Reply Deadline: February 10, 2017 at 4:00 p.m.
Hearing Date and Time: February 14, 2017 at 10:00 a.m.

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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MOTOR LIQUIDATION COMPANY AVOIDANCE ACTION TRUST, by and through the Wilmington Trust Company, solely in its capacity as Trust Administrators And Trustee,	
Plaintiff,	Adversary Proceeding Case No. 09-00504 (MG)
against	
JP MORGAN CHASE BANK, N.A., *et al.*,	
Defendants.	

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REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND FOR FAILURE TO TIMELY SERVE PROCESS

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February 10, 2017

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Defendant immigon portfolioabbau ag (formerly known as Österreichische Volksbanken Aktiengesellschaft) ("**Immigon**"), submits this reply memorandum in further support of its motion, dated December 23, 2016 ("**Motion**"), to dismiss on grounds of lack of personal jurisdiction and untimely service.

The Plaintiff's lead argument in support of personal jurisdiction is that Österreichische Volksbanken-Aktiengesellschaft ("**OEVAG**") consented to jurisdiction as a Loan Party pursuant to a choice of forum provision of the Term Loan Agreement. But Loan Parties are defined as the Borrower and Guarantor, and OEVAG is neither. In any event, Plaintiff fails to establish that OEVAG is bound by the Term Loan Agreement by virtue of purchasing an interest in the loan via the secondary market, or that any provision of the Term Loan Agreement remains in force.[1]

As a fallback position, Plaintiff puts forward an expansive view of personal jurisdiction that would by operation of law subject all foreign participants in the secondary market for dollar-denominated securities to jurisdiction in New York. Plaintiff's position is unreasonably overbroad and is impracticable.

Plaintiff's response to the defense of untimely service is similarly without merit. Plaintiff has put in an affidavit by a Karina Shreefer who is employed by a litigation support company. That affidavit simply confirms the long periods (in one instance for seven months) during which neither the Plaintiff nor its consultant monitored or took any steps regarding service. Moreover, Plaintiff made no attempt to effect service via Fed. R. Civ. P. 4(f)(3), which is further evidence of Plaintiff's lack of diligence. The untimely service on Immigon is an independent basis to dismiss.

[1] Capitalized terms not defined here are defined in the opening Memorandum of Law, ECF No. 823-1, or in Plaintiff's Opposition Memorandum, ECF No. 831.

I. THE TERM LOAN DOES NOT PROVIDE A BASIS FOR PERSONAL JURISDICTION OVER IMMIGON

A. Immigon Is Not A Loan Party

Plaintiff contends that Immigon consented to jurisdiction in New York by virtue of a forum selection clause in the Term Loan Agreement. According to Plaintiff, "[e]ach 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 . . . ." (Op. at 5, quoting from § 10.11(a) of the Term Loan Agreement (ECF No. 428-2)). OEVAG, however, is not a Loan Party under the Tern Loan Agreement. The term "Loan Party" is defined in the agreement and only includes "each of the Borrower and each Guarantor." *Id*. § 1.01 Defined Terms at page 9. The Borrower is General Motors Corporation and the Guarantor is Saturn Corporation. Thus, even if OEVAG were an assignee, which Plaintiff has not demonstrated, assignees are not Loan Parties.

B. Plaintiff Has Not Established That OEVAG Was An Assignee

Plaintiff attaches to its counsel's affidavit a two page trade confirmation produced by Immigon. Exhibit A to the Declaration of Eric B. Fisher, ECF No. 832-1. That trade confirmation references the LSTA Standard Terms and Conditions, which are attached as Exhibit D to the Fisher Declaration. ECF No. 832-4. The LSTA Terms and Conditions do **not** contain a choice of forum provision. They do provide, at ¶ 10, that in the case of an assignment, the "parties shall execute an assignment (or similar) agreement in the form stipulated in the Credit Agreement…." Similarly, § 10.06(b)(iv) of the Term Loan Agreement provides that the "Agent, acting for this purpose as an agent for the Borrower, shall maintain at one of its offices a copy of each Assignment and Acceptance delivered to it…." ECF No. 428-2 at 9. The Plaintiff has not produced a copy of an Acceptance and Assignment signed by OEVAG. The absence of this

document, which is required to be maintained, suggests that no such Acceptance and Assignment exists. Thus, although Plaintiff references the "execution of each Assignment Agreement …" (Op. at 5), Plaintiff nowhere acknowledges that it has not produced an Assignment Agreement executed by OEVAG, or any explanation for its absence. Plaintiff states that interests were sold "typically through assignments," Op. at 4, but that language concedes that not every interest was sold through an assignment. In short, Plaintiff fails to establish that OEVAG was an assignee. *See Whitney Holdings, Ltd. v. Givotovsky*, 988 F. Supp. 732, 739 n.37 (S.D.N.Y. 1997) (burden of proving existence of a contract rests on the party seeking to enforce it).

C. Any Choice Of Forum Clause That May Have Applied Has Been Released

Paragraph 19(b) of the Final DIP Order provides that "[u]pon payment ("**Payment**") of all obligations under the Prepetition Senior Facilities, all commitments under each of the Prepetition Senior Facilities shall be deemed irrevocably terminated." ECF No. 428-7. The Term Loan Agreement is included within the definition of Prepetition Senior Facilities. Accordingly, even if OEVAG had committed to a choice of forum in New York, which Plaintiff has not established, any such commitment was released upon the payment of the amount owed.

II. PARAGRAPH 19(d) OF THE DIP ORDER DOES NOT ESTABLISH JURISDICTION IN THIS COURT

Plaintiff submits a spreadsheet that Plaintiff represents show that an OEVAG employee viewed a JP Morgan Lender Update Memorandum and the DIP Order. Op. at 7-8. The Lender Update Memorandum has been entered in the court record at ECF No. 428-8. That memorandum does not give notice that the receipt of funds would constitute a consent to jurisdiction. Plaintiff highlights the phrase "subject to the rights reserved by the Committee regarding the investigation of liens" (Op. at 7), but that language says nothing about consenting to jurisdiction.

The sole remaining basis that Plaintiff has for consent is the spreadsheet that Plaintiff represents shows that Silvia Hauser of OEVAG viewed the DIP Order on IntraLinks. The DIP Order is a thirty-page long complex and intricate legal document. At page 26, towards the end of a paragraph that is itself nearly a page and a half in length, there is the statement that "Any Prepetition Senior Facilities Secured Party accepting Payment shall submit to the jurisdiction of the Bankruptcy Court…." There is a reason that clauses regarding consent to jurisdiction invariably stand alone in a contract, and that an authorized representative of the party must execute the contract before the party is held to have consented. Moreover, Plaintiff does not explain the source of the Bankruptcy Court's authority to condition the repayment of a loan upon an agreement to consent to jurisdiction. Absent evidence that OEVAG in fact had actual meaningful notice of this condition, Plaintiff has failed to establish consent.[2]

III. THE PURCHASE OF AN INTEREST IN THE TERM LOAN ON THE SECONDARY MARKET DOES NOT CREATE PERSONAL JURISDICTION

As a fall-back position, Plaintiff contends that even absent consent to jurisdiction, the secondary market transaction itself creates personal jurisdiction. Plaintiff does not contest the accuracy of Immigon's factual statements that establish OEVAG's lack of contacts with the United States nor does Plaintiff contest that the purchase was made on the secondary market, and that OEVAG transacted the purchase in Austria. Nevertheless, Plaintiff contends that the use of a bank account in New York in connection with this dollar-denominated transaction "is sufficient by itself to provide personal jurisdiction 'so long as the use was purposeful and not coincidental.'" Op. at 17, citing *Official Comm. of Unsecured Creditors of Arcapita Bank B.S.C. (c) et al. v. Bahrain Islamic Bank*, 549 B.R. 56, 67-68 (S.D.N.Y. 2016). Plaintiff is suggesting

[2] Plaintiff also fails to explain how OEVAG, as a purchaser of a loan interest on the secondary market, falls within the definition of a "Prepetition Senior Facilities Secured Party."

that this Court apply a "check the boxes" analysis, divorced from any real examination of the transactions at issue.

A brief review of the facts in Plaintiff's three principal cases demonstrates that context matters. In *Arcapita*, Arcapita, while insolvent but before bankruptcy, transferred approximately $30 million to the two defendant banks. The defendant banks purposefully structured, directed and executed the transactions using multiple U.S. bank accounts, *i.e.*, the banks deliberately planned and executed an unlawful wire transfer using the U.S. banking system. The transfers were in amounts virtually equally existing debts owed by Arcapita to the defendant banks and occurred just days before Arcapita filed for Chapter 11 protection.

In *In Re Bernard L. Madoff Investment Securities, LLC v. Chais*, 440 B.R. 274 (Bankr. S.D.N.Y. 2010), the defendant Miri Chais had numerous contacts in New York, appointed her father-in-law to serve as her agent in New York, and by virtue of a jointly owned account, Chais jointly owned net profits of $13.5 million arising out of the Madoff Ponzi scheme. Plaintiff also relies on a recent New York Court of Appeals decisions in *Al Rushaid v. Pictet & Cie*, 28 N.Y.3d 316 (2016). In that case the defendant bank was alleged to have repeatedly used its New York correspondent bank account to assist clients in furthering a multi-million dollar international bribery kick-back scheme. The defendant bank funneled millions of dollars through a New York account for its clients, the former disloyal employees of Al Rushaid.

Plaintiff would have this Court apply the result in these three cases without considering the context. In *Al Rushaid* and *Arcapita* the defendant banks used New York accounts to assist their customers in perpetrating fraudulent schemes. In *Chais*, an individual investor in the Madoff Ponzi scheme used a bank account over a number of years to collect millions. From those cases, Plaintiff requests this Court to extend the rule to foreign financial institutions that

purchase U.S. dollar-denominated securities on the secondary market outside of the United States and use a New York account for these dollar transactions. There is no allegation that OEVAG used the New York account in connection with any services to customers, as in *Al Rushaid* or *Arcapita*, or that there was any fraud. If the mere presence of a New York bank account were enough to establish personal jurisdiction in New York, then the decisions in *Arcapita* and *Al Rushaid* would have been a paragraph long each. Plainly that is not the law. Instead, as the Court of Appeals said in *Al Rushaid*, "[d]etermining 'purposeful availment' is an objective inquiry, [which] always requires a court *to closely examine the defendant's contacts for their quality*." 28 N.Y.3d at 323 (citations omitted) (emphasis supplied). Certainly if a foreign bank uses a bank account in New York in order to facilitate fraudulent schemes on behalf of its customers it opens itself up to personal jurisdiction. Extending that rule to any foreign financial institution that purchases dollar-denominated securities on the secondary market outside of the United States has nothing to recommend it.

Correspondent banking accounts play an important role in the international securities markets. At its most basic level, correspondent banking is an "arrangement under which one bank (correspondent) holds deposits owned by other banks (respondents) and provides payment and other services to those respondent banks." Committee on Payments and Market Infrastructures, Bank for International Settlements, Correspondent Banking 9 (2016), http://www.bis.org/cpmi/publ/d147.pdf. "On a cross-border level, however, correspondent banking is essential for customer payments and for the access of banks themselves to form financial systems for services and products that may not be available in the bank's own jurisdictions." *Id*. "The smooth functioning of the international correspondent banking market is essential to facilitate global trade and financial transactions across jurisdictions." *Id*. at 18.

Figures prepared by The Bank for International Settlements show for North America during the years 2011-2015 that there were approximately 400,000 active correspondents in North America. *Id*. at 16, Graph 3a. Presumably a large number of those would have been in in New York. Nothing in the case law Plaintiff cites suggest that each of those 400,000 correspondent banking relationships result in jurisdiction in New York for any transaction that touches upon the New York account. By the same logic, U.S. financial institutions that have correspondent bank accounts in London, Boston, Paris, and Rome would be subject to jurisdiction in each of those countries.

Had the parties to these transactions on the secondary market felt it important that jurisdiction be in New York then a forum selection clause could easily have been added to the LSTA term sheet. The absence of such a clause suggests that financial institutions that purchase and sell dollar-denominated securities on the secondary market do not expect or intend that jurisdiction will automatically obtain in New York for any dollar-denominated transaction. Plaintiff is seeking to engineer a case for jurisdiction long after the fact that is untethered to the reasonable expectations of the transacting parties, as evidenced by the standard industry forms that they chose to use.

Plaintiff also contends that because the loan was payable to JPMC in New York, that supports jurisdiction. (Op. at 16). But "[i]t is well-settled that an agreement to pay money in New York is insufficient to satisfy § 302(a)(1)." *Spanierman Gallery, PSP v. Love*, 320 F. Supp. 2d 108, 111 (S.D.N.Y. 2004) (collecting cases). And why would an agreement to pay JPMC in New York support jurisdiction over OEVAG? Plaintiff cites to *A.I. Trade Finance, Inc. v. Petra Bank*, 989 F.2d 76 (2d Cir. 1993), Op. at 18, but that case concerned a guaranty, and the *A.I. Trade* court itself recognized that courts distinguish between guaranties and an "original

obligation to pay money." *Id*. at 81. *See, e.g. Semi-Conductor Materials, Inc. v. Citibank Int'l PLC*, 969 F. Supp. 243, 247 (S.D.N.Y.) (*A.I. Trade* "is unavailing because the instant case does not concern the breach of a guaranty agreement").[3]

Plaintiff notes that OEVAG received the contested payment in its New York bank account. Op. at 16-17. But OEVAG did not solicit that payment. That payment resulted because of a court order. *Cf. Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (unilateral activity of a third-party is not a consideration in judging sufficient contacts). And the receipt of dollars in a New York correspondent account for transfer onwards to Austria is not a significant contact.

IV. SUBJECTING IMMIGON TO PERSONAL JURISDICTION DOES NOT COMPORT WITH DUE PROCESS

Plaintiff cite *Licci v. Lebanese Canadian Bank, SAL (Licci IV)*, 732 F.3d 161, 173 (2d Cir. 2013), *Arcapita* and *Picard v. Cohmad Sec. Corp.* (*In re Madoff Inv. Sec. LLC*, 418 B.R. 75 (Bankr. S.D.N.Y. 2009) in support of its due process argument. Op. at 14-21. Each of these cases involved either banks or individuals who utilized New York accounts as part of a fraudulent scheme or to aid terrorists. In the *Madoff* case, for example, the defendants, who worked closely with Madoff, were alleged to have maintained joint accounts in New York, using these accounts for transfers to and from, "to the detriment of BLMIS victims." 418 B.R. at 79.

These cases provide no meaningful guidance as to whether asserting jurisdiction over an Austrian bank with none of the traditional contacts with New York because it purchased an interest in a dollar-denominated security on the secondary market and used a correspondent bank account in New York to facilitate the dollar transaction comports with due process. Plaintiff ignores the clear guidance set out by the Supreme Court in *Asahi Metal Industry Co. Ltd. v.*

[3] The final case cited by Plaintiff, *King Cty Wash. v. IRB Deutsche Industriebank AG*, 712 F. Supp. 2d 104 (S.D.N.Y. 2010) concerned a defendant with *extensive* contacts in New York, and is not remotely relevant to the present motion.

Superior Court of California, Solann, 480 U.S. 102 (1987) that courts should be wary of extending personal jurisdiction over national borders. It is *Asahi*, and not case law dealing with Bernie Madoff's Swiss confederates, that should control here.

V. THE SERVICE ON IMMIGON WAS UNTIMELY

A. The Repeated Delays In Service Were Not Reasonable

Plaintiff submits the declaration of Karina Shreefer to establish diligence. The declaration shows the opposite. Ms. Shreefer states that the first letter rogatory was submitted to the State Department on July 24, 2015. Shreefer Decl. ¶ 10 (ECF No. 832-15). The next action point on the file was *seven months later*. *Id*. ¶ 12. During that period, neither Plaintiff nor its consultant took any action whatsoever to monitor, inquire or check with the State Department. They were content to let the bureaucratic wheels turn at their own slow pace.

Then on January 15, 2016, the State Department, on its own accord and without prompting from the Plaintiff, advised that the First Letter Rogatory had been rejected. Shreefer Decl. ¶ 11. Plaintiff then waited *nearly six more months* to submit a second letter rogatory to the State Department. Shreefer Decl. ¶ 14. Plaintiff argues that this timeliness challenge is a request that this Court "second guess" its decision regarding the second letter rogatory. Op. at 22. Plaintiff is arguing, without authority, that a routine and unopposed issuance of a letter rogatory somehow washes away all lack of diligence that preceded the unopposed application. It does not. Plaintiff cannot escape its own lack of diligence so easily.

B. Plaintiff Failed To Utilize Fed. R. Civ. P. 4(f)(3)

Plaintiff purports to quote the entirety of Fed. R. Civ. P. 4(f) in its opposition (Op. at 21) but omits Fed. R. Civ. P. 4(f)(3) which allow for service "by other means not prohibited by international agreement, as the court orders." Court-directed service under Rule 4(f)(3) "is as favored as service available under Rule 4(f)(1) or Rule 4(f)(2)." *Rio Props., Inc. v. Rio Int'l*

Interlink, 284 F.3d 1007, 1015 (9th Cir. 2002) (footnote omitted). Plaintiff states that "alternative service on Austrian defendants is discouraged" (Op. at 21) but the very case it cites declined to dismiss for lack of correct service. *See, e.g., In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000*, No. MDL 1428 SAS, 2003 WL 21659368, at *4 (S.D.N.Y. July 15, 2003). Plaintiff does not contend that there is any international agreement that prohibits alternative means of service, so there was no bar to the use of Rule 4(f)(3). *See Freedom Watch Inv. v. OPEC*, 766 F.3d 74, 84 (D.C. Cir. 2014) ("district court retains discretion under Rule 4(f)(3) to authorize service even if the alternative means would contravene foreign law"). Given the amount at stake, and the late stage of this litigation, Plaintiff's failure to pursue a readily available alternative mode of service is further support for Immigon's motion. Fundamentally, service at this late date, following material delays caused by Plaintiff's own lack of diligence, is contrary to an "orderly litigation process." *See* this Court's Memorandum and Order, ECF No. 806, at 21.

Respectfully submitted,

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