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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11 Case
MOTORS LIQUIDATION COMPANY, *et al.,*	Case No. 09-50026 (MG)
Debtors.	(Jointly Administered)
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)
vs.	
JPMORGAN CHASE BANK, N.A., individually and as Administrative Agent for various lenders party to the Term Loan Agreement described herein, *et al.,*	
Defendants.	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE MOVING TERM LOAN LENDERS' MOTION FOR JUDGMENT ON THE PLEADINGS

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PRELIMINARY STATEMENT

Plaintiff's Opposition[1] provides no valid excuse for Plaintiff's failure—*for six years*—to serve the Moving Term Loan Lenders with a summons and complaint as the Federal Rules of Civil Procedure require. Plaintiff's various responses—that the Moving Term Loan Lenders suffered no prejudice, or that they probably knew about the litigation through other means, or that JPMorgan Chase Bank, N.A. ("**JPMorgan**") served as their litigation "agent," or that they should have somehow intervened in the action to defend their interests—are all *post hoc* rationalizations for Plaintiff's failure to adhere to the Federal Rules and the basic duty to serve defendants with a summons and complaint.

While some of the Moving Term Loan Lenders were in fact unaware of the litigation, the question of "actual notice" is a red herring for purposes of this motion. There are 500 defendants named in the lawsuit—some of them knew about the litigation, others knew nothing, and others fall somewhere in between (e.g., they were aware of the lawsuit but not that they were named; or a junior employee knew something but more senior personnel did not). Discovery concerning the level of knowledge within each of the 500 defendants is exactly the sort of uncertainty and confusion the service provisions of the Federal Rules were designed to avoid.

For efficiency, the Moving Term Loan Lenders incorporate by reference the more detailed arguments set forth in the Omnibus Reply in Support of Certain Term Lenders' Rule 12 Motions (the "**Omnibus Reply**"), regarding service of process and the preference claim. The Moving Term Loan Lenders submit this pleading to briefly supplement those arguments and, consistent with the Stipulation and Order Regarding Extension of the Deadline for the

[1] Omnibus Memorandum of Law in Opposition to Defendant's Motions to Dismiss and for Judgment on the Pleadings, ECF No. 427 (hereinafter, "**Opp.**"). Capitalized terms not defined herein are defined in the Memorandum of Law in Support of the Moving Term Loan Lenders' Motion for Judgment on the Pleadings (the "**Moving Term Loan Lenders' Motion**"), ECF No. 390.

Undersigned Defendants to File Cross-Claims Between and Among Themselves, ECF No. 188, defer any factual or legal argument with respect to JPMorgan's conduct, and continue to reserve their rights in connection thereto.

ARGUMENT

PLAINTIFF'S ACTION SHOULD BE DISMISSED FOR INSUFFICIENT SERVICE OF PROCESS

A. Plaintiff's Failure to Serve and the Service Extension Orders Violated the Moving Term Loan Lenders' Procedural Rights

There is no dispute that Plaintiff failed for six years to serve the Moving Term Loan Lenders with either a summons and complaint or a request to waive service. This failure deprived the Moving Term Loan Lenders of their basic procedural due process protections of notice and an opportunity to be heard, contravenes Rules 4, 19, and 23 of the Federal Rules of Civil Procedure, and significantly prejudiced the Moving Term Loan Lenders. In response, Plaintiff argues, without any support, that the Moving Term Loan Lenders suffered no such deprivation, that neither Rule 19 nor 23 applies, and that the Moving Term Loan Lenders were not prejudiced. None of these arguments avail.

Plaintiff concedes, as it must, that due process requires that the Moving Term Loan Lenders be provided with notice and an opportunity to be heard "appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); (Opp. at 38 (quoting *Mullane*)). Plaintiff thus improperly attempts to shift the burden to the Moving Term Loan Lenders by arguing that the Moving Term Loan Lenders "knew" about the pendency of the case and so had an opportunity to participate if they so chose. This argument fails, as straightforward application of Supreme Court precedent dictates that only formal notice pursuant to Rule 4 suffices to bring a defendant into an action, *Murphy Bros. v. Michetti Pipe Stringing*, 526 U.S. 344, 347 (1999), and courts routinely conclude that an unserved defendant has no duty

to voluntarily appear in a case in which it has not been formally served pursuant to Rule 4. *See* Omnibus Reply, Point I.A. (collecting cases).

Plaintiff's response to its clear failure to properly join hundreds of necessary parties as required by Federal Rule of Civil Procedure 19 is to state that Rule 19 does not apply to the Moving Term Loan Lenders because they were named as original defendants. (Opp. at 38.) But Plaintiff's reading would nullify the requirement that all necessary parties to an action be *served* and so would authorize actions to proceed against unknowing defendants. This is simply not the law, as explained by the Advisory Committee Note to Rule 19 and the Supreme Court of the United States. Fed. R. Civ. P. 19, Advisory comm. note; *see Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (noting that a defendant is "made a party by service of process"). Plaintiff's flat statement that Rule 23 does not apply because Plaintiff did not elect to pursue this action as a defendant class action misses the point: while it was Plaintiff's choice to pursue this action by naming hundreds of defendants rather than suing a putative Rule 23 defendant class, Plaintiff must bear the consequences of that choice and properly serve all defendants. Instead, Plaintiff circumvented the procedural safeguards of Rule 23 by naming hundreds of defendants, electing not to serve those defendants while it litigated so-called "Phase I" of this action with JPMorgan only, and then attempting to bind the absent defendants to the outcome of "Phase I." Plaintiff cites to no authority that permits such a procedural chimera. *See* Omnibus Reply, Point II.B.

Plaintiff argues that the Moving Term Loan Lenders were not prejudiced because they were "on notice" of the litigation and were represented by JPMorgan. This glib response cannot hide the manifest prejudice to the Moving Term Loan Lenders. Extensive discovery, focusing only on certain issues, took place without their involvement. Summary judgment motions were made, decisions rendered thereon, appeals taken and decided, all again without their

participation. Now the Moving Term Loan Lenders are required to defend themselves against a Plaintiff who has been strategizing since 2009 and in a case whose core issues relate to the classification and value of hundreds of thousands of assets as they existed nearly seven years ago.[2] To say the least, the Moving Term Loan Lenders find themselves in an unenviable position that is of Plaintiff's own making and violates the procedural safeguards put in place to avoid this very situation. Plaintiff baldly asserts that the Moving Term Loan Lenders were "on notice of the litigation." (Opp. at 35.) Even if this were true as to all 500 defendants (it is certainly not), such "notice" cannot cure Plaintiff's failure to provide the legally-required notice in the form of a summons and complaint, whatever level of awareness some defendants may have had over the last six years—which may well run the gamut from no notice at all to knowledge of the complaint.[3]

Finally, Plaintiff has failed to show that either "good cause" or sound discretionary factors justified the service extensions granted by the Bankruptcy Court. No circumstances beyond Plaintiff's control in 2009 impeded Plaintiff from serving the Moving Term Loan Lenders, as demonstrated by the ease with which Plaintiff served nearly all of them in 2015. And while in the absence of good cause a court may, in the exercise of its discretion, delay the

[2] Plaintiff describes the posture of this case as one in which the defendants "st[ood] on the sidelines and watch[ed] JPMorgan litigate Phase I on their behalf." (Opp. at 30.) Not so. The burden was on the Plaintiff to bring the defendants into this case, not on the Moving Term Loan Lenders or other non-served defendants to somehow learn of the suit and then decide to appear voluntarily.

[3] Indeed, the "knowledge" inquiry could well present dozens of different scenarios. Some defendants were not aware that any suit had been filed at all. Others may have known of the suit but were not aware that they had been named as defendants. Others may have had an employee who knew of the suit but did not know that their employer held a position in the Term Loan. Others may have had an employee who knew of the lawsuit but mistakenly believed that that their employer had sold its position in the Term Loan. Others may have had an employee who knew of the suit but did not relay that information to individuals responsible for litigation (nor was it their role to do so). Others may have had knowledge that the Term Loan had been repaid pursuant to the DIP Order and that the DIP Order contemplated this litigation, but did not know that this litigation had actually been commenced. And so on—there are numerous permutations.

time for service, the circumstances informing such a decision here weigh in favor of denying such an extension, not granting one. *See* ECF No. 390 at 4-5.

Once the Court reverses the service extension orders, the only outcome that remains is the dismissal of Plaintiff's lawsuit as to the defendants it failed to timely serve. Fed. R. Civ. P. 12(b)(5), (b)(7); *Point-DuJour v. U.S. Post. Serv.*, No. 02 Civ. 6840(JCF), 2003 WL 1745290, at *3 (S.D.N.Y. Mar. 31, 2003) (granting motion to dismiss for failure to serve); *Global Discount Travel Servs., L.L.C. v. Trans World Airlines, Inc.*, 960 F. Supp. 701, 710 (S.D.N.Y. 1997) (granting motion to dismiss for failure to join an indispensable party) (Sotomayor, J.).

B. JPMorgan Did Not Act as the Moving Term Loan Lenders' Agent

Only now—nearly seven years into this litigation—has Plaintiff first adopted the untenable position that JPMorgan was defendants' litigation agent throughout "Phase I" of this lawsuit. Plaintiff cites to no evidence that the Moving Term Loan Lenders ever appointed JPMorgan as their representative to defend this action on their behalf. Indeed, JPMorgan expressly disclaimed any such representative role in its Answer: "JPMorgan does not Answer this Complaint on behalf of any other defendant named in the Complaint or lender under the Term Loan Agreement." ECF No. 12 at 2 n.1. JPMorgan maintains this view today. *See* ECF No. 448.

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in the Moving Term Loan Lenders' Motion, Plaintiff's claims should be dismissed in their entirety for insufficient service of process, and Plaintiff's Third Claim for Relief should be dismissed for the independent reason that it was released by the final DIP Order.

Dated: New York, New York
March 30, 2016

Respectfully submitted,

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