Objection Deadline: January 31, 2017
Reply Deadline: February 10, 2017 at 4:00 p.m.
Hearing Date and Time: February 14, 2017 at 10:00 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
IMMIGON'S MOTION TO DISMISS THE AMENDED COMPLAINT

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

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 submitted by defendant immigon portfolioabbau ag (**"Immigon"**), formerly known as Österreichische Volksbanken Aktiengesellschaft (**"OEVAG"**).

PRELIMINARY STATEMENT

This Court has personal jurisdiction over Immigon in this action. Immigon's predecessor, OEVAG, consented to jurisdiction in New York when it became a party to the Term Loan Agreement with General Motors Corporation (**"GM"**). The Term Loan Agreement[1] is governed by New York law and selects the courts of New York as the forum for all disputes arising out of or relating to the Term Loan Agreement. Further, the DIP Order authorizing the provisional final payment to the lenders of record under the Term Loan Agreement, including OEVAG, confirmed that each lender accepting payment would be subject to jurisdiction in the Bankruptcy Court with respect to this action, brought by the AAT as successor to the creditors' committee's right to bring these claims on behalf of the GM bankruptcy estate. OEVAG reviewed the DIP Order prior to receiving its provisional final payment and accepted the payment on notice of the DIP Order's terms.

Even without OEVAG's consent to personal jurisdiction in New York in connection with the Term Loan Agreement, and its acceptance of this Court's jurisdiction in connection with receiving a payment from the GM bankruptcy estate, this Court would still have specific personal jurisdiction over Immigon. OEVAG purchased its Term Loan interests from JPMorgan's secondary loan trading desk in New York. It communicated regularly with

[1] Terms not defined in this Preliminary Statement are defined in later sections of this brief.

individuals in the United States regarding its interests in the Term Loan. And it chose to use a correspondent account in New York to receive transfers of payment under the Term Loan, including the very payment that the AAT seeks to avoid in this case. In short, by participating in the Term Loan, OEVAG has purposefully availed itself of the privilege of doing business in this forum as well as the benefits of the United States banking system. It has no basis to contest this Court's exercise of jurisdiction over it in connection with those very transactions.

The cases on which Immigon relies are inapposite, as they involve general, not specific, jurisdiction or involve defendants that, unlike Immigon, did not agree to select New York as a forum for disputes and did not engage in transactions centered in the United States. In cases with facts analogous to this case, courts have consistently exercised personal jurisdiction over the defendants.

Moreover, it is fair and reasonable to exercise jurisdiction here, and thus consistent with due process. The AAT has a strong interest in obtaining relief in this forum, and the U.S. Bankruptcy Court for the Southern District of New York has a strong interest in adjudicating claims arising under the Bankruptcy Code. In contrast, any burden on Immigon in having to defend itself in a foreign legal system and foreign language is mitigated by the conveniences of modern communication and use of U.S. counsel. Having purchased its interest in the Term Loan in New York and received payment in New York from a debtor in a bankruptcy proceeding before this Court, OEVAG cannot credibly argue that it cannot defend itself against this action in this Court.

In the alternative, if this Court were to find that the AAT has not made a prima facie showing of this Court's jurisdiction over Immigon, then the AAT should be authorized to take discovery related to the issue of jurisdiction.

Finally, Immigon has been timely served. Austria requires service by letter rogatory – a time-consuming process. Alternate service is strongly discouraged and invalid under Austrian law. The AAT's first attempt to serve Immigon through the letter rogatory process was rejected by the Austrian authorities through no fault of the AAT; and so the AAT had to make a second attempt, which was successful. Immigon provides no basis for this Court to revisit its Order granting permission for that second try, and service was made within four months of that Order, a reasonable period for international service. Further, Immigon has not been prejudiced, as it had actual notice of this suit when it was first filed.

For these reasons, as explained below, Immigon's motion to dismiss is without merit and should be denied.

BACKGROUND

The AAT presumes the Court's familiarity with the general facts of this case.[2] A brief description of the particular jurisdictional and service facts relevant to Immigon's motion is set forth below.

A. The Term Loan

On November 29, 2006, GM obtained a $1.5 billion seven-year term loan (the **"Term Loan"**) evidenced by a note pursuant to the Term Loan Agreement. The Term Loan was secured by a Collateral Agreement, in which GM and Saturn granted to JPMorgan Chase Bank, N.A. ("**JPMorgan**" or "**JPMC**") a first priority security interest in certain equipment and fixtures in its U.S. manufacturing facilities. The Term Loan was a syndicated loan, through which several large financial institutions (the **"Bank Lenders"**), including JPMorgan, committed up front to provide funding, and then had the right to sell interests on the secondary

[2] A full discussion of the procedural history is set forth in ECF No. 643 (Opinion and Order Denying Motions to Dismiss dated June 30, 2016).

market, typically through assignments, to qualified investors. ECF No. 428-2 (Term Loan Agreement) at § 10.06. OEVAG is a qualified investor in the Term Loan. The AAT has succeeded to the rights of GM's official committee of unsecured creditors to bring this action on behalf of the GM bankruptcy estate, seeking the return of avoidable payments made under the Term Loan Agreement. ECF No. 428-7 (DIP Order) ¶ 19(d).

1. Immigon's Predecessor OEVAG Is A Lender Of Record Under The Term Loan Agreement

In September 2007, OEVAG made purchases in two separate trades of $5 million each on the secondary market. Def. Br. at 4. OEVAG's records show that the two transactions were arranged by an employee of OEVAG in Vienna, Austria and that the counterparty was JPMC. *Id.* Records from Immigon and JPMC show that these purchases were formal assignments, executed under the standard LSTA Par/Near Par trade confirmations between OEVAG and JPMC employees in New York through Bloomberg, email and fax. *See* Declaration of Eric B. Fisher (**"Fisher Decl."**), Ex. A (IMMIGON 000001). JPMC's Secondary Loan Trading desk in New York verified that OEVAG was on JPMC's "approved assignee list." *Id.* Ex. B (JPMCB-5-000019693); Ex. C (JPMCB-5-00019329).

Assignments are governed by §10.06 of the Term Loan Agreement, which required the parties to "execute and deliver to [JPMC] an Assignment and Acceptance" agreement in the form annexed as Exhibit A to the Term Loan Agreement. ECF No. 428-2 (Term Loan Agreement) at § 10.06(b)(ii)(B) & Ex. A. Form of Assignment and Acceptance (**"Assignment Agreement"**). Upon the execution and recording of the Assignment Agreement, the assignee (here, OEVAG), became a party to the Term Loan Agreement and "to the extent of the interest assigned by such Assignment . . . [had] the rights and obligations of a Lender under this Agreement." *Id*. at § 10.06(b)(iii) & Ex. A Assignment Agreement §§ 3(v); 6(i).

Upon execution of each Assignment Agreement, JPMC as administrative agent, recorded each Assignment and updated a register of Lenders and outstanding principal amounts owing to each Lender. The entries in the Register are prima facie evidence of the existence and amounts of the obligations of the Borrower, and the Borrower, the Agent and the Lenders may treat each Person whose name is recorded in the Register as a Lender. *Id.* § 10.06(b)(iv). JPMC has confirmed that OEVAG was a lender of record on June 30, 2009 in the loan made under the Term Loan Agreement, ECF No. 12 ¶ 270 (JPMC Answer), and that it received the specified payoff amount. ECF No. 761-9, at AAT00056667 (letter from JPMC to AAT dated Feb. 20, 2015, providing a register of lender addresses and payoff amounts, including OEVAG).

2. Immigon's Predecessor OEVAG Consented To New York Jurisdiction In The Term Loan Agreement

Each Loan Party under the Term Loan Agreement, including assignees such as OEVAG:

> irrevocably and unconditionally submits . . . to the nonexclusive jurisdiction of any New York State court or Federal court of the United States of America sitting in New York City . . . in any action or proceeding arising out of or relating to this Agreement. . . ." [Each Loan Party also] "agrees that all claims in respect of any such action or proceeding may be heard and determined in such New York State court or, to the extent permitted by law, in such Federal court.

Id. § 10.11(a). And each Loan Party:

> irrevocably and unconditionally waives . . . any objection which it may now or hereafter have to the laying of venue of any suit, action or proceeding arising out of or relating to this Agreement in any New York State or Federal Court" [and otherwise waives] "to the fullest extent permitted by law, the defense of an inconvenient forum to the maintenance of such action or proceeding in any such court.

Id. § 10.11(b). In purchasing its $10 million interest as a Lender under the Term Loan Agreement, OEVAG thus specifically agreed to personal jurisdiction in New York concerning any dispute relating to that interest, including the instant dispute with the AAT.

3. Immigon's Predecessor OEVAG Entered Into A Transaction In New York Governed By New York Law

By virtue of its $10 million interest as a Lender under the Term Loan Agreement, OEVAG has enjoyed the benefits of New York's financial system and the protections of New York law since 2007. OEVAG purchased its interests in the Term Loan Agreement from JPMC, a New York-based lender, chose Bank of New York, located in this District, for its correspondent account, and received the payment under the Term Loan Agreement at issue here, in that account. *See* ECF No. 823-2 (Süssenbach Decl.) ¶ 29; Def. Br. at 4-5. The trade confirmations, the Term Loan Agreement and the Assignment Agreement are governed and construed under New York law. Fisher Decl. Ex. D at § 22 (LSTA Standard Terms as of Dec. 1, 2006); ECF No. 428-2 (Term Loan Agreement) § 10.10; Assignment Agreement at § 7.

Additionally, OEVAG had contacts with the United States and New York in connection with the Term Loan. OEVAG periodically accessed IntraLinks – JPMC's platform for distributing formal notifications to the Lenders. Document Access Reports tracked each Lender's use of IntraLinks and access to specific postings on the system. For example, on February 19, 2009, IntraLinks sent an alert to OEVAG employee Silvia Hauser, who subsequently logged in to the private side area and viewed various collateral valuation certificates. Fisher Decl. Ex. E (JPMCB-3-00000013); Ex. F (JPMCB-3-00000015). On February 24, 2009, René Eibensteiner, an OEVAG credit analyst, emailed JPMC's attorney in New York, attaching OEVAG's consent to an amendment of the Term Loan. Fisher Decl. Ex. G (JPMCB-MLB-0004199).

4. Immigon's Predecessor OEVAG Reviewed The DIP Order Before Receiving Payment

Shortly after the GM bankruptcy petition was filed, OEVAG employees made inquiries to JPMC. Ms. Hauser of OEVAG viewed the Q1 2009 collateral certificate on June 2, 2009. *See* Fisher Decl. Ex. H (JPMCB-3-00001190). Mr. Eibensteiner of OEVAG emailed Andrew Laughlin, a JPMorgan associate in New York on June 2, 2009, requesting "a brief update" and a "short phone call with us." Mr. Laughlin responded by referencing a June 1, 2009 IntraLinks posting to all of the Term Lenders, including OEVAG, referencing the petition and highlighting key filings that were uploaded to IntraLinks and otherwise "filed publicly with the bankruptcy court." These included a list of first-day motions, the motion to approve adequate protection for the Term Lenders, and the DIP loan motion. Mr. Laughlin stressed the DIP loan was "of critical importance to the Term Loan Lenders," as "one business day after the entry of the Final Order approving the DIP loan . . . the proceeds will be used to, among other things, pay in full in cash all obligations under the Term Loan Facility." Fisher Decl. Ex. I (JPMCB-2-00039617).

OEVAG argues that it is "virtually impossible" that it was notified of the DIP Order given the compressed timeframe. Def. Br. at 10. But the records show that Ms. Hauser viewed the DIP Order. On June 25, 2009, JPMorgan posted a lender update memo to IntraLinks notifying Term Lenders that the Court had approved the DIP Order and payment to each of them, including OEVAG, would be made on June 30, 2009. The memo also stated that the Creditors Committee "received until July 31, 2009 to investigate and challenge the perfection of the liens securing the Term Loan" and that "***subject to the rights reserved by the Committee regarding the investigation of liens***, upon payment of the secured facilities, the Lenders receive a release of all claims that the bankruptcy estates have or might have against the Lenders." ECF No. 428-8 (JPMC Memo dated June 25, 2009) (emphasis added). JPMC also posted to IntraLinks the most

recent versions of the DIP and Adequate Protection Orders and stated it would post the final versions upon entry by the court. *Id.* The Document Access Report for this posting indicates Ms. Hauser received an alert on June 25, 2009 and viewed this memo on June 26, 2009 at 4:19 a.m. (11:19 a.m. Austria time). Fisher Decl. Ex. J (JPMCB-3-00000478). The Document Access Report for the final DIP Order likewise shows Ms. Hauser viewed that Order at this same time. Fisher Decl. Ex. K (JPMCB-3-00000476). OEVAG was therefore on notice as of June 26, 2009 that, pursuant to ¶ 19(d) of the Final DIP Order, "[a]ny Prepetition Senior Facilities Secured Party accepting Payment shall submit to the jurisdiction of the Bankruptcy Court[.]"[3]

Following entry of the DIP Order, on or around June 30, 2009, OEVAG received $9,893,347.29, which was paid by JPMC into OEVAG's "account in New York maintained at the Bank of New York Mellon." Def. Br. at 5; ECF No. 823-2 (Süssenbach Decl.) ¶ 29. OEVAG made no objection and accepted the payment.

5. Immigon's Predecessor OEVAG Monitored The Term Loan In New York After Payoff And Was Aware Of The Complaint In This Action

OEVAG continued to have contacts with U.S., including in New York, to monitor these proceedings following the conditional payoff of its Term Loan interest. For example, between July 1 and 6, 2009, OEVAG sent several emails to a U.S.-based JPMC employee regarding the calculation of break funding in connection with the payoff of the Term Loan. Fisher Decl. Ex. L (JPMCB-5-00060178). Another IntraLinks list shows Ms. Hauser accessed the system on July 23, 2009 at 4:20 a.m. (11:20 a.m. Austria time) – the same day JPMC held a conference call with term lenders. Fisher Decl. Ex. M (JPMCB-5-00049258); ECF No. 428-10.

[3] OEVAG is generally familiar with bankruptcy proceedings in this district, as it had previously engaged counsel to file an objection on its behalf to a proposed order establishing procedures for the settlement or assumption and assignment of certain derivative contracts with Lehman Brothers. OEVAG also purchased certain claims in those proceedings. *See In re Lehman Brothers Holdings Inc., et al.*, No. 08-13555 (JMP) (Bankr. S.D.N.Y.), ECF Nos. 1906 (objection); 13162, 22583 (notices of claims transfer).

The IntraLinks logs also show OEVAG received notice of the initial complaint.[4] On September 17, 2009, JPMC posted a memo to the Term Lenders about the commencement of this adversary proceeding, which "seeks, in part, to avoid and recover approximately $1.4 billion in post-petition payments made to lenders in connection with the Term Loan Agreement[.]" ECF No. 428-12 (JPMCB-3-00000444). The Document Access Report shows Ms. Hauser received an alert on September 17, 2009 and viewed the memo on September 21, 2009 at 2:26 a.m. (8:26 a.m. Austria time). Fisher Decl. Ex. N (JPMCB-3-00000445).

B. Service on OEVAG

The AAT took reasonable steps to serve OEVAG, as detailed below.

1. The First Letter Rogatory Request

Following the close of Phase 1 of this litigation, the AAT worked to identify all parties to the Term Loan Agreement to prepare for service of an amended complaint. Counsel for the AAT contacted Legal Language Services, Inc. (**"LLS")**, a vendor providing international translation and service of process, on May 15, 2015. Shreefer Decl. ¶ 4.[5] On May 19, 2015, the AAT engaged LLS to translate the Amended Complaint and effect service upon defendant OEVAG in Vienna, Austria. *Id.* On May 20, 2015, the AAT filed the Amended Complaint. ECF No. 91. The AAT promptly sent the Amended Complaint to LLS for expedited translation. Shreefer Decl. ¶ 5. On May 26, 2015, the Clerk of this Court issued a Summons and Notice of Pretrial Conference directed to all defendants. ECF No. 92. The Summons portion provided defendants were "required to submit a motion or answer to the complaint which is attached . . . on a date to be determined by the U.S. Bankruptcy Court as set forth in paragraph 3 of the

[4] OEVAG is named in the Original Complaint by its abbreviation. ECF No. 1 ¶ 270. It concedes this is the abbreviation of Österreichische Volksbanken-Atkiengesellschaft. *See* ECF No. 823-2 (Süssenbach Decl.) ¶ 7.

[5] A copy of the Shreefer Declaration is annexed to the Fisher Declaration as Exhibit O.

Stipulation and Order, entered on May 19, 2015, and provided herewith." *Id.* The filing separately notified all parties that a pretrial conference would be held on August 13, 2015. *Id.* The AAT had no reason to believe at that time that the inclusion of a conference date then three months out would render service by letters rogatory ineffective. Shreefer Decl. ¶ 6.

As soon as it was issued, the AAT forwarded the Summons and Stipulation and Order to LLS. Shreefer Decl. ¶ 5. The next day, on May 27, 2015, the AAT provided OEVAG's address to LLS, and provided its FedEx information for faster shipping of its application to the State Department. At this point, the AAT had provided LLS with all the information necessary to serve OEVAG, and it waited for the vendor to translate the complaint and draft application papers for a letter rogatory. On June 8, 2015, LLS provided a draft application for review. Shreefer Decl. ¶ 8. After a week of internal review, on June 15, 2015, the AAT filed its first request for issuance of a letter rogatory (the **"First Request"**). ECF No. 97. Any objections to the First Request were due by June 25, 2015. On June 29, 2015, Judge Gerber granted the application. ECF No. 107.

On July 24, 2015, the letter rogatory was submitted by LLS to the U.S. State Department. ECF No. 599 (Fisher Decl. at ¶ 3); Shreefer Decl. ¶ 10. LLS continued to monitor the status, but as of July 24, 2015 service through this formal channel was out of the AAT's control. Shreefer Decl. ¶ 10. Due to an unusual and significant backlog of approximately six months at the U.S. State Department, the letter rogatory was not even transmitted to the Austrian Ministry of Foreign Affairs until November 18, 2015. *Id.* ¶ 11. This delay was not known to the AAT. The Austrian Ministry then rejected the application on December 11, 2015, because the summons referenced a stale pretrial conference date. *Id.* It is unclear when, specifically, the Austrian Ministry transmitted its rejection back to the U.S. State Department. But the AAT did not learn

about the rejection until January 15, 2016. To attempt service again, the AAT had to submit a new $2,275 filing fee to the State Department, execute another services agreement with LLS, and ask the Court to issue a new summons and letter rogatory.

2. The Second Letter Rogatory Request

After further consultation, the AAT received a bid from LLS on February 19, 2016 for preparation, translation and service of a second application. Shreefer Decl. ¶ 12. The AAT also notified this Court on March 15, 2016, that service had been rejected by the Austrian Ministry and the AAT was obtaining and serving a summons with a revised hearing date. ECF No. 434 at 3. On March 25, 2016, the AAT requested that a custom summons be issued to address the Austrian Ministry's concerns. The custom summons provided an answer would be due within 30 days of service and that a conference would be held at a date and time to be determined. *See* ECF No. 471 at 16. On April 1, 2016, the Clerk issued the Fourth Summons. On May 11, 2016, the AAT filed its formal request for issuance of a second letter rogatory (the **"Second Request"**), ECF Nos. 597; 599, which this Court granted on May 26, 2016. ECF No. 620-1. On May 31, 2016, the AAT submitted the second letter to the Court for its signature and seal, Fisher Decl., Ex. P; it received the stamped original back from the Court on June 8, 2016.

The translation of the Second Request could not proceed until the issuance of the stamped letter from the Court. Upon receipt, the AAT had to wait while LLS translated copies of the request, stamped letter, Fourth Summons, Amended Complaint and unsealed Exhibits 3 and 4. Shreefer Decl. ¶ 13. The final application was transmitted to the U.S. State Department on July 6, 2016, Shreefer Decl. ¶ 14, where it was once again placed beyond the control of the AAT.

On September 23, 2016, the Second Request was served on Immigon in Vienna, Austria. Def. Br. at 6; ECF No 825. On October 3, 2016, the Republic of Austria, Josefstadt District Court issued a stamped certificate of service to the Austrian Foreign Ministry of Justice, ECF

No. 825, which the U.S. Embassy in Austria received on November 9, 2016. *Id.* The certificate was transmitted to the U.S. State Department on or about November 9, 2016 via diplomatic pouch and along to LLS on or about December 20, 2016. Shreefer Decl. ¶ 16. LLS provided the AAT the original proof of service (in German) along with a certified translation on December 23, 2016, which the AAT filed on January 9, 2017. ECF No. 825.

Immigon concedes that the form of the second letter rogatory and methods of service were proper, although it contends such service was untimely.

ARGUMENT

I. THIS COURT HAS SPECIFIC PERSONAL JURISDICTION OVER IMMIGON

OEVAG (i) arranged two purchases of $5 million each from JPMC in New York for an interest in the Term Loan with GM; (ii) became a lender under a Term Loan Agreement, governed by New York law; (iii) agreed in the Term Loan Agreement to personal jurisdiction in New York for all matters arising out of or relating to the Term Loan Agreement; (iv) maintained a New York correspondent account in connection with the Term Loan; (v) received Term Loan payments from JPMC into its New York correspondent account; (vi) emailed JPMC contacts in the U.S. periodically regarding its interest in the Term Loan; (vii) monitored its interest in the Term Loan and was on notice of the GM bankruptcy petition; (viii) reviewed the DIP Order – which notified payment recipients that accepting payment would subject them to jurisdiction in the Bankruptcy Court – on or about June 26, 2009; (ix) received a transfer of $9,893,347.29 to its New York account on or about June 30, 2009 representing its pro rata share of its interest in the Term Loan; and (x) was on notice of this adversary proceeding at or around the time it was initially filed.

As detailed below, these facts show that Immigon's predecessor agreed to specific jurisdiction in New York under the Term Loan Agreement and the jurisdiction of this Court

under the DIP Order, and in any event had sufficient minimum contacts with the United States to subject it to specific personal jurisdiction here. Exercising such jurisdiction in these circumstances is fully consistent with traditional notions of fair play and substantial justice and is thus permitted and appropriate.

A. Applicable Legal Standards

In evaluating a motion to dismiss for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2), made applicable under Fed. R. Bankr. P. 7012, "plaintiffs need only make a prima facie showing of personal jurisdiction over the defendant[.]" *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 163 (2d Cir. 2010). This Court is not confined to the complaint's allegations and may consider affidavits and documentary evidence. *Hollins v. U.S. Tennis Ass'n*, 469 F. Supp. 2d 67, 70 (E.D.N.Y. 2006). Where the issue is addressed on affidavits, "all allegations are construed in the light most favorable to the plaintiff and doubts are resolved in the plaintiff's favor, notwithstanding a controverting presentation by the moving party." *A.I. Trade Fin., Inc. v. Petra Bank*, 989 F.2d 76, 79–80 (2d Cir. 1993).[6]

In determining whether a Bankruptcy Court may exercise personal jurisdiction over a foreign defendant, the Court must first "determine whether the defendant has the requisite minimum contacts with the United States at large." *Official Comm. of Unsecured Creditors of Arcapita Bank B.S.C. (c) et al. v. Bahrain Islamic Bank*, 549 B.R. 56, 63 (Bankr. S.D.N.Y. 2016). Where, as here, specific personal jurisdiction is sought, the inquiry then "focuses on the

[6] If the Court were to conclude that the AAT has not made a prima facie showing of personal jurisdiction, the AAT seeks leave to conduct formal jurisdictional discovery. *Ayyash v. Bank Al-Madina*, No. 04-cv-9201(GEL), 2006 WL 587342, at *5-6 (S.D.N.Y. Mar. 9, 2006); *Creditcorp Int'l., Inc. v. N. Am. Bank and Trust Co.*, No. 89 Civ. 6600 (PNL), 1991 WL 150616, at *1 (Bankr. S.D.N.Y. July 31, 1991). The AAT has shown at least a sufficient start in showing jurisdiction and much of the information about Immigon's contacts with the U.S. is in Immigon's exclusive control. *In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 208 (2d Cir. 2003). Before responding to this motion, Immigon informally produced basic transaction documents, without waiver of its jurisdictional arguments, but the AAT has had no opportunity to take formal discovery or review all of OEVAG's U.S. contacts.

affiliation between the forum and the underlying controversy." *Arcapita*, 549 B.R. at 63 (citing *Goodyear Dunlop Tires Operations S.A. v. Brown*, 564 U.S. 915 (2011)). The defendant "must have contact with the forum, and the underlying cause of action must arise out of or relate to that contact." *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). Sufficient contacts are found "where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there." *Id.* at 69.

For specific jurisdiction in a New York Bankruptcy Court, under CPLR § 302(a)(1), one prong of New York's long arm statute, the Court may exercise jurisdiction over a foreign defendant who "transacts any business within the state" provided that the cause of action arises therefrom. *ESI, Inc. v. Coastal Corp.*, 61 F. Supp. 2d 35, 57 (S.D.N.Y. 1999). New York's long arm is a "single act" statute, and defendant need not be physically present in the state, "as long as he engages in purposeful activities or volitional acts through which he avails himself of the privilege of conducting activities within the State, thus invoking the benefits and protections of its laws." *Chloe*, 616 F.3d at 169. Courts look to the totality of the circumstances in determining whether a defendant has "transacted business" under 302(a)(1) and may consider, *inter alia*, whether a defendant has an ongoing contractual relationship with a New York corporation, whether the contract contains New York choice of law, forum selection or consent to jurisdiction clauses, and the place of payment. *See ESI Inc.*, 61 F. Supp. 2d at 57-59. As the New York long arm statute does not reach as far as the Constitution permits, if the New York statute is met, due process is generally considered to be satisfied. *Picard v. Chais et al., (In re Madoff Inv. Secs., LLC)*, 440 B.R. 274, 280 (Bankr. S.D.N.Y. 2010). Below, we show that New York's long arm statute, minimum contacts and the limits of due process are all satisfied.

B. Immigon's Predecessor OEVAG Consented To Jurisdiction Under The Term Loan Agreement And The DIP Order

Here, OEVAG received a transfer made under the Term Loan Agreement. ECF No. 91, (Am. Compl.) at ¶ 367; *see also* ECF No. 12 ¶ 270 (JPMC Answer) (confirming OEVAG was a Lender of Record under the Term Loan Agreement). The Term Loan Agreement provided the basis for payment to OEVAG under the DIP Order. The DIP Order provisionally authorized the postpetition transfers while authorizing the AAT to challenge the lenders' interests under the Term Loan and the transfers.

As detailed above (at 5), the Lenders, including OEVAG, consented to New York law and to a New York forum "in any action or proceeding arising out of or relating to this Agreement." ECF No. 428-2 (Term Loan Agreement) at §§ 10.10, 10.11. A party resisting a forum selection clause "must make a strong showing in order to overcome the presumption of enforceability." *New Moon Shipping Co., Ltd. v. MAN B&W Diesel AG*, 121 F.3d 24, 29 (2d Cir. 1997). Immigon has not done so here, nor can it, as the provisions of the Term Loan discussed above (at 5) demonstrate that OEVAG enjoyed the benefits and protection of New York law in connection with that Agreement and should be held to the New York forum choice. *Sunward Elec. Inc. v. McDonald*, 362 F.3d 17, 23 (2d Cir. 2004); *ESI Inc.*, 61 F. Supp. 2d at 62.

Immigon argues that the Amended Complaint is "devoid of any allegations supporting specific jurisdiction." Def. Br. at 8. This is incorrect. The Amended Complaint grounds its standing and authority on the DIP Order, which granted the AAT, as successor to the creditors' committee, the right to prosecute this action to seek recovery against the Prepetition Senior Facilities Secured Parties. Am. Compl. ¶ 577 (citing DIP Order ¶ 19(d)).[7] The AAT specifically

[7] This Court has previously held that the postpetition transfers "were indeed authorized subject to the Committee's (and now the [AAT's]) right to challenge the perfection of the first lien priority" and that such challenge rights

alleges that each Term Lender, *i.e.*, each Prepetition Senior Facilities Secured Party, including OEVAG, that accepted payment after the Petition Date consented to the jurisdiction of this Court. Am. Compl. ¶ 579 (citing DIP Order ¶ 19(d)). The AAT's rights against Immigon flow from the payment made to OEVAG under the Term Loan Agreement, Am. Compl. ¶ 367, and the Term Loan Agreement includes OEVAG's consent to personal jurisdiction.[8]

Moreover, even looking solely at the DIP Order, the record does not support OEVAG's contention that it was impossible for it to have received notice that the DIP Order included a consent to this Court's jurisdiction. Def. Br. at 10. The AAT makes a prima facie showing here that OEVAG monitored the bankruptcy, and actually received and viewed the final DIP Order prior to receiving payment, meaning it should be considered to have consented to the jurisdiction provisions by accepting the transfer of funds. *E.g.,* ECF No. 428-8 (JPMC Memo dated June 25, 2009); Fisher Decl. Ex. J (JPMCB-3-00000478); Ex. K (JPMCB-3-00000476); pp. 7-9 above.

C. Minimum Contacts Exist Regardless of Consent

Even if OEVAG did not consent to jurisdiction – which it did – it had sufficient minimum contacts to support specific personal jurisdiction here.

As discussed above (at 6), the form of note under the Term Loan Agreement is payable to JPMC in New York. *See* ECF No. 428-2 (Term Loan Ex. B Form of Note). OEVAG purchased interests in the Term Loan from JPMC in New York, agreed to New York law and a New York forum to govern its loan relationship, interacted with U.S.-based JPMC personnel, chose Bank of New York, located in this district, as its correspondent account, and received the contested

"effected a provisional authorization of the postpetition transfers." ECF No. 643 (Opinion and Order Denying Motions to Dismiss dated June 30, 2009) at 39.

[8] This Court may consider the provisions of the Term Loan Agreement on this motion as it is referenced in the Amended Complaint and is a necessary predicate to the payments made and the AAT's claims. *Jacobs v. Terpitz (In re Dewey & LeBoeuf LLP)*, 522 B.R. 464, 472-74 (Bankr. S.D.N.Y. 2014); *Hollins*, 469 F. Supp. 2d at 70.

payment under the Term Loan Agreement in that New York account. *See* ECF No. 823-2 (Süssenbach Decl.) ¶ 29. These contacts are more than adequate. *See Deutsche Bank Secs., Inc. v. Mont. Bd. Of Inv.*, 7 N.Y.3d 65, 72 (2006) (due process is satisfied where institutional investor bought $15 million in bonds from New York investment bank using Bloomberg system).

The use of the Bank of New York correspondent account alone demonstrates purposeful availment of a New York-based account to obtain payments and is sufficient by itself to provide personal jurisdiction "so long as the use was purposeful and not coincidental." *Arcapita,* 549 B.R. at 67-68. Under *Arcapita*, where "the receipt of the funds in New York is precisely the conduct targeted by the Committee, and the activity that the cause of action seeks to have voided" specific jurisdiction should be found. *Id.* at 69. *See also Picard,* 440 B.R. 274 (denying Israeli defendant's motion to dismiss SIPA trustee's adversary proceeding, where defendant maintained U.S. accounts, including one in New York and appointed father in law as her agent in New York).[9]

Moreover, and more broadly, the lending relationship under the Term Loan Agreement was centered in New York and governed by New York law, and allowed all of the parties, including OEVAG, to enjoy the benefits of the U.S. banking system and New York's status as a financial capital. Courts routinely determine that they have jurisdiction over parties to lending relationships with these types of New York-based arrangements. *See, e.g., Republic of Argentina v. Weltover, Inc.,* 504 U.S. 607 (1992) (Argentina's issuance of negotiable debt instruments denominated in USD payable in New York and appointing financial agent in New York

[9] Contrary to Immigon's argument, Def. Br. at 11, the recent New York Court of Appeals decision in *Al Rusaid v. Pictet & Cie*, 2016 WL 6837930, 2016 N.Y. Slip Op. 07834 (N.Y. Nov. 22, 2016), finding personal jurisdiction based on the use of correspondent accounts to perpetrate a fraud supports jurisdiction here as well. *Al Rusaid* does not require any specific number of transactions in a correspondent account, nor does it require instances of fraud. Rather, *Al Rusaid* clarified that "additional contacts" were not required to find personal jurisdiction based on a defendant's purposeful use of NY-based correspondent accounts. *Id.* at *6.

sufficient purposeful availment); *A.I. Trade Fin., Inc. v. Petra Bank*, 989 F.2d 76 (2d Cir. 1993) (Jordanian bank that made guaranty on a promissory note executed in Jordan by Greek importer to Swiss exporter subject to specific New York jurisdiction where New York was designated as place of payment and the existence of a secondary market for the notes further supported jurisdiction); *King Cnt'y Wash. v. IKB Deutsche Industriebank AG*, 712 F. Supp. 2d 104, 113 (S.D.N.Y. 2010) (specific jurisdiction proper where German bank benefited from New York being situs of structured investment vehicle, as New York was "widely regarded as the capital of U.S. capital markets").

Immigon's reliance on *Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2d Cir. 2016) for the proposition that due process constraints should apply absent a finding of OEVAG's "actual consent" to receiving funds under the jurisdictional provisions of the DIP Order is misplaced. Def. Br. at 9. *Brown* involved general jurisdiction, which the AAT does not assert as to Immigon, holding that registration to do business in Connecticut under Conn. Gen. Stat. § 33-920 could not support treating that corporate defendant as "essentially at home." *Id.* at 628 (citing *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). The AAT does not argue that OEVAG is "at home" in New York. Rather, OEVAG consented to specific jurisdiction in New York as a Lender under the Term Loan Agreement and confirmed the jurisdiction of this Court over it by accepting funds pursuant to the DIP Order.

Immigon's cases regarding lender relationships are likewise inapposite. *See* Def. Br. at 11. In *Sledziejowski v. MyPlace Dev. SP ZO.O. (In re Sledziejowski*), Adv. No. 15-08207 (SHL), 2016 WL 6155929 (Bankr. S.D.N.Y. Oct. 21, 2016), the court held that a Polish company's obligation to repay loans to a U.S. entity was insufficient, where the loans were secured by property in ***Poland*** and were governed by ***Polish*** law. And in *Colson Servs. Corp. v. the Bank of*

Baltimore, 712 F. Supp. 28 (S.D.N.Y. 1989), defendant's wiring of the purchase price for a certificate of deposit from a California bank to the bank's paying agent in New York was not considered purposeful availment of the New York banking system as the defendant had no choice where the wire would be sent and otherwise had no New York contacts. Those cases do not involve New York loans with New York parties where the proceeds were paid into a New York account purposefully chosen by the defendant.

Immigon also incorrectly relies on *Cedar Petrochems., Inc. v. Dongbu Hannong Chem. Co., LTD.*, No. 06 Civ. 3972 (LTS)(JCF), 2009 WL 666780 (S.D.N.Y. Mar. 6, 2009), for its claim that, absent a showing that Immigon was given notice of the DIP Order, "there is no basis to find personal jurisdiction by consent." There, the court merely held that a party sued for breach of contract containing a forum selection clause did not consent to jurisdiction where it was not a party to that agreement. Here, OEVAG, is a party to the Term Loan Agreement.

D. Subjecting Immigon To Personal Jurisdiction Satisfies Due Process

To exercise personal jurisdiction, the Court must determine whether this comports with traditional notions of fair play and substantial justice. *Chloe*, 616 F.3d at 164-65 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). The Second Circuit has identified several factors to determine reasonableness for these purposes, including (1) the burden that exercise of jurisdiction will impose on the defendant; (2) interest of the forum state in adjudicating the case; (3) plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies. *Id*. To avoid personal jurisdiction on this ground, defendant must – but does not here – present a "compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Licci v. Lebanese*

Canadian Bank, SAL (*Licci IV)*, 732 F.3d 161, 173 (2d Cir. 2013) (quoting *Burger King*, 471 U.S. at 477).

Here, the U.S. and this District, have a strong interest in adjudicating claims arising under the Bankruptcy Code. *Arcapita*, 549 B.R. at 72 ("It does not seem prudential to allow foreign creditors to potentially obtain priority over domestic creditors based simply on their foreign status."); *cf. Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 130 (2d Cir. 2002) (New York had interest in adjudicating claim where New York was center of loan transaction at issue). The AAT likewise has a strong interest in obtaining convenient and effective relief in this forum. *See Arcapita*, 549 B.R. at 72. In contrast, Immigon's burden in having to litigate in Bankruptcy Court in New York "is substantially mitigated by the conveniences of modern communication and transportation." *Id.* at 71. The fact that Immigon will have to defend itself in a foreign legal system and foreign language, is not dispositive "otherwise a United States court could never constitutionally exercise jurisdiction over a non-US entity."[10] *Id.* at 72; *see also Picard v. Cohmad Secs. Corp. (In re Madoff Inv. Secs. LLC)*, 418 B.R. 75 (Bankr. S.D.N.Y. 2009) (interests of plaintiff and forum justified even serious burden placed on Swiss defendant). Finally, Immigon is not under any equivalent foreign bankruptcy proceeding and its knowledge of these proceedings pre-dates its decision to engage in an orderly wind down.

Immigon erroneously contends that the division of this case into two phases, and the alleged "untimely" international service in the second phase (discussed in Point II below), somehow causes the exercise of jurisdiction to become unreasonable. Def. Br. at 15. This is

[10] Based on his declaration and information he has published on the internet, the head of Immigon's legal department, Dr. Stefan Süssenbach, appears to be fluent in English. *See* ECF. 823-2; Mr. René Eibensteiner and Mr. Alexander Kitz (who signed the trade confirms) also claim "full professional proficiency." Fisher Decl. Exs. Q; R (LinkedIn profiles).

incorrect. Delay is not a factor in assessing the reasonableness of personal jurisdiction. Moreover, this Court has already confirmed that the division of the case into phases was "a sensible and rational case management decision," ECF No. 643 at 32, and in any event, as shown below, the AAT served Immigon as permitted by this Court and international law.

II. SERVICE OF PROCESS WAS APPROPRIATE

As a lender with notice of these proceedings, Immigon was "no doubt happy to sit by on the sidelines without having to defend the action." ECF No. 643 at 15. This Court should not countenance its claims that it should be dismissed because service took too long. Def. Br. at 6.

Service on a foreign corporation in federal Bankruptcy Court is governed by Fed. R. Civ. P. 4(h)(2) and 4(f), made applicable by Fed. R. Bankr. P. 7004:

> if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:
> (A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;
> (B) as the foreign authority directs in response to a letter rogatory or letter of request; or
> (C) unless prohibited by the foreign country's law, by:
> (i) delivering a copy of the summons and of the complaint to the individual personally; or
> (ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt

As Austria is not a signatory to the Hague Convention, service there must be accomplished via formal request through letters rogatory.[11] Austria requires that all translations be done by an Austrian court-certified translator. Shreefer Decl. ¶¶ 2-3. Moreover, alternative service on Austrian defendants is discouraged. *See, e.g., In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000*, No. MDL 1428 SAS, 2003 WL 21659368, at *3 (S.D.N.Y. July 15, 2003) (alternative service attempt under 4(f)(3) was invalid as "the direct service of foreign legal documents by

[11] *See* https://travel.state.gov/content/travel/en/legal-considerations/judicial/country/austria.html

foreign authorities or by private individuals without the assistance or consent of Austrian authorities is regarded as an infringement of Austria's sovereignty.").

In recognition of the difficulties of international service, the Federal Rules do not impose the 90 day time limit that is imposed for domestic service. *See* Fed. Rule. Civ. P. 4(m); Adv. Comm. Note 2016. Courts apply a flexible due diligence standard in determining whether service of process was timely. *Burda Media, Inc. v. Blumenberg*, No. 97-cv-7167, 2004 WL 1110419, at *6 (S.D.N.Y. May 18, 2004); *Picard*, 418 B.R. at 84 ("reasonable time" under foreign service "should be liberally construed."). Moreover, extensions of the period to serve may be granted, even in the absence of good cause, *Zapata v. City of New York*, 502 F.3d 192 (2d Cir. 2007), and dismissal under Federal Rule 12(b)(5) is discretionary. *Stone v. Ranbaxy Pharm., Inc.*, No. JFM-10-cv-08816, 2011 WL 2462654, at *7 (S.D.N.Y. June 16, 2011).

A. Service Within Four Months Of The Granting Of The Second Request Was Reasonable

Here, the AAT's first attempt to serve by letter rogatory was rejected by the Austrian Ministry, and on May 26, 2016, this Court issued an Order granting the Second Request, giving the AAT a second opportunity to effectuate service. ECF No. 620-1. The AAT served Immigon pursuant to this Order on or about September 23, 2016. By its timeliness challenge, Immigon asks this Court to second guess this permission for the AAT to try again, making an argument similar to that made by other Term Lenders (including foreign ones) and rejected by this Court in denying the motion to dismiss the Amended Complaint. *See* ECF No. 643 at 32-37. There, this Court addressed the series of extensions of time for summonses to be served on all defendants except JPMC, ordered by the Court for case management purposes while a threshold legal issue was determined. *Id.* at 14-17. This Court found no justification for reconsidering those extension orders given that there had been no change in the controlling law and no newly

discovered evidence warranting reconsideration. *Id.* at 34. Similarly, Immigon provides no such justification here for this Court to reconsider its Order granting the Second Request, which had the effect of extending the time for Immigon to be served.

Moreover the four month period of time needed to request and serve the second letter rogatory was reasonable under the circumstances. International service "may be a time-consuming process even in an English-speaking jurisdiction." *Itel Container Int'l Corp. v. Alanttrafik Express Serv., Ltd.*, 686 F. Supp. 438, 444 n. 9 (S.D.N.Y. 1988). Here, as noted above (at 11), the AAT learned of Austria's rejection of the first letter rogatory on or around January 15, 2016. ECF No. 599 ¶ 4. Shortly thereafter, in February 2016 the AAT solicited bids for service and translation work for a Second Letter Rogatory request. Shreefer Decl. ¶ 12. In March 2016 the AAT notified this Court of its service efforts, worked with the Clerk of this Court to request a custom summons, ECF No. 434 at 3, and filed its Second Request on May 11, 2016, ECF No. 597, which was granted on May 26, 2016. ECF. No. 620. That Order was submitted for sealing on May 31, 2016, and received by the AAT on June 8, 2016. Fisher Decl. Ex. P. LLS then translated all materials and submitted them to the State Department less than a month later, on July 6, 2016. Immigon was served on September 23, 2016. Def. Br. at 6; ECF No. 825. The AAT completed this process in a diligent manner.

B. The AAT Was Diligent Throughout The Process

Even if the Court were to reconsider its Order granting the Second Request – which it should not – and were to look to the time frame of service beginning with the date the First Request was issued, service was still reasonable in the circumstances presented. As discussed in more detail above (at 9), the AAT engaged a vendor to provide certified translations and effect international service, Shreefer Decl. ¶ 4, and filed its First Letter Rogatory request on June 15, 2015, within a month of filing the Amended Complaint. *See* ECF No. 97. After the Court

granted the First Request on June 29, 2015, the AAT prepared the application, translated all materials, and submitted its application to the U.S. State Department within a month, on July 24, 2015. Shreefer Decl. ¶ 10. The AAT then had to wait for (i) the State Department to transmit the application by diplomatic pouch to Austria; (ii) the U.S. Embassy to formally deliver the application to the Austrian Ministry of Foreign Affairs; (iii) the Austrian Ministry to effect service and return a signed proof to the U.S. Embassy in Vienna; (iv) the U.S. Embassy to transmit the proof of service to the State Department; (v) the State Department to transmit the proof of service back to LLS; and (vi) LLS to provide a certified translation of the original proof of service. Unfortunately, the State Department did not transmit the first application to Austria until November 18, 2015. LLS was not informed of the delay. Shreefer Decl. ¶ 11. The Austrian Ministry then rejected the application on December 11, 2015 as the summons referenced a stale pretrial conference date. *Id.* This was not within the AAT's control.

The cases on which Immigon relies do not involve the level of diligence found here. In *Allstate Ins. Co. v. Hewlett-Packard Co.*, No. 13-cv-02559, 2016 WL 613571 (M.D. Pa. Feb. 16, 2016), plaintiff insurer did not even attempt service under the Hague Convention until over 14 months after filing the complaint, and otherwise filed an unsworn and untranslated Korean certificate of service. *See id.* at *3-5. Here, by contrast, the AAT retained a vendor, made an immediate attempt within a month of filing the Amended Complaint, and has filed sworn, original and translated proof of service.[12] ECF No. 825. Likewise, in *Cryson/Montenay Energy Co. v. E & C Trading Ltd. (In re Cryson/Montenay Energy Co.)*, 166 B.R. 546 (S.D.N.Y. 1994) plaintiff first attempted to serve process upon a Swiss corporation's alleged agent, ignored a

[12] Immigon's claim of prejudice based on not having been served until "over seven years since the filing of the Original Complaint" is the same allegation this Court has found to be "entirely speculative" and is an even more direct attack on the extension orders that have been upheld by this Court. *See* ECF No. 643 at 35. At most, the relevant time period began with the filing of the Amended Complaint in May 20, 2015.

court order directing Plaintiff to conduct discovery to determine the agency status, and waited 14 months before it began the process for service by letters rogatory. *See id.* at 548. In addition, the *Cryson* defendant suffered actual prejudice by the death of a material employee. *Id.* at 551. That is not the case here. Immigon's Süssenbach Declaration shows that it was able to identify the transactions and relevant personnel, and makes no showing that it was unable to contact them or gather sufficient information from any former employee.

Immigon also contends – contrary to international comity – that the AAT should have sought alternative service, "even if the method contravenes foreign law." Def. Br. at 18. Courts are sensitive to the infringement of a foreign sovereign's interest through alternative service and are reluctant to order it. *See In re Ski Train Fire,* 2003 WL 1807148, at *7; *Baker Hughes Inc. v. Homa*, No. H-11-3757, 2012 WL 1551727, at *17 (S.D. Tex. Apr. 30, 2012). The AAT cannot be faulted for declining to request such service.

Finally, Immigon's motion is not like the GIFT Trust's motion granted by this Court. There, this Court determined that the defendant had not been properly served within the time permitted by the Court. ECF No. 806. By contrast, here, the Court granted the AAT's Second Letter Rogatory request and service was made successfully on Immigon. There is no defect to be cured and the AAT should not be prevented from proceeding against Immigon.

CONCLUSION

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

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New York, New York

Respectfully submitted,

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