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

In re:	:	Chapter 11 Case
MOTORS LIQUIDATION COMPANY, <i>et al.</i> ,	:	Case No. 09-50026 (REG)
Debtors.	:	(Jointly Administered)
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MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST, by and through the Wilmington Trust Company, solely in its capacity as Trust Administrator and Trustee,	:	Adversary Proceeding
Plaintiff,	:	Case No. 09-00504 (REG)
vs.	:	
JPMORGAN CHASE BANK, N.A., individually and as Administrative Agent for various lenders party to the Term Loan Agreement described herein, <i>et al.</i> ,	:	
Defendants.	:	

**MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO DISMISS BY
NONPARTY GLOBAL FUND TRUST COMPANY, SOLELY IN ITS CAPACITY AS
THE FORMER TRUSTEE OF DEFENDANT MACKAY
SHORT DURATION ALPHA FUND**

PRELIMINARY STATEMENT

Nonparty Global Funds Trust Company (“GFTC”), solely in its capacity as the former trustee of Defendant MacKay Short Duration Alpha Fund by special appearance through its attorneys, submits this memorandum in support of its simultaneously filed Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(5) and 12(b)(6) and Federal Rule of Bankruptcy Procedure 7012(b).¹ Defendant MacKay Short Duration Alpha Fund, named incorrectly in the Amended Complaint as “MacKay Shields Short Duration Alpha Fund,” is referred to herein as “MacKay.” GFTC brings this motion on behalf of MacKay, as MacKay was formerly a trust for which GFTC served as trustee. MacKay no longer exists and there is no entity that has succeeded it.

GFTC’s position is simple and incontrovertible: MacKay lacks capacity to sue or be sued and thus must be dismissed from the action. The Amended Complaint, brought by the Wilmington Trust Company, solely in its capacity as Trust Administrator and Trustee of the Motors Liquidation Company Avoidance Action Trust (the “AAT”), names MacKay as a defendant and alleges that MacKay received a transfer made under the Term Loan Agreement (as defined in the Amended Complaint). Fatal to the AAT’s claims against MacKay is that (i) MacKay is a terminated Cayman trust; (ii) MacKay’s capacity to be sued in federal court is governed by either New York or Cayman law; and (iii) under both New York and Cayman law, a trust (terminated or not) lacks capacity to be sued. Because claims brought against an entity that lacks such capacity must be dismissed, MacKay’s motion to dismiss the AAT’s claims should be granted.

¹ GFTC hereby incorporates by reference Certain Term Loan Investor Defendants’ Joint Motion to Dismiss Plaintiff’s Amended Complaint [ECF No. 226] and Point II of the Memorandum of Law in Support of Certain Term Loan Investor Defendants’ Joint Motion to Dismiss Plaintiffs’ Amended Complaint [ECF No. 226-1] with respect to relief sought pursuant to Fed. R. Civ. P. 12(b)(5).

ARGUMENT

Federal law and the Federal Rules of Bankruptcy Procedure provide that the law of the state where the court is located governs whether an entity (other than an individual who is not acting in a representative capacity or a corporation), such as a trust, has the capacity to sue or be sued in federal court. Fed. R. Civ. P. 17(b)(3) (“for all other parties, by the law of the state where the court is located”).² Here, that governing law is the law of the State of New York. *See Sokolow v. Palestine Liberation Organization*, 60 F. Supp. 3d 509, 523 n.18 (S.D.N.Y. 2014) (noting that in New York, Rule 17(b)(3) always looks to the law of the State of New York because “Rule 17(b) is itself a choice of law provision, and does not require that [the] Court take the additional step of determining if New York choice of law requires application of foreign law as to the issue of capacity.”). But even if the Court interpreted Federal Rule of Civil Procedure 17(b)(3) to suggest that a choice of law analysis is appropriate, engaged in that analysis, and determined that Cayman law, rather than New York law, governs, the result would be the same.³

Under New York law, a trust lacks capacity to sue or be sued in its own name. *In re Vebeliunas*, 252 B.R. 878, 887 (Bankr. S.D.N.Y. 2000) (contrasting a corporation, which may sue on its own behalf, with a trust, which cannot). This is, of course, well known to the AAT, which sued “by and through the Wilmington Trust Company, solely in its capacity as *Trust Administrator and Trustee*” (emphasis added). The caption and Amended Complaint so read because the AAT lacks the legal capacity to pursue its allegations independently (and also lacks the capacity to be sued). The AAT thus lacks any excuse for failing to follow the same

² Federal Rule of Civil Procedure 17 applies in this adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7017.

³ In the event that the Court finds that Federal Rule of Civil Procedure 17(b)(2) is relevant to this question, it would look to the law for the jurisdiction under which MacKay was organized, which is Cayman law.

procedure for MacKay. Like the AAT, MacKay lacks the capacity to pursue a cause of action, and it lacks the capacity to be sued.

The same is true under Cayman law. According to MacKay's Declaration of Trust, MacKay was organized as "a trust" and the Global Funds Trust Company as its "trustee."⁴ See Moskowitz Decl., Ex. A. Under Cayman law, a trust is not a legal person. See *The North London Mosque Trust v. The Policy Exchange and Anor* [2010] EWCA (Civ) 526, ¶ 2 (Moskowitz Decl., Ex. B). Rather, it is an equitable relationship, and accordingly cannot sue or be sued. *Id.* MacKay was terminated on December 21, 2012. See Moskowitz Decl., Ex. C. MacKay lacks capacity to sue or be sued under Cayman law, and therefore lacks capacity to sue or be sued in the federal courts.

Dismissal is the standard remedy for a claim brought against an entity that lacks capacity to be sued. See, e.g., *Marsh v. Rosenbloom*, 499 F.3d 165, 184 (2d Cir. 2007) (granting motion to dismiss under Rule 12(b)(6) because corporation lacked capacity to be sued); *Wang v. U.S. Medical License Examination Secretariat*, 206 Fed. Appx. 67, 67-68 (2d Cir. 2006) (affirming motion to dismiss under Rule 12(b)(6) against entity that lacked capacity to be sued).

Straightforward application of these controlling precedents dictates that the AAT's claims against MacKay should be dismissed because MacKay lacks capacity to be sued under both New York and Cayman law.

⁴ Citations to "Ex. _" are to the exhibits annexed to the Declaration of Elliot Moskowitz dated November 20, 2015 ("Moskowitz Decl."), which is being filed simultaneously with this memorandum of law.

CONCLUSION

For all the foregoing reasons, MacKay respectfully requests that the Court dismiss the claims of the Amended Complaint asserted against MacKay.

Dated: New York, New York
November 20, 2015

Respectfully submitted,

By: /s/ Elliot Moskowitz
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