary deadline for service and the statute of limitations against them expired, but JPMorgan claims that any cross-claims the Term Lenders may assert to eliminate or mitigate any damages they face are time-barred. The Term Lenders clearly have been prejudiced by this delay, and the claims against them should be dismissed as a result for failure to effect service consistent with due process. Moreover, JPMorgan's agreement to the Extension Orders should not bind the Term Lenders. JPMorgan never acted in a representative capacity on behalf of the Term Lenders in this litigation, nor could it, because of its clear conflict of interest as the wrongdoer whose actions led to the filing of the UCC-3 Termination Statement in the first place.

Finally, even assuming *arguendo* that service was timely and appropriate, the Avoidance Trust's purported preference claim should be dismissed for the additional and independent reason that the claim has been released. The DIP Order included a broad release of the estate's claims against the Term Lenders, subject only to a very narrow carve-out to the Committee for challenges to the perfection of the Term Lenders' liens. However, the Committee's grant of standing conspicuously omitted authority to prosecute a preference claim, and, thus, this claim is subject to the release in the DIP Order.

For the foregoing reasons, and as more fully set forth herein, the Motion should be granted in its entirety.

FACTUAL 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. Am. Compl. ¶¶ 8, 12-14.

The Moving Term Lenders are an *ad hoc* group of investors and investment funds, including public and private employee pension funds, identified as purported recipients of payments under the Term Loan Agreement, dated as of November 29, 2006, as amended by that certain first amendment dated as of March 4, 2009 (the "**Term Loan Agreement**"), as well as certain of their successors in interest. *Id.* ¶¶ 9, 10; *see* Appendix A. The Moving Term Lenders are among over 500 other term lender defendants (excluding JPMorgan, the "**Term Lenders**") that were named in this action when it was filed in 2009.

II. THE EVENTS UNDERLYING PLAINTIFF'S PURPORTED CLAIMS.

A. The Term Loan Agreement.

Pursuant to the Term Loan Agreement, the Term Lenders advanced $1.5 billion to Motors Liquidation Company f/k/a General Motors Corporation ("**GM**") and certain of its subsidiaries (collectively, and with GM, the "**Debtors**") secured by first-priority liens on certain assets of GM (the "**Liens**"). Am. Compl. ¶ 572. JPMorgan Chase Bank, N.A. ("**JPMorgan**") is the Administrative Agent under the Term Loan Agreement. *See id.* ¶ 9.

On November 30, 2006, in connection with the Term Loan Agreement, a UCC-1 financing statement (the "**Financing Statement**") was filed with the Secretary of State of Delaware listing GM as "debtor" and JPMorgan as "administrative agent and secured party" indicating that the collateral covered by the Financing Statement was the assets described on Annex 1 attached to the Financing Statement (the "**Collateral**"). *Id.* ¶ 581, Ex. 1. On October

30, 2008, a UCC-3 financing statement amendment was filed with the Secretary of State of Delaware providing that the "[e]ffectiveness of the Financing Statement . . . is terminated with respect to security interest(s) of the Secured Party authorizing this Termination Statement" (the "**Termination Statement**"). *Id.* Ex. 2. The Termination Statement lists JPMorgan as the secured party of record that authorized the amendment. *Id.* ¶ 582, Ex. 2. However, the Amended Complaint includes no allegations that any Term Lender ever authorized JPMorgan to file the Termination Statement.

B. The Bankruptcy Filing.

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

On June 3, 2009, the Office of the United States Trustee appointed the Official Committee of Unsecured Creditors of Motors Liquidation Company f/k/a General Motors Corporation (the "**Committee**") pursuant to Section 1102 of the Bankruptcy Code. *Id.* ¶ 7.

C. The DIP Order.

On the Petition Date, the Debtors filed a motion (the "**DIP Motion**") seeking authority from this Court to obtain in excess of $33 billion in post-petition financing (the "**DIP Loans**") to pay certain pre-petition claims, among other things. *Id.* ¶ 574. The DIP Motion included a request for authorization to use a portion of the DIP Loans to pay in full all claims under the Term Loan Agreement, which were fully secured, first-priority claims. *Id.* ¶ 575.

On June 25, 2009, this Court entered the *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] (the "**DIP Order**").

Among other things, the DIP Order approved the DIP Loans. Am. Compl. ¶ 577. Following entry of the DIP Order, the Debtors paid $1,481,656,507.70 to the Term Lenders in full satisfaction of all claims arising under the Term Loan Agreement. *Id.* ¶ 578.

III. PROCEDURAL HISTORY

A. The Avoidance Action, Plan, Summary Judgment And Amended Complaint.

The Committee commenced this Avoidance Action on July 31, 2009 by filing the initial *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] (the "**Initial Complaint**"). The Initial Complaint challenged the Liens securing the Term Loan Agreement on the ground that the Termination Statement caused the Liens on the Collateral to be unperfected. Initial Compl. ¶¶ 433, 440, 449.

On July 1, 2010, the Committee filed a motion for partial summary judgment [Adv. Proc. Docket Nos. 24-27], and JPMorgan filed a motion for summary judgment [Adv. Proc. Docket Nos. 28-42].

On March 29, 2011, the Court entered an order [Docket No. 9941] (the "**Confirmation Order**") confirming the *Debtors' Second Amended Joint Chapter 11 Plan* [Docket No. 9836] (the "**Plan**"). The Plan provided, among other things, for the creation of the Avoidance Trust to hold and administer certain assets, including the Avoidance Action. Am. Compl. ¶ 12. On or about December 15, 2011, the Debtors transferred the Avoidance Action to the Avoidance Trust. *Id*. ¶ 13.

On March 1, 2013, this Court entered its *Decision on Cross Motions for Summary Judgment* [Adv. Proc. Docket No. 71], *Judgment* against the Committee [Adv. Proc. Docket No. 73], and *Order on Cross Motion for Summary Judgment* [Adv. Proc. Docket No. 72] (collectively, the "**March 1, 2013 Summary Judgment Orders and Judgment**"). The March 1, 2013 Summary Judgment Orders and Judgment denied the Committee's prayers for relief set forth in the Initial Complaint, granted summary judgment in favor of JPMorgan, denied the Committee's motion for partial summary judgment, and concluded that the UCC-3 Termination Statement did not terminate the perfection of the Liens in favor of the Term Lenders. *See* [Adv. Proc. Docket No. 71], at 5-6, 74; [Adv. Proc. Docket No. 72], at 1; [Adv. Proc. Docket No. 73], ¶ 2; Am. Compl. ¶ 584.

On January 21, 2015, the Second Circuit reversed and remanded, holding that the filing of the UCC-3 Termination Statement was not unauthorized and was effective to terminate the Term Lenders' security interest in the Collateral. *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, 104-05 (2d Cir. 2015).

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

B. The Extension Orders.

On October 6, 2009, following a status conference, the Court entered the *Stipulated Scheduling Order* [Adv. Proc. Docket No. 10] (the "**October 6, 2009 Scheduling Order**"), which granted the Committee a 240-day extension to complete service of the Initial Complaint on all defendants other than JPMorgan, without prejudice to seek an additional extension if necessary. *See* October 6, 2009 Scheduling Order, at 2, ¶ 1. At the October 6, 2009 conference, counsel for the Committee stated that its "game plan . . . 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." *See Transcript of First Status Conference on October 6, 2009* (the "**October 6, 2009 Conference Transcript**") [Adv. Proc. Docket No. 13], at 10:9-13. At that same conference, by agreeing with the Committee to sideline the Term Lenders from the litigation, and by counsel stating that JPMorgan was named in this Avoidance Action both in its individual capacity and as administrative agent with "a piece of the action" (*see id.* at 11:14-15), JPMorgan suggested to the Court that it would act in the Term Lenders' interest. As shown below, JPMorgan was not at any time an adequate representative of the Term Lenders (nor did it act as such), given its conflict of interest as the party responsible for the filing of the Termination Statement.

On January 20, 2010, the Court so-ordered the *Joint Stipulation Requesting Modification of Stipulated Scheduling Order* [Adv. Proc. Docket No. 17] (the "**January 20, 2010 Modified Scheduling Order**"), which granted the Committee a further extension of time to serve the defendants other than JPMorgan "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 . . . ." January 20, 2010 Modified Scheduling Order, at 2, ¶ 4.

On April 10, 2013, the Court entered the *Order Further Extending Time to Serve Summons and Complaint* [Adv. Proc. Docket No. 82] (the **"April 10, 2013 Extension Order,"** and with the October 6, 2009 Scheduling Order and the January 20, 2010 Modified Scheduling Order, the "**Extension Orders**"), permitting the 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* April 10, 2013 Extension Order, at 2. None of the Term Lenders were parties to the stipulations so-ordered by the Court in the Extension Orders, nor was their consent solicited.

On May 19, 2015, the Court entered the *Stipulation and Order* [Adv. Proc. Docket No. 90], which permitted the Plaintiff to serve the Amended Complaint on defendants other than JPMorgan 60 days after the filing of the Amended Complaint (the "**May 19, 2015 Stipulation and Order**"). *See* May 19, 2015 Stipulation and Order, at 2, ¶ 2.

On August 13, 2015, on motion of the Avoidance Trust, the Court further extended the Avoidance Trust's time to serve the Amended Complaint until September 30, 2015 [Adv. Proc. Docket No. 152] (the "**August 13, 2015 Extension Order**"). *See* August 13, 2015 Extension Order, at 2. The August 13, 2015 Extension Order provides that it "shall not affect or impair . . . (ii) any defendant's right to move to set aside or otherwise challenge any prior order of this Court extending the time for service of the summons, complaint or amended complaint . . . ." *Id.*

ARGUMENT

I. THE AVOIDANCE TRUST'S CLAIMS SHOULD BE DISMISSED FOR FAILURE TO TIMELY SERVE THE COMPLAINT AND AMENDED COMPLAINT.

Federal Rule 12(b)(5), made applicable to the Avoidance Action by Bankruptcy Rule 7012, provides that a defendant may move to dismiss a complaint when a plaintiff fails to timely serve the defendant. Fed. R. Civ. P. 12(b)(5); Fed. R. Bankr. P. 7012. Where, as here, a

defendant challenges service of process, the plaintiff has the burden to show that service was sufficient. *See Dickerson v. Napolitano*, 604 F.3d 732, 752-53 (2d Cir. 2010) ("When a defendant moves to dismiss under Rule 12(b)(5), the plaintiff bears the burden of proving adequate service.") (quoting *Burda Media, Inc. v. Viertel*, 417 F.3d 292, 298 (2d Cir. 2005)); *Mende v. Milestone Tech., Inc.*, 269 F. Supp. 2d 246, 251 (S.D.N.Y. 2003) ("When a defendant raises a Rule 12(b)(5) 'challenge to the sufficiency of service of process, the plaintiff bears the burden of proving its adequacy.'") (citation omitted).

For the reasons set forth below, the Avoidance Trust's claims should be dismissed for failure to properly serve the Term Lenders.

A. The Orders Extending The Deadline For Service Of Process Should Be Vacated.

1. Courts Have Vacated Extensions For Service Under These Circumstances.

Where an order extending the deadline for service is improperly granted and violates a defendant's due process rights, the order should be vacated. Accordingly, the Extension Orders should be vacated.

Courts have discretion to reconsider or modify their interlocutory orders. *United States v. Uccio*, 940 F.2d 753, 757-58 (2d Cir. 1991). The Extension Orders are procedural, "interlocutory" orders because they did not resolve all of the disputed issues, and are thus not final orders. *See Shimer v. Fugazy Limo. Ltd* (*In re Fugazy Express, Inc.*), 982 F.2d 769, 776 (2d Cir. 1992) (a final, as opposed to interlocutory, order "must completely resolve all of the issues pertaining to a discrete claim, including issues as to the proper relief"); *Nova Information Systems, Inc. v. Premier Operations, Ltd*. (*In re Premier Operations*), 290 B.R. 33, 42 (S.D.N.Y. 2003) (a final order must resolve "all the issues . . . that are outstanding between particular

parties, that the bankruptcy court has under consideration or will be expected to rule upon, and that potentially may become the basis for appeal").

It is well-settled that "a district court that has extended the time for service [may] vacate that extension and dismiss the case for untimely service, if it concludes that the plaintiff in fact had not shown good cause for the extension." *McCrae v. KLLM Inc.*, 89 Fed. App'x 361, 363, 364 (3d Cir. 2004) (affirming vacation of extension orders and dismissal for untimely service of process); *see Cooper v. City of New York*, No. 10 CIV. 5636, 2012 WL 92343, at *3 (S.D.N.Y. Jan. 11, 2012) (vacating prior extension order and dismissing claims against the untimely served defendant). Indeed, courts "routinely take such corrective action." *McCrae*, 89 Fed. App'x at 363; *see, e.g.*, *Cooper*, 2012 WL 92343, at *3; *Tso v. Delaney*, 969 F.2d 373, 377 (7th Cir. 1992) (affirming district court's vacation of an earlier order granting an extension of time to effect personal service on the ground that good cause was lacking, despite plaintiff's argument that the district court erred because the new claims it added during the extension period were rendered time-barred by the reversal of the extension); *Efaw v. Williams*, 473 F.3d 1038, 1041 (9th Cir. 2007) (vacating trial judgment upon finding that trial court abused its discretion in allowing service of process to occur 7 years after the filing of the complaint, and well after the statute of limitations had run); *Putnam v. Morris*, 833 F.2d 903, 905 (10th Cir. 1987) (affirming trial court's dismissal for improper service of process after the trial court first granted an extension order).

Further, the law of the case doctrine does not "foreclose [a party's] due process argument" based on improper service. *Johns-Manville Corp. v. Chubb Indem. Ins. Co.* (*In re Johns-Manville Corp.*), 600 F.3d 135, 150-51 (2d Cir. 2010); *see also Uccio*, 940 F.2d at 758 (law of the case doctrine "is not an inviolate rule" and does not limit a court's power to

reconsider or modify its prior rulings) (internal quotation marks and citation omitted). Because the Term Lenders were not parties to this litigation, the law of the case doctrine should not apply. *See Cobalt Multifamily Investors I, LLC v. Arden*, 46 F. Supp. 3d 357, 360 (S.D.N.Y. 2014) ("The law-of-the-case doctrine . . . should not bind Defendant to decisions made in this action before Defendant was properly served and made a party. '[A] party joined in an action after a ruling has been made should be free to reargue the matter without the constraints of law-of-the-case analysis.'") (citation omitted).

Any prejudice that the Avoidance Trust (or JPMorgan) could claim that would result from the *vacatur* of the Extension Orders is belied by the fact that the Committee and JPMorgan proceeded to obtain those orders *ex parte*. Indeed, *ex parte* motions are disfavored, and, where a court proceeds *ex parte*, it must give the unrepresented party a full opportunity to present its position. *See Great E. Shipping Co. v. Phoenix Shipping Corp.*, No. 07 CIV. 8373, 2007 WL 4258238, at *3 (S.D.N.Y. Dec. 4, 2007) (warning that *ex parte* proceedings, "untrammelled by the safeguards of a public adversary judicial proceeding, afford too ready opportunities for unhappy consequences to prospective defendants"); *United States v. Libby*, 429 F. Supp. 2d 18, 21 (D.D.C.) ("courts routinely express their disfavor with *ex parte* proceedings"), *opinion amended on reconsideration*, 429 F. Supp. 2d 46 (D.D.C. 2006). *See also In re MMG LLC*, 256 B.R. 544, 553 (Bankr. S.D.N.Y. 2000) (while order was issued *ex parte*, creditors permitted to participate in the proceedings and "will have ample opportunity to be heard").

Moreover, neither the Committee nor JPMorgan had any important rights or cognizable interests that trumped the participation of the Term Lenders. On the contrary, the Committee represented unsecured creditors whose rights were subordinated to the Term Lenders. Their only interest was in seeking to recover the windfall that they hoped would result from JPMorgan's

colossal error in filing the Termination Statement. For its part, JPMorgan's principal interest appears to have been to exclude the Term Lenders from the proceedings to avoid the inevitable focus on its own error. There are therefore no equities weighing in the Avoidance Trust's (or JPMorgan's) favor, and all the equities weigh in favor of the innocent, absent, Term Lenders.[6]

Accordingly, the Court should reconsider and vacate the Extension Orders.[7]

2. The Court Erred In Granting The Extension Orders Pursuant To Bankruptcy Rule 9006(b)(1).

Bankruptcy Rule 9006(b), which is modeled after Federal Rule 6(b) and Federal Rule of Appellate Procedure 26(b), permits a bankruptcy court to enlarge the time period for a party to meet a deadline arising under the Bankruptcy Rules, a notice provided under the rules, or a court order. *See* Fed. R. Bankr. P. 9006(b); *Kontrick v. Ryan*, 540 U.S. 443, 456 n.10 (2004) (citing Fed. R. Bankr. P. 9006(b) Advisory Committee Notes); *In re Fairfield Sentry Ltd. Litigation*, 458 B.R. 665, 691 (S.D.N.Y. 2011). Specifically, Bankruptcy Rule 9006(b)(1) provides:

> *In General*. Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be

---

[6] Further, where, as here, the plaintiff has *not* "been diligent in attempting to make service," any contention by the plaintiff that the defendants were not prejudiced is irrelevant. *See Koppelman v. Schaller*, No. 87 CIV. 7912, 1988 WL 98781, at *9 (S.D.N.Y. Sept. 14, 1998); *see, e.g.*, *Lopez v. United States Postal Serv.*, 132 F.R.D. 10, 12 (E.D.N.Y. 1990) (recognizing that "absence of prejudice" to the defendant will not "support a finding of 'good cause' in the absence of plaintiff's diligent attempt to effect service within the 120 day period").

[7] In addition, even if the Court were to conclude that the Extension Orders are "final," Federal Rule 60(b)(4), made applicable by Bankruptcy Rule 9024, authorizes a court to relieve a party from a final order if the order is void. *See* Fed. R. Civ. P. 60(b)(4); Fed. R. Bankr. P. 9024. Indeed, where, as discussed below, the order violates a party's due process rights, the court *must* grant relief under Federal Rule 60(b)(4) because the order at issue "is void." *Triad Energy Corp. v. McNell*, 110 F.R.D. 382, 385 (S.D.N.Y. 1986) (a judgment is void "where, *e.g.*, the Court lacked personal or subject matter jurisdiction or the entry of the order violated due process.") (citation omitted); *see also United States v. Castro*, 243 B.R. 380, 382 (D. Ariz. 1990) (explaining that vacatur of an order is mandatory, not discretionary). Further, Federal Rules 60(b)(5) and (6) provide, in relevant part:

> On motion and just terms, the Court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons . . . . (5) *applying [the order] prospectively is no longer equitable*; or (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b)(5), (6) (emphasis added).

> done at or within a specific period by these rules or by a notice given thereunder by order of court, the court *for cause shown* may at any time in its discretion (1) 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 extended by previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Fed. R. Bankr. P. 9006(b) (emphasis added).[8]

While courts have broad discretion to grant or deny extensions under Bankruptcy Rule 9006(b)(1)(1), the moving party must not be "guilty of negligence or bad faith and the privilege of extensions [must not be] abused." COLLIER ON BANKRUPTCY ¶ 9006.06[2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

Indeed, "in exercising discretion regarding enlargements of time, courts should be mindful that rules are 'intended to force parties and their attorneys to be diligent in prosecuting their causes of action.' Deadlines . . . serve a useful purpose and reasonable adherence to them is to be encouraged." *Spears v. City of Indianapolis*, 74 F.3d 153, 157 (7th Cir. 1996) (quoting *Geiger v. Allen*, 850 F.2d 330, 331 (7th Cir. 1988) ("We live in a world of deadlines. If we're

---

[8] Federal Rule 6(b) states:

> *In General.* When an act may or must be done within a specified time, the court may, for *good cause*, extend the time: (A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or (B) on motion made after the time has expired if the party failed to act because of excusable neglect.

Fed. R. Civ. P. 6(b) (emphasis added).

Courts generally rely on Federal Rule 6(b) to interpret Bankruptcy Rule 9006(b). *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 401 (1993) (O'Connor, J., dissenting) ("The Court concedes that Federal Rule of Civil Procedure 6(b) and Bankruptcy Rule 9006(b) have virtually identical language; indeed it even relies on the former to support its interpretation of the latter."); *Georgine v. Amchem Prods., Inc.*, No. CIV. A. 93-0215, 1995 WL 251402, at *4 n.8 (E.D. Pa. Apr. 26, 1995) ("There is no basis to interpret [the two rules] any differently.") (citing *Pioneer*, 507 U.S. at 390-91). For this reason, both rules are analyzed interchangeably herein.

late for the start of the game or the movie, or late for the departure of the plane or the train, things go forward without us. The practice of law is no exception.")) (interpreting Federal Rule 6(b)). Indeed, bankruptcy courts should "be wary" of granting extensions "as a matter of course" and "[t]he requirement of cause should be taken seriously and proceedings not delayed without reason." COLLIER ON BANKRUPTCY ¶ 9006.06[2].

Federal Rule 4(m), which is incorporated herein by Bankruptcy Rule 7004, governs both the dismissal of actions for untimely service of process, and extensions of the time in which service may be effected. Federal Rule 4(m) states:

> TIME LIMIT FOR SERVICE. If a defendant is not served within 120 days after the complaint is filed, the court -- on motion or on its own after notice to the plaintiff -- must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. [9]

Fed. R. Civ. P. 4(m).

At no point has the Committee or Avoidance Trust demonstrated cognizable "good cause" -- or any "cause" whatsoever -- for the extensive delay in serving the Moving Term Lenders (or any defendant other than JPMorgan), aside from the purported inconvenience and cost of actually serving the non-JPMorgan defendants named in the Initial and Amended Complaints. As the caselaw herein demonstrates, neither cost or burden, nor even judicial

---

[9] Effective December 1, 2015 (absent contrary Congressional action), Federal Rule 4(m) will be amended to state:

> TIME LIMIT FOR SERVICE. If a defendant is not served within 90 days after the complaint is filed, the court -- on motion or on its own after notice to the plaintiff -- must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

economy constitute "good cause" warranting an extension of the deadline for service under Federal Rule 4(m).[10]

As a result, the Extension Orders should not have been entered and should now be vacated as void.

i. There Was No "Good Cause" For The Extension Orders.

The Extension Orders were granted on the basis of the Court's conclusion that "the avoidance of substantial expenses by the Plaintiff which ultimately may not have to be incurred constitutes good cause" for indefinitely extending the time to serve process in this Avoidance Action. April 10, 2013 Extension Order, at 2. Respectfully, this conclusion is erroneous as it departs from the overwhelming weight of authority.

Numerous courts have declined to extend the 120-day service deadline under Federal Rule 4(m), on the basis that judicial economy and/or the cost or burdensome nature of service do not qualify as "good cause." *See, e.g.*, *Mann v. Castiel*, 681 F.3d 368, 375, 376-77 (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

---

[10] The "good cause" analysis of Federal Rule 4(m) should apply in the context of Bankruptcy Rule 9006(b)(1)(1) and Federal Rule 6(b)(1)(A). *See, e.g.*, *Paden v. Testor Corp.*, No. 03 C 50057, 2004 WL 2491633, at *2 (N.D. Ill. Nov. 2, 2004) ("the court considers the discretionary standards of Rule 6(b)(1) and Rule 4(m) to be essentially the same"); *Oyama v. Sheehan (In re Sheehan)*, 253 F.3d 507, 514 (9th Cir. 2001) (holding, in the context of service after the 120-day Federal Rule 4(m) deadline had lapsed, that Federal Rule 4(m) and Bankruptcy Rule 9006(b) can be "read congruently," following amendments to the Bankruptcy Rules and Federal Rules). Indeed, the Federal Rules previously used the term "for cause shown" in Federal Rule 6(b) -- which was amended in 2007 to state "for good cause," a change that was intended only to be stylistic. *Drippe v. Tobelinski*, 604 F.3d 778, 784 n.5 (3d Cir. 2010) (citing Fed. R. Civ. P. 6(b) Advisory Committee Notes).

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) (citation omitted); *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.") (citation omitted).

Rather, instances of service extensions are typically granted where, *unlike here*, a plaintiff is unable to effectuate service due to a defendant's evasion of service, or lacks knowledge of a defendant's whereabouts or address. *See, e.g., Global Crossing Ltd. Estate Representative v. Credit Suisse First Boston LLC* (*In re Global Crossing, Ltd.*), 385 B.R. 52, 82 (Bankr. S.D.N.Y. 2008) ("The cause for securing a Rule 4(m) order has historically been difficulties in serving a named defendant with process including such things as difficulties in finding the defendant, or a defendant's ducking service."); *McKibben v. Credit Lyonnais*, No. 98 CIV. 3358, 1999 WL 604883, at *3 (S.D.N.Y. Aug. 10, 1999) ("Good cause or excusable neglect is generally found only in exceptional circumstances where the plaintiff's failure to serve process in a timely manner was the result of circumstances beyond its control[,]" such as when "defendant had avoided service to such an extent as to evidence a peregrinatory penchant[,]" or

"defendant, by its active participation in the litigation had lulled plaintiff into believing that service had been accomplished.") (internal quotation marks and citations omitted); *National Union Fire Insurance Co. v. Sun*, No. 93 CIV. 7170, 1994 WL 463009, at *3 (S.D.N.Y. Aug. 25, 1994) (same). Here, no efforts have been made to serve the Term Lenders.

Because judicial economy and the cost or burden of serving process do not qualify as "good cause," the Court erred in granting the Extension Orders, which should be vacated.

ii. The Term Lenders Have Been Prejudiced By The Extensive Delay In Service Of Process.

The Second Circuit has held that a defendant is "harmed by a generous extension of the service period beyond the limitations period for the action," and that district courts must "decide on the facts of each case how to weigh the prejudice to the defendant that arises from the necessity of defending an action after both the original service period and the statute of limitations have passed before service." *Zapata v. City of New York*, 502 F.3d 192, 198 (2d Cir. 2007).

The Court here did not follow *Zapata*'s direction "to decide on the facts of each case how to weigh the prejudice to the defendant" arising from delayed service. *Id.* That alone is reason to set aside the prior Extension Orders. As *Zapata* makes clear, where "good cause is lacking," and there are not "sufficient indications on the record that the district court weighed the impact that a dismissal or extension would have on the parties" before extending the service deadline, then such an extension is improper. *Id.* at 197.

Far from containing "sufficient indications" that the Court weighed prejudice to the Term Lenders before each of its many service extensions, the record makes clear that the Court did not conduct this inquiry. In October 2009, for example, the Court approved the first extension request based solely upon Plaintiff's and JPMorgan's submission that it would be best to "litigate

this case from beginning through dispositive motions" without the involvement of the Term Lenders. *See* October 6, 2009 Conference Transcript at 10:11-12. Likewise, the Court granted three extension requests based solely upon Plaintiff's and JPMorgan's representation that they had been engaged in discovery but had not yet finished, and thus needed more time to prepare dispositive motions -- factors having nothing to do with why the Term Lenders should be kept out of the case, or why service was not possible. *See* [Adv. Proc. Docket Nos. 17, 20, 23.] Although the Court's April 10, 2013 Extension Order purported to find good cause in "the avoidance of substantial expenses by the Plaintiff which ultimately may not have to be incurred," (April 10, 2013 Extension Order, at 2), those factors are not only irrelevant under the rules but also had no bearing on the *unserved defendants* and how they would be affected. For these reasons alone, the Extension Orders were unsound exercises of discretion and should be vacated.

Here, the indefinite delay provided for in the April 10, 2013 Extension Order -- which has ultimately led to a 6-year delay in service, and over a 5-year delay from the January 10, 2010 Modification Order -- weighs heavily against a finding of good cause warranting an extension of time for service of process. *See Gordon v. Hunt*, 116 F.R.D. 313, 324 (S.D.N.Y. 1987), ("[S]ervice was not made on [Defendant] until over four years after [the complaint] was filed . . . . The court is aware of no case in which good cause was found for untimely service under [former] Rule 4(j) [the predecessor to Federal Rule 4(m)] where the delay in service was so long."), *aff'd*, 835 F.2d 452 (2d Cir. 1987).

Moreover, the Term Lenders have been sidelined from this Avoidance Action -- by stipulation between the Committee and JPMorgan, and the Extension Orders -- which has prejudiced their ability to defend and protect their interests. Indeed, counsel for the Committee admitted that the "game plan" for this litigation was to proceed with JPMorgan "without the

involvement of the hundreds of other defendants aside from JPMorgan." *See* October 6, 2009 Conference Transcript, at 10: 9-13. There has been extensive discovery and briefing, including before the Second Circuit, as to whether the priority of the Liens and the Term Lenders' security interests therein have been impaired. Indeed, the Second Circuit has now addressed the merits of the Avoidance Trust's underlying claim in a way that directly affects the Term Lenders' interests. These critical issues expose the Term Lenders to the risk of an order requiring the disgorgement of potentially hundreds of millions of dollars. To bind the Term Lenders to such an order is manifestly unfair given they have not participated in the litigation because they were never made a part of the litigation. And the theoretical availability of a "do over" by the Term Lenders at this late date is no substitute for the real opportunity to appear and be heard before the decisions were made. *See Global Discount Travel Servs., LLC v. TWA*, 960 F. Supp. 701, 708 (S.D.N.Y. 1997) (dismissing breach of contract claim for failure to join indispensable party where, *inter alia*, although the court's interpretation of the agreement at issue "would only be persuasive authority for another court's interpretation of the contract" it would "undoubtedly have a *practical* effect on any subsequent action brought by [the non-party] concerning the [agreement]") (emphasis in original).

Further, several of the Term Lenders have dissolved, been terminated, or reorganized into other entities, or otherwise materially changed their positions in the over-six years since the Initial Complaint was filed in July 2009.

Finally, JPMorgan -- who is ultimately responsible for the filing of the UCC-3 Termination Statement and the Extension Orders -- is now steadfastly insisting that the cross claims against it arising from its filing the Termination Statement are time-barred. *See, e.g., Stipulation and Order Regarding Extensions of the Deadline for the Undersigned Defendants to*

File Cross-Claims Between and Among Themselves, dated November 2, 2015 [Adv. Proc. Docket No. 188], at 3.[11] The Term Lenders are therefore in the untenable situation of entering a litigation that may have already adjudicated critical elements of claims against them during the six-year delay in service and subjected them to possible liability, but potentially left without recourse against JPMorgan, the party that put them in this predicament. This procedural posture is highly prejudicial to the Term Lenders and alone should constitute grounds to nullify the Extension Orders. *See Gordon*, 116 F.R.D. at 323-24 (noting that defendant's claim that it was prejudiced by plaintiff's failure to serve was "substantial" and "serious" where defendant argued that if he "had been timely served . . . he would have filed cross-claims[.]").

The prejudice suffered by the Term Lenders also requires that the Extension Orders be vacated.

iii. The Extension Orders Were Improper Because They Circumvent The Procedures Set Forth In Federal Rules 19 And 23 For Multi-Party Litigation.

The Extension Orders are improper for the additional reason that they would have the effect of essentially circumventing and rendering meaningless Federal Rules 19 and 23, relating to joinder of parties and class actions, respectively. *See* Fed. R. Civ. P. 19, 23. As with any plaintiff in a multi-party litigation, the Committee had the option of either (i) naming all Term Lenders as necessary parties pursuant to Federal Rule 19, or (ii) naming only JPMorgan as a representative party on behalf of a Term Lender class pursuant to Federal Rule 23. Neither of these options, however, includes the avenue taken by the Committee here, which simply named

[11] The Moving Term Lenders reserve all rights as to all statute of limitations arguments raised or that may be raised by JPMorgan.

all of the Term Lenders, yet did not actually serve them with process or provide them an opportunity to be heard, and be involved in the litigation.

Indeed, if the Committee were permitted to name as defendants -- thereby preserving claims against them, including for statute of limitations purposes -- hundreds of entities to determine the priority of their interests in the Term Loan, but then serve with process and litigate that issue with only one defendant (here, JPMorgan), then the protections afforded to indispensable parties under Federal Rule 19 would be rendered meaningless. Federal Rule 19 provides that a party is "necessary" if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19 (a)(1).

The Term Lenders were plainly "necessary" parties because disposing of the Avoidance Action in their absence impairs or impedes their ability to perfect their security interests in the Term Loan. Fed. R. Civ. P. 19(a). Thus, under Federal Rule 19, the issue of the Liens' priority could not be "dispos[ed] of . . . in [the Term Lenders'] absence." *Id.*

Given that the Term Lenders were necessary parties under Federal Rule 19, the only way for the Committee to have avoided naming the hundreds of Term Lenders pursuant to Federal Rule 19 would have been to proceed against JPMorgan only as a representative on behalf of all of the Term Lenders pursuant to Federal Rule 23. *See* Fed. R. Civ. P. 19(d) ("This Rule is subject to Rule 23."). However, to proceed under Federal Rule 23, the Committee still would have been required to provide notice to the Term Lenders and an opportunity to opt out. *See generally* Fed. R. Civ. P. 23. Indeed, Federal Rule 23(a)(4), and due process generally, require

that (i) notice is provided to the members of the purported class, with an opportunity to opt out, *see Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985), and (ii) that the class is represented by an adequate representative with aligned interests, *see Hansberry v. Lee*, 311 U.S. 34, 41-43 (1940). *See* Fed. R. Civ. P. 23(a)(4). The Committee would have failed entirely to satisfy that burden here. The Term Lenders were not given adequate notice or an opportunity to opt out, and JPMorgan is certainly not an "adequate representative" of the Term Lenders, given that JPMorgan is the party responsible for the improper filing of the Termination Statement.

For this additional reason, the Extension Orders were improper, and should be vacated.

B. The Extension Orders Violate The Term Lenders' Due Process Rights.

Interpreting Bankruptcy Rule 9006 in a manner that permits an indefinite and demonstrably prejudicial delay of the deadline for service of process set forth in Federal Rule 4(m) violates fundamental principles of due process. "The core of due process is the right to notice and a meaningful opportunity to be heard." *Lochance v. Erickson*, 522 U.S. 262, 266 (1998). The Due Process Clause demands "notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present objections." *Combs v. Nick Garin Trucking*, 825 F.2d 437, 442 n.43 (D.C. Cir. 1987) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 390 U.S. 306, 314 (1950)).

Providing adequate notice of a proceeding is a "core function of service [of process,]" required to establish jurisdiction. *Stuart v. Paulding*, No. 1:12-CV-0025, 2013 WL 1336602, at *2 (N.D.N.Y. Mar. 28, 2013) (quoting *Henderson v. United States*, 517 U.S. 654, 672 (1996)). Due process is "a threshold matter spring[ing] from the nature and limits of the judicial power of the United States and is inflexible and without exception." *Id.* (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1988)); *see Friedman v. Estate of Presser*, 929 F.2d

1151, 1156 (6th Cir. 1991) ("[T]he requirement of proper service of process is not some mindless technicality.") (citation and internal quotation marks omitted).

That a defendant has knowledge of a lawsuit, or even obtains a copy of the complaint from a source other than the plaintiff, does not provide constitutionally adequate notice, as "*actual knowledge and lack of prejudice cannot take the place of legally sufficient service*." *Toncz v. Bank of America, N.A.*, No. 3:12-1010, 2013 WL 1245746, at *3 (M.D. Tenn. Mar. 26, 2013) (quoting *LSJ Inv. Co, Inc. v. OLD, Inc.*, 167 F.3d 320, 324 (6th Cir. 1999)) (emphasis added), *report and recommendation adopted*, No. 3:12-1010, 2013 WL 1775505 (M.D. Tenn. Apr. 25, 2013); *accord SLW Capital, LLC v. Mansaray- Ruffin* (*In re Mansaray-Ruffin*), 530 F.3d 230, 239 (3d Cir. 2008) ("[A] creditor's actual knowledge regarding the bankruptcy proceedings does not eliminate our due process concerns."); *Gleason v. McBride*, 869 F.2d 688, 692 (2d Cir. 1989) ("Appellant's contention that the appellees had constructive notice of the lawsuit is without merit.").[12]

Indeed, the United States Bankruptcy Court for the District of Delaware recently noted that, while there is "nothing inherently improper concerning the use of extension motions in a bankruptcy context to facilitate a reorganization or for some other procedural or equitable endeavor," there are highly concerning issues as to whether a defendant is notified that the time for service had been extended and whether it had an opportunity to be heard. *See In re Worldspace*, Adv. Proc. No. 10-53286 (Bankr. D. Del. June 5, 2014) [Docket No. 94], at 10, 16-17 (holding that claims did not relate back to filing of initial complaint because the defendant did

[12] Here, certain of the Moving Term Lenders were either identified incorrectly in the Initial and Amended Complaints, and/or never adequately served with process in this Avoidance Action.

not receive notice of extension orders).[13] In *Worldspace*, the court reasoned that had it known that "four years after the original complaint was filed, service would be made for the first time, alerting a corporation to the existence of a potential lawsuit for the first time," it "would have questioned in a different manner the existence of due diligence in service, due diligence in prosecution, [and] good cause and prejudice when reviewing the nine extension motions." *Id.* at 10-11.

Here, the Extension Orders were entered without notice to the Term Lenders, and in violation of their due process rights. At the time the first extension order was presented, counsel for the Committee stated, on the record before the Court, that its "game plan" for the litigation, following extensive discussions with JPMorgan, was to litigate the case "without the involvement of the hundreds of other defendants aside from JPMorgan." *See* October 6, 2009 Conference Transcript, at 10:9-13. Indeed, two of the three Extension Orders were so-ordered stipulations entered into by the Committee and JPMorgan, without notice to, or the consent of, the Term Lenders. The third, the April 10, 2013 Extension Order, was ordered by the Court pursuant to Bankruptcy Rule 9006(b) nearly *four years following commencement of the Avoidance Action*, and is an open-ended order extending the time to serve on the ground that it appeared to the Court 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 Summons and Complaint until after the entry of a final, non-appealable order resolving the Cross-Motions for Summary Judgment[.]" April 10, 2013 Extension Order, at 2.

---

[13] In accordance with paragraph 33 of this Court's Case Management Order [Bankr. Case Docket No. 12625], orders entered in other cases that are cited herein, along with a chart discussing the procedural context of such orders, are annexed to the Declaration of Michele L. Angell filed contemporaneously herewith.

Finally, the May 19, 2015 Stipulation and Order and the August 13, 2015 Extension Order provided the Avoidance Trust with *even more time* to serve the Amended Complaint, until, ultimately, September 30, 2015. The foregoing orders -- and the open-ended April 10, 2013 Extension Order in particular -- violate the Term Lenders' critical due process rights to be notified of and given an opportunity to participate in the litigation, and should be vacated as void. Further, to the extent that the Court thought that JPMorgan might adequately represent the Term Lenders' interests based on the confirmation by JPMorgan's counsel that their client had a "piece of the action" in the underlying indebtedness (*see* October 6, 2009 Conference Transcript, at 11:9-20), any such supposed representative status clearly was contrary to the Term Lenders' due process rights, as well as to Federal Rule 23. *See Hansberry*, 311 U.S. at 40-46; Fed. R. Civ. P. 23(a)(4). Critically, while the Extension Orders were granted pursuant to Bankruptcy Rule 9006, the Court's exercise of its discretion under that rule is still subject to the Due Process Clause of the Fifth Amendment.

In its April 10, 2013 Extension Order, the Court justified the lack of procedural due process on the ground that it could "avoid" the "substantial expenses by the Plaintiff which ultimately may not have to be incurred", April 10, 2013 Extension Order, at 2, though this justification for an open-ended extension does not have any basis in the law. *See* Point I.A.2.i, *supra*. Indeed, the lack of notice -- and the fact that the Court so-ordered stipulations between JPMorgan and the Committee, which caused the Term Lenders to stand by the wayside for the years during which JPMorgan and the Committee engaged in extensive discovery and litigated their respective summary judgment motions -- disenfranchised the Term Lenders from participating in the litigation, and, as set forth more fully above, prejudiced their rights, including potentially the right to assert plainly meritorious claims against JPMorgan.

C. Because The Extension Orders Should Be Vacated, The Avoidance Trust's Claims Should Be Dismissed Because The Term Lenders Were Not Timely Served.

The Amended Complaint should be dismissed because each of the Extension Orders should be vacated, and consequently service of process was not timely effected.

The six-year delay in service here bars the Avoidance Trust's claims. The Committee filed the Initial Complaint on July 31, 2009, but did not serve the Initial Complaint on the Term Lenders, or on any defendant besides JPMorgan. *See* [Adv. Proc. Docket Nos. 1, 10, 17, 82, 90, 152]. Rather, the Avoidance Trust filed the Amended Complaint in May 2015, and only began to serve the Term Lenders with the Amended Complaint in May and June 2015, *six years after commencement of the Avoidance Action*, pursuant to the April 10, 2013 Extension Order, which was even further extended by the Court in the May 19, 2015 Stipulation and Order and August 13, 2015 Extension Order.

Pursuant to Section 546(a) of the Bankruptcy Code, in relevant part, claims brought under Sections 544 and 547 of the Bankruptcy Code (*see* Am. Compl. ¶¶ 1, 586-89, 604-615), must be 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* Am. Compl., at 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 purportedly effected. While the Avoidance Trust has been able to rely on the Extension Orders to bridge the gap between the time service should have been effected pursuant to Federal Rule 4(m) and the dates on which the Amended Complaint was actually served in 2015, because those Extension Orders should be vacated and/or modified, the service extensions contained therein

will be eliminated, and as a result, service was effected far too late, is improper, and the claims asserted in the Amended Complaint should be dismissed.

II. THE PREFERENCE CLAIM WAS RELEASED IN THE DIP ORDER AND SHOULD BE DISMISSED.

The Committee was never granted standing or authority, in the DIP Order or by any other means, to pursue preference claims against the Term Lenders on behalf of the Debtors' estates. The DIP Order included a broad release of claims against the Term Lenders, subject only to a very narrow carve-out for the Committee. Because the Committee's grant of standing did not include authority to prosecute a preference claim, the Third Claim for Relief alleged in the Amended Complaint should be dismissed. The DIP Order states, in pertinent part:

> Effective upon entry of this Final Order, the Debtors (on behalf of their estates) and any successor thereto release the Prepetition Senior Facilities Secured Parties [including the Term Lenders] . . . from, against and with respect to any and all . . . liabilities . . . directly or indirectly related to the Prepetition Senior Facilities and any and all dealings between the Prepetition Senior Facilities Secured Parties in connection with the Prepetition Senior Facilities, provided, however, that such release shall not apply *to the Committee with respect only to the perfection of first priority liens of the Prepetition Senior Facilities Secured Parties* . . . (the "Reserved Claims"). The 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 (the "Challenge Period") . . . .

DIP Order ¶ 19(d) (the "**Challenge Provision**") (emphasis added) (bold type omitted). The definition of "Prepetition Senior Facilities Secured Parties" includes the Term Lenders. *Id.* ¶ 19(b). Notably, the May 19, 2015 Stipulation and Order provided: "the Avoidance Trust agrees that its amendment of the complaint, including its substitution as plaintiff, does not . . . in any way expand or alter the meaning of Reserved Claims as that defined term is used in the Final DIP Order[.]" May 19, 2015 Stipulation and Order, ¶ 1.

Unlike the DIP Order here, DIP orders in large bankruptcies routinely provide creditors' committees with explicit standing and authority to assert, on behalf of the estate, claims besides lien avoidance, including for preferences. Such DIP orders employ language that makes the committees' broader standing abundantly clear. *Cf., e.g.*, *In re Relativity Fashion, LLC*, Case No. 15-11989 (MEW) (Bankr. S.D.N.Y. Aug. 27, 2015) [Docket No. 342], ¶ 34 (granting committee "standing and the requisite authority to pursue any Challenges" including to prepetition obligations and perfection/priority of liens *but also* "any objections, claims, or causes of action (including, without limitation, *any actions for preferences, fraudulent conveyances, or other avoidance power claims*)" against prepetition lenders relating to prepetition liens and obligations) (emphasis added); *In re Chassix Holdings, Inc.*, Case No. 15-10578 (MEW) (Bankr. S.D.N.Y. Apr. 10, 2015) [Docket No. 252], ¶ 27(b) (providing that "Creditors Committee is hereby granted standing to file any such adversary proceeding or contested matter as a representative of the Debtors' estates" challenging prepetition obligations or liens on prepetition collateral "*or* [] otherwise asserting or prosecuting *any avoidance actions or any other claims . . .* in connection with *any* matter related to" prepetition obligations or collateral) (emphasis added); *In re Pinnacle Airlines Corp.*, Case No. 12-11343 (REG) (Bankr. S.D.N.Y. May 17, 2012) [Docket No. 316], ¶ 16 (providing that "Creditors' Committee shall have standing to commence . . . an action, including the Claims and the Defenses" and defining "Claims and Defenses" to include, *in addition* to challenging validity/enforceability/priority/extent of prepetition debt or liens, "otherwise asserting or prosecuting any *action for preferences,* fraudulent conveyances, *other avoidance power claims*, or any other any claims, counterclaims, or causes of action, objections, contests, or defenses . . .") (emphasis added); *In re Terrestar Networks Inc.*, Case No. 10-15446 (SHL) (Bankr. S.D.N.Y. Nov. 18, 2010) [Docket No. 181], ¶ 17 (providing that "the

Committee, which shall be deemed to have requisite standing" could file an adversary proceeding "(X) challenging the validity, enforceability, priority or extent of the Prepetition Obligations or the liens on the Prepetition Collateral securing such Prepetition Obligations *or* (Y) *otherwise asserting or prosecuting any claims or causes of action arising under sections 542-553 of the Bankruptcy Code* or any other claims, counterclaims or causes of action, objections, contests or defenses . . . against the Prepetition Agent or any of the other Prepetition Secured Parties . . . in connection with any matter related to the Prepetition Obligations or the Prepetition Collateral . . .") (emphasis added); *In re Buffets Restaurants Holdings, Inc,* Case No. 12-10237 (Bankr. D. Del. February 14, 2012) [Docket No. 225], ¶ 21 (explicitly granting standing to unsecured creditors committee "to prosecute a Claim and Defense without further order of this Court[,]" and defining Claim and Defense to include "(i) challenging the validity, enforceability, priority or extent of the Prepetition Debt or the Prepetition Liens on the Pretention Collateral or (ii) otherwise asserting or prosecuting *any Avoidance Action or any other claims* . . . in connection with matters related to the Prepetition Agreements, the Prepetition Debt or the Prepetition Collateral. . . ") (emphasis added).

Here, in contrast, the carveout from the DIP Order release was solely for the "perfection of first priority liens." DIP Order, ¶ 19(d). A preference action is not "based upon" "the perfection of first priority liens" of the Term Lenders. To the contrary, it is based on, *inter alia*, the insolvency of the debtor, the potential recovery to the creditor in a Chapter 7 litigation, whether the payment was in the ordinary course and other relevant factors. *See Industrial Distribution Services, Inc. v. Grinnell Corp.* (*In re Industrial Distribution Services, Inc.*), 100 B.R. 584, 585 (Bankr. M.D. Fla. 1989) (finding preference claim "is based on the contention that the seizure of the pipes by the Sheriff was a voidable preference pursuant to § 547 of the

Bankruptcy Code and *not based on the contention directly that the lien claim of [creditor] could be avoided by the Debtor by utilizing the strong-arm clause of the Code, § 544(a)(b).*") (emphasis added). Because the Preference Claim was not carved out of the DIP Order release in the Challenge Provision, the claim should be dismissed.

CONCLUSION

For the foregoing reasons, this Court should grant the Motion and dismiss the Avoidance Action against the Term Lenders.

Dated: November 19, 2015
New York, New York

By: /s/ Andrew K. Glenn
Marc E. Kasowitz (mkasowitz@kasowitz.com)
Andrew K. Glenn (aglenn@kasowitz.com)
Paul M. O'Connor III (poconnor@kasowitz.com)
Michele L. Angell (mangell@kasowitz.com)
Michelle G. Bernstein (mgenet@kasowitz.com)
KASOWITZ, BENSON, TORRES
& FRIEDMAN LLP
1633 Broadway
New York, New York 10019
Telephone: (212) 506-1700
Facsimile: (212) 506-1800

Counsel for Ad Hoc Group of Term Lenders

Appendix A

Blackrock California State Teachers Retirement System
Blackrock Corporate High Yield Fund, Inc.
Blackrock Corporate High Yield Fund III, Inc.
Blackrock Corporate High Yield Fund V, Inc.,
Blackrock Corporate High Yield Fund VI, Inc.
Blackrock Debt Strategies Fund, Inc.
Blackrock Diversified Income Strategies Fund, Inc.
Blackrock Employees' Retirement Fund of the City of Dallas
Blackrock Floating Rate Income Strategies Fund Inc.
Blackrock Funds High Yield Bond Portfolio
Blackrock Funds II - High Yield Bond Portfolio
Blackrock Global Investment Series: Income Strategies Portfolio
Blackrock GSAM Goldman Core Plus Fixed Income Fund
Blackrock High Incm Fund of Blackrock Bond Fund Inc.
Blackrock High Income Shares
Blackrock-Lockheed Martin Corp Master Retirement Trust
Blackrock High Yield Trust
Blackrock Managed Account Series High Income Portfolio
Blackrock MET Investor Series TR High Yield Portfolio
Blackrock Multi Strategy Sub-Trust C
Blackrock Senior High Income Fund, Inc.
Blackrock Senior Income Series II
Blackrock Senior Income Series IV
Blackrock Strategic Bond Trust
R3 Capital Partners Master LP
The Galaxite Master Unit Trust
Employees' Retirement Fund of the City of Dallas
California State Teachers' Retirement System
BlackRock Corporate High Yield Fund IV, Inc.
Corporate High Yield Fund V, Inc.
BlackRock Diversified Income Strategies Portfolio, Inc.
BlackRock High Yield Portfolio of BlackRock Series Fund, Inc.
BlackRock Funds II, High Yield Bond Portfolio
BGIS Income Strategies Portfolio
BlackRock High Income Fund
Lockheed Martin High Yield Portfolio
Managed Account Series: High Income Portfolio
R3 Capital Partners Master - Cayman Trading Portfolio
Galaxite - Citi Prime Brokerage Account
Fundamental Core PLUS Portfolio
LGT Multi Manager Bond High Yield
NEXCOM High Yield
MIST BlackRock High Yield Portfolio
ULTRA-HY

PNC Pension High Yield Portfolio
MOSERS Credit Opportunities- Bank Loan Portfolio
Missouri State Employees Retirement System (MOSERS)
Fortress Credit Investments I Ltd.
Fortress Credit Investments II Ltd.
Drawbridge Special Opportunities Fund LP
Drawbridge Special Opportunities Fund Ltd.
Taconic Capital Partners 1 5 LP
Taconic Capital Partners 1.5 LP
Taconic Market Dislocation Fund II LP
Taconic Market Dislocation Master Fund II LP
Taconic Opportunity Fund LP
Solus Core Opportunities Master Fund Ltd.
Solus Core Opportunities Master Fund
Sola Ltd.
Ultra Master Ltd
Mason Capital, L.P.
Mason Capital, Ltd.
Thrivent Financial for Lutherans
Thrivent High Yield Fund
Thrivent High Yield Portfolio
Thrivent Income Fund
Thrivent Series Fund, Inc. - Income Portfolio
Delaware LVIP Delaware Bond Fund
L3-Lincoln Variable Insurance Products Trust Managed Fund
Lincoln National Life Insurance Company Separate Account 12
Lincoln National Life WSA20
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
The Lincoln National Life Insurance Company Separate Account 12
The Lincoln National Life Insurance Company Separate Account 20
Freescale Semiconductor, Inc.
Freescale Semiconductor Inc., Retirement Savings
PIMCO 1464-Freescale Semiconductor Inc
PIMCO 1641-Sierra Pacific Resources
PIMCO Fairway Loan Funding Company
PIMCO2244 - Virginia Retirement System
PIMCO2496-FLTG RT INC FD
PIMCO2497-FLTG RT STRT FD
PIMCO2603 - Red River HYPI LP
PIMCO3813 - PIMCO Cayman Bank Loan Fund
PIMCO400-Stocks Plus Sub Fund B LLC
PIMCO6819 Portola CLO LTD.
PIMCO700-FD TOT RTN FD
PIMCO706-Private High Yield Portfolio

Mayport CLO Ltd.
Global Investment Grade Credit Fund
Portola CLO Ltd.
Golden Knight II CLO, Ltd.
NV Energy, Inc. Master Defined Benefit Trust
Fairway Loan Funding Company – CDO
Virginia Retirement System
PIMCO Income Strategy Fund (PFL)
PIMCO Income Strategy Fund II (PFN)
Red River HYPi, L.P.
PIMCO Cayman Bank Loan Fund (USD)
PIMCO StockPLUS LP Fund B
Portola CLO, Ltd.
PIMCO Total Return Fund
PAPS High Yield Portfolio
Mayport CLO, Ltd.
GIS Global Investment Grade Credit Fund
Hewlett-Packard Company
Hewlett-Packard Company Master Trust
Illinois Teachers Retirement System
Lord Abbett Inv Trst-LA HI YLD
Lord Abbett Investment Trust - Lord Abbett Floating Rate Fund
Lord Abbett & Co - Teachers Re
Lord Abbett Investment Trust - Lord Abbett High Yield Fund
Lord Abbett Investment Trust - Lord Abbett Floating Rate Fund
Lord Abbett managed account for Teachers' Retirement System of Oklahoma
MacKay 8067 - Fire & Police Employee Retirement System of the City of Baltimore
Fire & Police Employees' Retirement System of the City of Baltimore
Putnam 29x-Funds Trust Floating Rate Income Fund
Delaware Delchester Fund
Delaware Diversified Income Fund
Delaware Diversified Income Trust
Delaware Enhanced Global Dividend & Income Fund
Delaware Extended Duration Bond Fund
Delaware Group Equity V Inc. Dividend Income Fund
Delaware Group Government Fund Core Plus Fund
Delaware Group Inc. Fund Inc. Corporate Bond Fund
Delaware Group Income Funds - Delaware High Yield Opportunities Fund
Delaware Investments Dividend & Income Fund Inc.
Delaware Investments Global Dividend & Income Fund
Delaware Optimum Fixed Income Fund
Delaware Pooled Trust - Core Plus Fixed Income Portfolio
Delaware Pooled Trust - High Yield Bond Portfolio
Delaware VIP Trust Diversified Income Series
Delaware VIP Trust High Yield Series
Delaware Delchester Fund, a series of Delaware Group Income Funds

Delaware Diversified Income Fund, a series of Delaware Group Adviser Funds
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 Global Dividend and Income Fund, Inc.
Optimum Fixed Income Fund, a series of Optimum Fund Trust
The Core Plus Fixed Income Portfolio, a series of Delaware Pooled Trust
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
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 GP - Portable Alpha
MacKay Shields Core Plus Alpha Fund Ltd.
Arnhold-Houston Police Officers' Pension System
MacKay-Houston Police Officers Pension System
Plumbers & Pipefitters National Pension Fund
Russell Strategic Bond Fund
Logan Circle - Russell Inst Funds LLC - Russell Core Bond
Logan Circle - Russell Investment Company PLC
Logan Circle - Russell Multi-Managed Bond Fund
Logan Circle - Russell Strategic Bond Fund
Russell Investment Company Russell Strategic Bond Fund
Russell Inst Funds LLC Russell Core Bond Fund
Russell Investment Company PLC The Global Strategic Yield Fund
Russell Investment Company PLC The Global Strategic Yield Fund on behalf of DDJ – Multi-Style, Multi-Manager Funds PLC – Global Strategic Fund
Russell Trust Company Russell Multi-Managed Bond Fund
Russell Investment Company Russell Strategic Bond Fund
Russell Inst Funds LLC - Russell Core Bond Fund
WAMCO 3073 - John Hancock Trust Floating Rate Income Trust,
WAMCO 3074 - John Hancock Fund II Floating Rate Income Fund
John Hancock Trust Floating Rate Income Trust
John Hancock II - Floating Rate Income Fund
John Hancock Variable Insurance Trust - Floating Rate Income Trust
John Hancock Funds II - Floating Rate Income Fund
John Hancock Variable Insurance Trust - U.S. High Yield Bond Trust
John Hancock Funds II - U.S. High Yield Bond Fund
Wells Capital Management 16959700
JHVIT U.S. High Yield Bond Trust
Wells Capital Management 16959701
JHF II U.S. High Yield Bond Fund
Lehman Brothers First Trust Income Opportunity Fund

Lehman Brothers High Income Bond Fund
Neuberger Berman High Income Bond Fund
Lehman Brothers High Income Trust Opportunity Fund
Lehman-Neuberger Berman-High Income Bond Fund
Neuberger Berman High Yield Strategies Fund Inc.
Neuberger Berman High Yield Strategies Fund
Neuberger Berman Income Funds - Neuberger Berman High Income Bond Fund
Neuberger Berman Income Opportunity Fund, Inc.
Guggenheim Portfolio CO X LLC
Guggenheim Portfolio Company X, LLC
Security Investors - Security Income Fund - High Yield Series
Guggenheim High Yield Fund
Commonwealth Virginia and the Virginia Retirement System
WAMCO 3023 - Virginia Retirement Systems Bank Loan Portfolio
WAMCO 176 - Virginia Supplemental Retirement System
Cap Fund, L.P.
BBT Master Fund, L.P.
BBT Fund, L.P.
SRI Fund, L.P.
Wells Capital Management 16017000
North Dakota State Investment Board