Objection Deadline: October 19, 2016 at 4:00 p.m.
Reply Deadline: November 10, 2016 at 4:00 p.m.
Hearing Date and Time: November 16, 2016 at 11:00 a.m.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

Chapter 11

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

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

Debtors.

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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 (MG)

against

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

Defendants.

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MEMORANDUM OF LAW IN OPPOSITION TO THE GIFT TRUST'S MOTION TO DISMISS THE AMENDED COMPLAINT

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

BACKGROUND 2

ARGUMENT 7

I. The AAT's Claims Against The GIFT Trust Are Not Time Barred 7

A. The GIFT Trust Was Properly Named In The Amended Complaint 7

B. The Amended Complaint Relates Back To The Original Complaint 8

II. Service On The GIFT Trust Was Proper 10

A. The Mailing Here Constituted Effective Service 11

B. The GIFT Trust Cannot Rebut The Presumption of Receipt 12

III. If The Court Concludes That Service Was Not Effectuated, Plaintiff Should Be Granted Leave To Re-Serve 14

A. An Extension Of The Time To Serve Would be Appropriate 14

B. Dismissal Is Not An Appropriate Remedy 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases

Advanced Magnetics, Inc. v. Bayfront Partners, Inc.,
106 F.3d 11 (2d Cir. 1997).....10

AIG Managed Mkt. Neutral Fund v. Askin Capital Mgmt., L.P.,
197 F.R.D. 104 (S.D.N.Y. 2000).....15

Akey v. Clinton Cnty.,
375 F.3d 231 (2d Cir. 2004).....12

BASF Corp. v. Norfolk S. Ry. Co.,
No. 04-cv-9662, 2008 WL 678557 (S.D.N.Y. March 10, 2008).....12

Cody v. Mello,
59 F.3d 13 (2d Cir. 1995).....16

Coleman v. Bank of N.Y. Mellon,
969 F. Supp. 2d 736 (N.D. Tex. 2013).....6

Cordell v. Unisys Corp.,
299 F.R.D. 411 (W.D.N.Y. 2014).....9

In re Dana Corp.,
No. 06-10354 (BRL), 2007 WL 1577763 (Bankr. S.D.N.Y. May 30, 2007).....12

DeLuca v. AccessIT Grp., Inc.,
695 F. Supp. 2d 54 (S.D.N.Y. 2010).....14

E. Refractories Co., Inc. v. Forty Eight Insulations, Inc.,
187 F.R.D. 503 (S.D.N.Y. 1999).....16

Feingold v. Hankin,
269 F. Supp. 2d 268 (S.D.N.Y. 2003).....14

Frasca v. United States,
921 F.2d 450 (2d Cir. 1990).....16

Ghartey v. St. John's Queens Hosp.,
869 F.2d 160 (2d Cir. 1989).....7

In re Global Crossing, Ltd.,
385 B.R. 52 (Bankr. S.D.N.Y. 2008).....9

Grammenos v. Lemos,
457 F.2d 1067 (2d Cir. 1972).....16

Krupski v. Costa Crociere S.p.A.,
560 U.S. 538 (2010).....10

In re Lenox Healthcare, Inc.,
319 B.R. 819 (Bankr. D. Del. 2005).....15

Leon v. Murphy,
988 F.2d 303 (2d Cir. 1993).....12

Macaluso v. N.Y. State Dep't of Envtl. Conservation,
115 F.R.D. 16 (E.D.N.Y. 1986).....17

Mejia v. Castle Hotel, Inc.,
164 F.R.D. 343 (S.D.N.Y. 1996).....14

Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.),
777 F.3d 100 (2d Cir. 2015).....4

Osrecovery, Inc. v. One Group Int'l, Inc.,
234 F.R.D. 59 (S.D.N.Y. 2005).....17

Prado v. City of N.Y.,
No. 12-cv-4239, 2015 WL 5190427 (S.D.N.Y. Sept. 3, 2015).....6

In re R.H. Macy Co., Inc.,
161 B.R. 355 (Bankr. S.D.N.Y. 1993).....11

In re Robinson,
228 B.R. 75 (Bankr. E.D.N.Y. 1998).....12, 13

Santos v. State Farm Fire & Cas. Co.,
902 F.2d 1092 (2d Cir. 1990).....16

SIPC v. Bernard L. Madoff Inv. Sec. LLC (In re Fred A. Daibes Madoff Secs. Trust),
No. ADV 08-01789 (BRL), 2011 WL 6010292 (Bankr. S.D.N.Y. Dec. 1, 2011).....12, 13

In re South African Apartheid Litig.,
617 F. Supp. 2d 228 (S.D.N.Y. 2009).....7

Stone v. Ranbaxy Pharm., Inc.,
No. 10-CV-08816 (JFM), 2011 WL 2462654 (S.D.N.Y. June 16, 2011).....16

In re Ted A. Petras Furs, Inc.,
172 B.R. 170 (Bankr. E.D.N.Y. 1994 15

In re Torres,
15 B.R. 794 (Bankr. E.D.N.Y. 1981).....11

In re Williams,
185 B.R. 598 (B.A.P. 9th Cir. 1995).....13

Yearwood v. N.Y. Presbyterian Hosp.,
No. 12 CIV. 6985 (PKC), 2013 WL 4713793 (S.D.N.Y. Aug. 20, 2013).....7

Zapata v. City of N.Y.,
502 F.3d 192 (2d Cir. 2007).....14

Rules

Fed. R. Bankr. P. 7004(b)(3).....11

Fed. R. Bankr. P. 7015 .....1, 8

Fed. R. Civ. P. 4 .....14, 15, 16

Fed. R. Civ. P. 15(a)(1).....8

Fed. R. Civ. P. 15(c)(1).....1, 8, 9, 10

Fed. R. Civ. P. 12(b)(5).....16

Fed. R. Civ. P. 12(b)(6).....7

Other Authorities

http://www.motorsliquidationdocket.com 9

The Motors Liquidation Company Avoidance Action Trust ("**Plaintiff**" or "**AAT**"), by and through the Wilmington Trust Company, solely in its capacity as Trust Administrator and Trustee respectfully submits this memorandum of law in opposition to the motion to dismiss filed by defendants GMAM Investment Funds Trust (the "**GIFT Trust**"), Lehman GMAM Investment Funds Trust ("**Lehman GIFT**"), and Pension Inv Committee of GM for GM Employees Domestic Group Pension Trust ("**Pens Inv Comm**") (together "**Movants**") on August 11, 2016 (the "**Motion**").

PRELIMINARY STATEMENT

Although the Motion is purportedly filed on behalf of all three Movants – the GIFT Trust, Lehman GIFT, and Pens Inv Comm – the Motion asserts that the only Movant that is a legal entity properly named as a defendant in this case is the GIFT Trust. Specifically, Movants assert that neither Lehman GIFT nor Pens Inv Comm is an actual legal entity and therefore neither is able to be sued, and that the transfers of money that form the basis of the claims against them are properly asserted against the GIFT Trust only. Therefore, the AAT's opposition addresses only the naming of, and service of process on, the GIFT Trust.

The AAT properly identified and named the GIFT Trust in the amended complaint filed in this action – with the express permission of the Court – after conducting extensive due diligence and taking discovery from JPMorgan Chase Bank, N.A. ("**JPMorgan**") that revealed the GIFT Trust's identity. That amended complaint relates back to the original complaint timely filed in this case pursuant to Fed. Rule Civ. P. 15(c)(1), as incorporated by Fed. Rule Bankr. P. 7015. Therefore, the claims against the GIFT Trust are also timely.

Additionally, the AAT properly served the GIFT Trust by First Class Mail at the address that the GIFT Trust concedes is the proper one. As demonstrated below and in the accompanying declarations, the AAT took every necessary step to properly serve the GIFT

Trust, and the AAT had every reason to believe that the GIFT Trust actually received the service copies of the summons and amended complaint. The GIFT Trust cannot and does not rebut the presumption of service.

Finally, even if the GIFT Trust had not been properly served, the Court should grant the AAT leave to re-serve the GIFT Trust, as dismissal would unduly prejudice the AAT and undermine the strong policy in favor of resolving disputes on the merits.

For these reasons and the reasons discussed herein, the Motion should be denied.

BACKGROUND

On July 31, 2009, the Official Committee of Unsecured Creditors of Motors Liquidation f/k/a General Motors Corporation (the "**Committee**") timely filed the original complaint in the instant adversary proceeding (the "**Original Complaint**") for the avoidance and recovery of certain transfers made in connection with a $1.5 billion term loan (the "**Term Loan**") made to General Motors Corporation and certain of its subsidiaries ("**Debtors**"). *See* Adv. Pro. Dkt. No. 1. The Committee named JPMorgan both as lender and as administrative agent on the Term Loan made to Debtors in 2006, as well as members of a consortium of over 500 term lenders for the Term Loan (the "**Term Lenders**"). *Id.* The identities of the Term Lenders named as defendants in the Original Complaint originated from JPMorgan, via Debtor's counsel, who represented it was the "latest list we have" of Term Lenders at the time the Original Complaint was filed. Declaration of Eric B. Fisher ("**Fisher Decl.**") Exs. A-B (requesting lender information); C (Weil providing "latest list we have"); D (Weil's spreadsheet).[1] Movants "Lehman GMAM Inv FDS TR" and "Pension Inv Comm of GM for GM" – but not Movant GIFT Trust – were listed by Debtor's counsel as entities that held an interest in the Term Loan,

[1] Discovery has shown that Weil's list originated from JPMorgan. *See* Fisher Decl. Exs. E - G.

and were therefore the entities named as defendants in the Original Complaint.[2] *See* Adv. Pro. Dkt. No. 1.

Soon after the Committee filed the Original Complaint, JPMorgan and the Committee agreed to bifurcate the litigation. As agreed by them and approved by the Court, Phase I of the action would address the question of whether the main lien securing the Term Loan had been terminated, and would be litigated by JPMorgan and the Committee; Phase II (which would be necessary only if JPMorgan lost Phase I) would involve the question of the extent to which the Term Loan was under-secured. By letter dated September 18, 2009, JPMorgan wrote to the Term Lenders that it had proposed to the Committee that the Committee serve JPMorgan, "but withhold service [upon the Term Lenders] for a substantial period of time" until Phase I discovery was complete and Phase I dispositive motions were decided. Adv. Pro. Dkt. No. 428-12.

The Court, at the request of JPMorgan and the Committee (and later the AAT), entered a series of orders extending the time to serve the Original Complaint on the Term Lenders until after the conclusion of Phase I. On October 6, 2009, the Court entered its first in the series of orders, which approved bifurcation of the case into the two phases, and provided the Committee 240 days to complete service on the Term Lenders without prejudice to seek an additional extension of time to serve them, if necessary. Adv. Pro. Dkt. No. 10. On January 20, 2010, while the Committee and JPMorgan were engaged in discovery for Phase I, the Court entered a second extension order granting the Committee "until 30 days after the date of entry of the

[2] The GIFT Trust acknowledges Lehman managed the GIFT Trust for some period of time. Adv. Pro. Dkt. No. 701-1 (GIFT Trust Memorandum of Law) at 1, n.1. Although the GIFT Trust is not called Pension Inv Comm, the GIFT Trust admits it did, in fact, trade in the Term Loan under that name. *Id.* at 18; Adv. Pro. Dkt. No. 701-13 (Cahill Aff.) ¶ 4.

Court's decision on any dispositive motion made" in Phase I to serve the Term Lenders. Adv. Pro. Dkt. No. 17.

By August 2010, the Committee and JPMorgan had completed Phase I discovery and submitted cross motions for summary judgment. On March 1, 2013, the Court denied Plaintiff's[3] motion for partial summary judgment and granted summary judgment in favor of JPMorgan. Adv. Pro. Dkt. No. 71. The ruling was certified for a direct appeal to the Second Circuit and the motion for a direct, expedited appeal to the Second Circuit was granted. On March 7, 2013, the AAT appealed to the Second Circuit. Adv. Pro. Dkt. Nos. 74, 76.

On April 10, 2013, the Court entered a third extension order, further extending Plaintiff's time to serve the Term Lenders until thirty days after the date of entry of a final non-appealable order on the cross-motions for summary judgment. Adv. Pro. Dkt. No. 82. On January 21, 2015, the Second Circuit reversed the Court's grant of summary judgment in favor of JPMorgan and remanded the matter to the Court with instructions to enter partial summary judgment in favor of the AAT. *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A., (In re Motors Liquidation Co.)*, 777 F.3d 100, 101 (2d Cir. 2015).

On May 4, 2015, with Phase I drawing to a close, the AAT informed the Court of its plans "to seek leave to file an Amended Complaint, chiefly to substitute the AAT as plaintiff" "and to *make certain corrections with respect to the identities* of the hundreds of transferee-defendants." Adv. Pro. Dkt. No. 87 (emphasis added). The Court granted this request on May 19, 2015, by entry of a stipulation and fourth extension order, which gave the AAT sixty days to serve an Amended Complaint on defendants. Adv. Pro. Dkt. No. 90. On August 13, 2015, the

[3] The Committee was dissolved on December 15, 2011 and prosecution of the action was transferred to the AAT. *See* Adv. Pro. Dkt. No. 643 at 12.

Court further extended the AAT's time to serve the Amended Complaint to September 30, 2015. Adv. Pro. Dkt. No. 152.

Between filing the Original Complaint and the entry of the fourth extension order, Plaintiff continued its efforts to properly identify all Term Lenders. The Committee and, later, the AAT first turned to the party it understood was most likely to have the necessary information – JPMorgan, as administrative agent on the Term Loan. By letter dated August 5, 2009, the Committee asked JPMorgan to provide a complete list of all Term Lenders that received payment under the Term Loan during the 90 days prior to or after June 1, 2009 and their addresses, and to notify all Term Lenders about the commencement of the action. Adv. Pro. Dkt. No. 428-11. By letter dated September 18, 2009, JPMorgan took steps to notify all Term Lenders of the commencement of the action, and continued to update them on the status of the litigation throughout the duration of Phase I. Adv. Pro. Dkt. Nos. 428-12; 428-15; 428-17. On February 20, 2015, JPMorgan provided the AAT a spreadsheet setting forth what it asserted were the Term Lenders' names, addresses, and payoff amounts. Fisher Decl. Ex. I (AAT00056662).

The Committee and the AAT also reviewed documents produced by JPMorgan during the course of Phase I discovery, combed JPMorgan's Answer to the Original Complaint, and researched publicly available sources for information regarding the addresses for entities identified by JPMorgan. Fisher Decl. ¶ 12. This process, which took place over an extended period of time, required efforts by numerous counsel, research support staff, and third party vendors, and cost Plaintiff tens of thousands of dollars. *Id.* That such an extensive effort was required is not surprising, given that there were over 500 Term Lenders.

JPMorgan identified the GIFT Trust as a Term Lender Defendant for the first time in its Answer to the Original Complaint. *See* Adv. Pro. Dkt. No. 12 ¶ 178. It again confirmed by letter on February 20, 2015, that the GIFT Trust was a Term Lender, but identified its address as

767 Fifth Avenue, New York, New York. Fisher Decl. Ex. I. In conducting independent research in preparation for serving the Amended Complaint, the AAT discovered that the correct address to use was One Lincoln Street, 1st Floor, Boston, MA 02111" (the "**Lincoln Street Address**"). Fisher Decl. Ex. H.

On May 20, 2015, the AAT timely filed its Amended Complaint, which correctly named, *inter alia*, the GIFT Trust as a defendant. *See* Adv. Pro. Dkt. No. 91 ¶ 202. The AAT also retained the Garden City Group to serve the Term Lenders, including the GIFT Trust. Declaration of Angela Ferrante ("**Ferrante Decl.**") ¶¶ 2, 3. On May 27, 2015, Garden City served the Summons and Amended Complaint on the GIFT Trust by First Class Mail to, *inter alia*, "GMAM Investment Funds Trust, Attn President, Managing Or General Agent, One Lincoln Street, 1st Floor, Boston, MA 02111." Adv. Pro. Dkt. No. 94 at 22. The GIFT Trust admits that the Lincoln Street Address is the correct address for the GIFT Trust's agent for service of process. *See* Adv. Pro. Dkt. No. 701-1 at 14 (GIFT Trust Memorandum of Law). The GIFT Trust also concedes that it received the AAT's application for a certificate of default that was served at that *same address* on or around April 2016. *See* Adv. Pro. Dkt. No. 701-12 (Connolly Aff. ¶ 3, Ex. A).[4]

[4] The GIFT Trust argues that the form of Summons served was defective because it bears the names of multiple defendants. *See* Adv. Pro. Dkt. 701-1 at 11-12. Yet the GIFT Trust concedes that envelopes received by State Street and Fidelity specifically identified various funds to whom the enclosed process (or Default Pleadings) were directed. *See* Dkt. 701-5 (Brown Aff.) ¶ 9 (Fidelity legal received copies of envelopes containing Summons); Dkt. 701-12 (Connolly Aff.) ¶3 (State Street legal received copy of envelope addressed to the Lincoln Street Address containing Default Pleadings). Further, the GIFT Trust fails to cite to binding authority that supports its position that the form of Summons was deficient, relying instead on cases that are inapposite. *See Coleman v. Bank of N.Y. Mellon*, 969 F. Supp. 2d 736 (N.D. Tex. 2013) (foreclosure case holding that the summons was defective where an attorney and law firm were not named separately but still denying dismissal under 12(b)(4)); *Prado v. City of N.Y.*, No. 12-cv-4239, 2015 WL 5190427 (S.D.N.Y. Sept. 3, 2015) (dismissing a false arrest case brought by counsel who was subsequently suspended from practicing law where the summons was generally addressed to "Police Officer and Other [John Doe] Police Officers").

Following service on the GIFT Trust, the Garden City Group continued to monitor and track mail returned as undeliverable in connection with its service of the Summons and Amended Complaint; the papers served on the GIFT Trust at the Lincoln Street Address were not returned. Ferrante Decl. at ¶¶ 5, 6.

ARGUMENT

I. The AAT's Claims Against The GIFT Trust Are Not Time Barred

The GIFT Trust does not dispute that the Original Complaint was timely filed on July 31, 2009, or that the AAT properly complied with the series of case management orders entered by the Court that permitted the AAT to defer service on the Term Lenders until mid-2015. It argues only that the addition of the GIFT Trust as a defendant in this action was outside the scope of the allowable amendment to the Original Complaint and that the Amended Complaint was not filed within the applicable statute of limitations. These arguments fail, however, because the Court explicitly granted permission to the AAT to correct the identification of defendants like the GIFT Trust who were mistakenly not named in the Original Complaint, and the Amended Complaint relates back to the Original Complaint and is therefore not time barred.[5]

A. The GIFT Trust Was Properly Named In The Amended Complaint

The AAT was not required to seek leave of court to amend its Original Complaint (which leave was, in any event, granted) or the GIFT Trust's consent to amend, because no defendant

[5] Statute of limitations is properly raised as an affirmative defense, and is not typically asserted in a motion to dismiss. *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228, 287 (S.D.N.Y. 2009). However, "[w]here the dates in a complaint show that an action is barred by a statute of limitations, a defendant may raise the affirmative defense in a pre-answer motion to dismiss" under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Ghartey v. St. John's Queens Hosp.*, 869 F.2d 160, 162 (2d Cir. 1989) (citations omitted). "Such a motion is well-grounded if it appears on the face of the complaint that the cause of action has not been brought within the statute of limitations." *Yearwood v. N.Y. Presbyterian Hosp.*, No. 12 CIV. 6985 (PKC), 2013 WL 4713793, at *4 (S.D.N.Y. Aug. 20, 2013) (citations omitted). That is not the case here.

other than JPMorgan responded to the Original Complaint. *See* Fed. Rule Civ. P. 15(a)(1). Additionally, it is plain from the record that the Court granted the AAT leave to amend the complaint to correct misnamed Term Lenders, which includes the GIFT Trust. The GIFT Trust concedes that, in fact, it held an interest in the Term Loan during the relevant period. Adv. Pro. Dkt. No. 701-1 at 1, n.1, 2.

As it relates to the GIFT Trust, the Amended Complaint simply corrected the name of the defendant party, which was incorrectly identified in the Original Complaint because of mistaken information provided to the AAT by Debtor's counsel. The AAT was able to make this correction by conducting extensive diligence, including reviewing information provided by JPMorgan that was not provided until discovery in Phase I of the litigation. *See* Fisher Decl. ¶¶10, 14. Therefore, the AAT exercised all required diligence, despite the GIFT Trust's unsupported claim that it did not.

B. The Amended Complaint Relates Back To The Original Complaint

Claims asserted in an amended complaint will not be time barred, even if the amended complaint is filed outside the allowable time period, if the amended complaint "relates back" to a timely filed complaint. Under Fed. Rule Civ. P. 15(c)(1), as incorporated by Fed. Rule Bankr. P. 7015, an amendment to a complaint relates back to the original filing if:

> (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out-or attempted to be set out-in the original pleading; or
>
> (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> (i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

The claims against the GIFT Trust here are timely because the Amended Complaint relates back to the Original Complaint. The GIFT Trust has not, and cannot, dispute that the Original and Amended Complaints arise out of the same transaction, conduct, or occurrence. The Original Complaint and the Amended Complaint both sought to identify "all lenders under the Term Loan Agreement or other entities who acquired an interest in the loan" and recover funds that were improperly paid to the Term Lenders. Adv. Pro. Dkt. No. 1 ¶ 8 (Original Compl.); Adv. Pro. Dkt. No. 91 ¶ 9 (Amended Compl.). The substance of the two complaints, including the nature of the allegations "to pursue claims challenging, *inter alia*, the security interest of lenders" to the Term Loan and all four claims for relief, remained unchanged. *Compare* Adv. Pro. Dkt. No. 1 ¶¶ 7, 438-64 *with* Adv. Pro. Dkt. No. 91 ¶¶ 8, 586-618.

Additionally, the AAT satisfied Rule 15(c)(1)(C) because the GIFT Trust has articulated no prejudice in defending the claims against it on the merits, and the GIFT Trust knew or should have known that the action would be brought against it.[6] The GIFT Trust does not dispute its participation in the Term Loan and it is inconceivable that, as a General Motors-related pension fund that received more than $19 million in transfers, it was not aware of the developments of this adversary proceeding. The Original Complaint was publicly filed, and was available on the Motors Liquidation Company website.[7] *See Cordell v. Unisys Corp.*, 299 F.R.D. 411, 412 (W.D.N.Y. 2014) (extension of time to serve warranted where statute of limitations had expired,

[6] At a minimum, there are issues of fact as to what the GIFT Trust knew or should have known about this action, rendering the Motion premature. *See In re Global Crossing, Ltd.*, 385 B.R. 52, 85 (Bankr. S.D.N.Y. 2008) (finding factual issues of whether additional defendants had requisite notice prior to expiration of original 120 day period for service with no extension "cannot be determined on a motion to dismiss").

[7] *See* http://www.motorsliquidationdocket.com.

defendant had notice of claims and complaint electronically filed). JPMorgan provided the Term Lenders notice of the filing of the Original Complaint and subsequent developments. *See* Adv. Pro. Dkt. No. 428-12 (Sept. 18, 2009 Letter). As the Court has noted before, JPMorgan has contended that the Term Lenders were kept apprised of developments. Adv. Pro. Dkt. No. 643 at 35; *see* Adv. Pro. Dkt. No. 393 ¶ 66 (JPMorgan "made available to the Term Lenders extensive information regarding the adversary proceeding, in addition to the extensive information that was publicly available to them."); Adv. Pro. Dkt. No. 428-12 (Sept. 18, 2009 Letter); Adv. Pro. Dkt. No. 428-18 (June 1, 2015 Letter). And the GIFT Trust's silence on its knowledge of the adversary proceeding prior to the AAT filing the Amended Complaint is telling.

Rule 15(c)(1) of the Federal Rules of Civil Procedure is intended to prevent defendants like the GIFT Trust "from taking advantage of otherwise inconsequential pleading errors to sustain a limitations defense." *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 19 (2d Cir. 1997). In *Krupski v. Costa Crociere S.p.A.,* 560 U.S. 538 (2010), the United States Supreme Court made clear that it was "error to conflate knowledge of a party's existence with the absence of mistake" and that an overly restrictive reading of Rule 15 "would be a windfall for a prospective defendant who understood, or should have understood, that he escaped suit during the limitations period only because the plaintiff misunderstood a crucial fact about his identity." *Id.* at 550. Therefore, the focus must be on whether GIFT Trust "knew or should have known that, absent some mistake, the action would have been brought against them." *Id.* at 548-50. To dismiss the GIFT Trust under the circumstances here would be to provide it with precisely the kind of unfair windfall to which it is not entitled under *Krupski*.

II. Service On The GIFT Trust Was Proper

The AAT properly served the GIFT Trust and is entitled to a presumption of effective service. The GIFT Trust cannot and has not overcome this presumption.

A. The Mailing Here Constituted Effective Service

Under Fed. R. Bankr. P. 7004(b)(3), service may be made within the United States by mailing a copy of the summons and complaint "to the attention of an officer, a managing or general agent[.]" Courts uniformly presume that an addressee receives a mailed item when it has been properly addressed, stamped, and deposited in the postal system. *See In re R.H. Macy Co., Inc.*, 161 B.R. 355, 359 (Bankr. S.D.N.Y. 1993) (citing *Hagner v. United States*, 285 U.S. 427, 430 (1932)) ("The rule is well settled that proof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed.").

On May 27, 2015, the Summons and Amended Complaint were sent to the GIFT Trust by First Class Mail to "GMAM Investment Funds Trust, Attn President, Managing or General Agent, One Lincoln Street, 1st Floor, Boston, MA 02111." *See* Gargan Aff. Dkt. 94 at 22. The envelope clearly identified the Term Lenders to which the service was related. The GIFT Trust concedes that the Lincoln Street Address used was the correct address for its service agent. *See* Adv. Pro. Dkt. No. 701-10 (Glass Aff. ¶ 5). The GIFT Trust also concedes that it received the AAT's application for a certificate of default at that *same address* on or around April 2016. *See* Adv. Pro. Dkt. No. 701-12 (Connolly Aff. ¶3, Ex. A). The AAT's mailing to the Lincoln Street Address was not returned as undeliverable by the U.S. Postal Service, a relevant factor in evaluating whether the presumption of receipt should be invoked. *In re Torres*, 15 B.R. 794, 797 (Bankr. E.D.N.Y. 1981) (presumption buttressed where notice has not been returned to sender); *see also* Ferrante Decl. ¶ 6.

Further, the AAT's process server used the same procedures for service as were used with other Term Lender Defendants. *See e.g.*, Adv. Pro. Dkt. Nos. 95, 117, 154, 163, 164; Ferrante Decl. ¶ 7. Numerous other Term Lender Defendants who were served by First Class

Mail from the process server on May 27, 2015 entered appearances by June 25, 2015, as required, indicating no inherent or systemic problem with the method of service. *See*, *e.g.*, Adv. Pro. Dkt. No. 98 (Alticor Inc.); Adv. Pro. Dkt. No. 104 (various Delaware SEI funds); Adv. Pro. Dkt. No. 101 (Indiana University). This provides "additional evidence that the notices were, in fact, properly mailed" and "the presumption of receipt is applicable." *In re Robinson*, 228 B.R. 75, 81 (Bankr. E.D.N.Y. 1998); *see Akey v. Clinton Cnty.*, 375 F.3d 231, 235 (2d Cir. 2004) (finding where party provided evidence that notice was "properly addressed and mailed in accordance with regular office procedures, it is entitled to a presumption that the notice[] [was] received.").

B. The GIFT Trust Cannot Rebut The Presumption of Receipt

While the presumption of receipt is rebuttable, "it is a very strong presumption and can only be rebutted by specific facts and not by invoking another presumption and not by a mere affidavit to the contrary." *In re Dana Corp.*, No. 06-10354 (BRL), 2007 WL 1577763, at *4 (Bankr. S.D.N.Y. May 30, 2007). "If a party were permitted to defeat the presumption of receipt of notice resulting from the certificate of mailing by a simple affidavit to the contrary, the scheme of deadlines and bar dates under the Bankruptcy Code would become unraveled." *SIPC v. Bernard L. Madoff Inv. Sec. LLC (In re Fred A. Daibes Madoff Secs. Trust)*, No. ADV 08-01789 (BRL), 2011 WL 6010292, at *3 (Bankr. S.D.N.Y. Dec. 1, 2011) (citation omitted).

The GIFT Trust has not, and cannot, rebut the presumption of receipt here. It must offer "some proof that the regular office procedure was not followed or was carelessly executed so the presumption that notice was mailed becomes unreasonable." *Leon v. Murphy,* 988 F.2d 303, 309 (2d Cir. 1993); *BASF Corp. v. Norfolk S. Ry. Co.*, No. 04-cv-9662, 2008 WL 678557 at *5 (S.D.N.Y. March 10, 2008) (affidavits merely detailing process of receiving mail held

insufficient to rebut presumption). The GIFT Trust offers no proof that there was any breach in procedure or that the AAT's process server was careless in effectuating service.

The Connolly Affidavit, the only relevant submission by the GIFT Trust to rebut the presumption of proper service to the Lincoln Street Address, fails to do so. Instead, it merely describes a general mail routing process used by the GIFT Trust's agent, and asserts that mailed packages would have been forwarded to Mr. Connolly's attention and would have been logged "at or around the time they are received." Mr. Connolly asserts that he reviewed the log and there is no record relating to the GIFT Trust. Adv. Pro. Dkt. No. 701-12 at ¶¶ 2, 4. However, Mr. Connolly does not even indicate if he had *any* involvement or oversight in May 2015 when service was effectuated, nor does he establish that he had personal knowledge of the handling of incoming mail. Neither does he indicate or suggest that a search was conducted for the mailing at issue.

Mr. Connolly's statements are the exact type of conclusory denials that courts have routinely rejected, and should be rejected here. *See, e.g., In re Robinson*, 228 B.R. 75, 82, 83 (Bankr. E.D.N.Y. 1998) (affidavit merely established notice did not reach proper file or computer log insufficient); *In re Williams*, 185 B.R. 598, 600 (B.A.P. 9th Cir. 1995); *SIPC v. Bernard L. Madoff Inv. Sec. LLC (In re Fred A. Daibes Madoff Secs. Trust)*, No. ADV 08-01789 (BRL), 2011 WL 6010292, at *3, *4 (Bankr. S.D.N.Y. Dec. 1, 2011) (holding defendant failed to rebut the presumption of receipt, even where defendant's affidavit described his standard procedures for processing mail, claimed that neither he nor any agent received service, and claimed that his search of files was unsuccessful).

III. If The Court Concludes That Service Was Not Effectuated, Plaintiff Should Be Granted Leave To Re-Serve

If the Court finds that service on the GIFT Trust at the Lincoln Street Address was insufficient, which it should not, the AAT should be granted leave to re-serve the GIFT Trust by extending the AAT's time for service under Rule 4(m). The GIFT Trust's proposed remedy of dismissal would be unduly prejudicial and is unwarranted here.

A. An Extension Of The Time To Serve Would be Appropriate

Rule 4(m) provides that time to effect service must be extended if the plaintiff can show "good cause for the failure" to timely effect service of process. Fed. R. Civ. P. 4(m). In determining good cause, courts weigh the plaintiff's reasonable efforts and diligence against the prejudice to the defendant resulting from the delay. *DeLuca v. AccessIT Grp., Inc.*, 695 F. Supp. 2d 54, 66 (S.D.N.Y. 2010). Here, the AAT's good faith belief that it had properly served the GIFT Trust based on information provided by JPMorgan and extensive research constitutes good cause for any failure to serve.

Even if it did not, the Court has the discretion to extend the time to serve even in the absence of good cause. *See Zapata v. City of N.Y.*, 502 F.3d 192, 196-97 (2d Cir. 2007), *cert. denied,* 552 U.S. 1243 (2008); *Mejia v. Castle Hotel, Inc.*, 164 F.R.D. 343, 345 (S.D.N.Y. 1996). Four factors inform a court's decision to extend the time to serve in the absence of good cause: "(1) whether the statute of limitations would bar a re-filed action, (2) whether the defendant had attempted to conceal the defect in service, (3) whether the defendant would be prejudiced by excusing the plaintiff from the time constraints of the provision, and (4) whether the defendant had actual notice of the claims asserted in the complaint." *Feingold v. Hankin*, 269 F. Supp. 2d 268, 277 (S.D.N.Y. 2003). All of the factors do not have to point in the same direction. *See Zapata*, 502 F.3d at 196-97.

The requirements for discretionary extension are satisfied here. *First*, the AAT will suffer extreme prejudice if the claims against the GIFT Trust are dismissed because it will be unable to refile its now time-barred claims. *See* Fed. R. Civ. P. 4 Advisory Committee Notes; *In re Lenox Healthcare, Inc.*, 319 B.R. 819, 823 (Bankr. D. Del. 2005) (exercising discretion where statute of limitations would have otherwise barred Trustee from recovering preference transfer). *Second*, the GIFT Trust's conclusory argument that it has suffered prejudice because it was uninvolved in Phase I of the litigation, Adv. Pro. Dkt. No. 701-1 at 12, is misplaced. This Court has already rejected this argument when advanced by other Term Lenders. *See* Adv. Pro. Dkt. No. 643 at 35. Further, if it so chooses, the GIFT Trust may participate in discovery being conducted by other Term Lenders concerning the Phase I issues. Any contention that allowing service after the statute of limitations has expired, by itself, qualifies as prejudice, also fails. *See AIG Managed Mkt. Neutral Fund v. Askin Capital Mgmt., L.P.*, 197 F.R.D. 104, 111 (S.D.N.Y. 2000) (rejecting claim of prejudice for having to defend a time-barred $40 million claim even where discovery had closed). *Third*, for the reasons discussed in section I.B. above, the GIFT Trust knew or should have known about the litigation.[8]

B. Dismissal Is Not An Appropriate Remedy

Even if service on the GIFT Trust was not proper, dismissal under such circumstances would run contrary to public policy, prejudice the AAT, and is otherwise unwarranted here.

Bankruptcy Courts are "reluctant to read excessive strictness into service provisions of Bankruptcy Rules, if service was reasonably calculated to reach defendant." *In re Ted A. Petras Furs, Inc.*, 172 B.R. 170, 177 (Bankr. E.D.N.Y. 1994), *subsequently dismissed*, 100 F.3d 943 (2d Cir. 1996). Even where a defendant provides a sworn affidavit contesting service, dismissal

[8] The second factor – whether defendant attempted to conceal a defect in service – is not relevant here.

under Rule 12(b)(5) "is not mandatory." *Stone v. Ranbaxy Pharm., Inc.,* No. 10-CV-08816 (JFM), 2011 WL 2462654, at *6 (S.D.N.Y. June 16, 2011) (plaintiff failed to properly serve defendant, but "in the interest of judicial efficiency" court granted leave to re-serve rather than dismissal). Indeed, the Second Circuit "has expressed on numerous occasions its preference that litigation disputes be resolved on the merits" and has recognized dismissal as a "harsh remedy to be utilized only in extreme situations. *Cody v. Mello*, 59 F.3d 13, 15 (2d Cir. 1995) (collecting cases); *Grammenos v. Lemos*, 457 F.2d 1067, 1071 (2d Cir. 1972) (dismissal may be proper if "there is simply no reasonably conceivable means of acquiring jurisdiction" over defendant).

The GIFT Trust urges the Court to disregard the strong public policy favoring resolution of claims on the merits. However, the cases cited by the GIFT Trust in its support are inapposite. For example, the GIFT Trust erroneously claims that *E. Refractories Co., Inc. v. Forty Eight Insulations, Inc.*, 187 F.R.D. 503, 506 (S.D.N.Y. 1999) is "clear Second Circuit precedent" for the requirement that the expiration of a limitations period does not require the Court to exercise discretion in favor of plaintiff. First, *E. Refractories* is a district court case. Additionally, *Frasca v. United States,* 921 F.2d 450, 453 (2d Cir. 1990), upon which *E Refractories* relied, did not address an extension of time for service. Rather, it addressed the predecessor to Rule 4(m) – Rule 4(j) – which allowed extension *only* for good cause.[9] *E. Refractories* is also factually distinguishable, as it involved a sixteen year delay in bringing a $676,000 asbestos indemnification claim against a single defendant that no longer existed as a corporate entity, and dismissal was based in large part on the "significant difficulty locating the most crucial documents and witnesses" that were likely "irretrievably lost." *E. Refractories Co., Inc.*, 187 F.R.D. at 506. Here, the GIFT Trust concedes its own continued corporate existence, *see* Adv.

[9] *Santos v. State Farm Fire & Cas. Co.*, 902 F.2d 1092, 1094 (2d Cir. 1990), also cited by the GIFT Trust and *E. Refractories*, is likewise a Rule 4(j) case.

Pro. Dkt. No. 701-1 at 3, and it has not specified any inability to locate documents, witnesses, or otherwise mount its defense.[10]

The GIFT Trust cannot overcome the fact that "a primary purpose of the Federal Rules of Civil Procedure is to promote the ends of justice by granting litigants their day in court." *Macaluso v. N.Y. State Dep't of Envtl. Conservation*, 115 F.R.D. 16, 19 (E.D.N.Y. 1986) (*citing Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966)). Notwithstanding any purported deficiencies in service, the dispute regarding transfers to the GIFT Trust under the Term Loan – totaling more than $19 million – should be resolved on the merits.

CONCLUSION

For the foregoing reasons, the AAT respectfully requests that the Court enter an Order denying the Motion in its entirety and granting such other and further relief as may be necessary.

Dated: October 19, 2016
New York, New York

Respectfully submitted,

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[10] *Osrecovery, Inc. v. One Group Int'l, Inc.*, 234 F.R.D. 59 (S.D.N.Y. 2005), is also not relevant. There, plaintiff never even attempted to serve a summons on defendants, and merely served the complaint and an unsigned order to show cause. *Id.*