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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
MOTORS LIQUIDATION COMPANY, *et al.*,	Case No.: 09-50026 (MG) f/k/a General Motors Corp., *et al.*
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, Plaintiff, -against- JPMORGAN CHASE BANK, N.A. *et al*, Defendants.	Adversary Proceeding No. 09-00504 (MG)

REPLY IN SUPPORT OF MOVING DEFENDANTS'
<u>MOTION TO DISMISS THE ACTION AGAINST THEM</u>

29624724.v12

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Defendants GMAM Investment Funds Trust ("**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 with GIFT Trust and Lehman GIFT, collectively, the "**Moving Defendants**"), by and through General Motors Investment Management Corporation ("**GMIMCo**"), as named fiduciary for the pension plans with assets therein, hereby submit this reply ("**Reply**"): (i) in response to Plaintiff Motors Liquidation Company Avoidance Action Trust's ("**Plaintiff**") *Memorandum of Law in Opposition to the GIF Trust's Motion to Dismiss the Amended Complaint* ("**Opposition**") [Adv. Proc. Docket No. 760]; and (ii) in further support of their motion ("**Motion**")[1] to dismiss the claims asserted against them in the Action[2].

SUMMARY OF ARGUMENT

Plaintiff's Opposition acknowledges that Lehman GIFT and Pens Inv Comm are not proper legal entities, and, as a result, it failed to present any arguments to rebut the Moving Defendants' position that they were not properly served. Accordingly, the claims against Lehman Gift and Pens Inv Comm should be dismissed with prejudice.

Further, in the Opposition, Plaintiff has admitted facts that establish the GIFT Trust's statute of limitations defense. Specifically, Plaintiff concedes that: (i) the GIFT Trust was *not* named as a defendant in the Original Complaint; (ii) it has been aware since October 2009, when JPM filed its answer, that the GIFT Trust was viewed by JPM as a Term Loan Lender; (iii) the GIFT Trust was *first* named as a defendant in the Amended Complaint in May 2015, approximately *70 months* after the Action was commenced; and (iv) when the Amended

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[1] *Motion to Dismiss Adversary Proceeding* [Adv. Proc. Docket No. 701].

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the memorandum of law ("**Memorandum of Law**") filed in support of the Motion. [Adv. Proc. Docket No. 701-1].

Complaint was filed first naming the GIFT Trust, the statute of limitations to sue the GIFT Trust had long since expired. Furthermore, Plaintiff does not refute (and therefore concedes) that the Bankruptcy Court did not grant it authority to amend the Original Complaint to name *new* defendants; rather, Plaintiff was only authorized to correct the names of *existing* defendants. While Plaintiff asserts that it simply corrected a mistaken name, this assertion is not true. The Original Complaint named "Lehman GMAM Inv FDR Tr" and "Pension Inv Comm of GM for GM" as defendants, and the Amended Complaint continued to name them as defendants (with slightly "corrected" names). Viewed against that backdrop, it is clear that the GIFT Trust was not merely a substituted or corrected name for an existing defendant; it was an entirely new defendant that was improperly added to the Action in May 2015, without Court authorization, years after the statute of limitations had expired.

Previously in the Action, Plaintiff argued (and the Court accepted) that it would be prejudiced if the Court did not affirm the Extension Orders since the time to commence and serve litigation against new defendants had expired. Plaintiff therefore has conceded for purposes of the Action that, if it was never authorized to add and serve new defendants, it would now be barred from suing the GIFT Trust because of the statute of limitations defense. Plaintiff conveniently ignores this prior concession and tries to make a "relation back" argument, but should be estopped from doing so.

Even if it could timely make a Rule 15(c)(1) "relation back" argument (which it cannot), Plaintiff has not met its burden to satisfy the two prong test under Rule 15(c)(1)(C). Plaintiff has not proffered any admissible evidence that the GIFT Trust knew or should have known of the Action, nor has it demonstrated that the GIFT Trust will not be prejudiced if, at this late date, it was added as a defendant in the Action.

The history of the GIFT Trust since 2009 illustrates how the GIFT Trust (and the pension plans which hold assets therein) will be prejudiced by an untimely joinder. As more particularly described in the accompanying Affidavit of Jason Glass ("**Reply Affidavit**"), a former employee of Promark Trust Bank, N.A. (formerly known as General Motors Trust Bank, N.A.) at the time the Action was commenced in 2009, the GIFT Trust was a Collective Investment Funds Trust holding separate funds ("**Promark Funds**") offered by Promark Trust Bank, N.A. In particular, the interest in the Term Loan was actually held by a single Promark Fund called the "Promark High Yield Bond Fund." That fund's investors included defined contribution plan participants, defined benefit plans and other Promark Funds.

For business reasons unrelated to the Action, in 2011, the trustee for the GIFT Trust, Promark Trust Bank, N.A, stopped offering its investors the opportunity to invest in Promark Funds, whereupon the Promark High Yield Bond Fund was terminated and all of the investors in that fund had their interests redeemed. Only one of the numerous 2011 investors in the Promark High Yield Bond Fund still holds an investment in the GIFT Trust.

In 2011, the GIFT Trust was converted into a custodial trust that solely holds pension plan assets; only two pension plans now have assets in the GIFT Trust. One of those pension plans ("**New Plan**") did not exist at the time of the Action, and never had an interest in the Term Loan or the Promark High Yield Bond Fund. Among other things, as a matter of ERISA law, the New Plan cannot be responsible for investments made by other pension plans/defined contribution plan participants in the GIFT Trust.

Further, the following facts illustrate why the GIFT Trust was unaware of the Action until calendar year 2016: (a) for insurance coverage purposes, the GIFT Trust would have had reporting requirements to insurers relating to litigation it became aware of and/or was brought

against it, and that was not done here until 2016 when a certificate of default was filed by Plaintiff and ultimately delivered in a circuitous manner to the trustee of the GIFT Trust, and (b) as fiduciaries, the trustee to the GIFT Trust (and GMIMCo for the plans therein) do not, and to the best of its knowledge have not, defaulted in responding to litigation brought against the GIFT Trust (except in the one instance relating to the Action due to the Plaintiff's service errors).

In addition, Plaintiff has not refuted (and therefore concedes) that the summons served on the GIFT Trust was defective, thus triggering the statute of limitations defense. Moreover, Plaintiff seeks to invoke a presumption that service of the Amended Complaint on the GIFT Trust was proper, even though it has not contested (and therefore concedes) that, at other times, it failed to effectuate proper service of the Amended Complaint on the Moving Defendants. In other words, Plaintiff is asking the Court for a presumption that it did service correctly in this instance, when it must acknowledge repeated failures on other occasions. Moreover, Plaintiff has not, and cannot, rebut the fact-specific affidavit filed by State Street of non-receipt of the Amended Complaint.

In sum, the Amended Complaint was neither properly nor timely served on the GIFT Trust, and the statute of limitations clearly prevents Plaintiff from doing so now.

ARGUMENT

1. The Claims Against the GIFT TRUST are Time Barred

A. Plaintiff Was Not Authorized to Name the GIFT Trust As A New Defendant in the Amended Complaint.

Plaintiff did not have the authority to add the GIFT Trust as a defendant for the first time in the Amended Complaint and, as such, the claim against the GIFT Trust is time barred. In its Opposition, Plaintiff claims that Rule 15 of the Federal Rules of Civil Procedure ("**Rule 15**"), did not require it to seek leave of court to amend the Original Complaint because no defendant

other than JPM responded to the Original Complaint. Opp'n at 7-8 [Adv. Proc. Docket No. 760] (citing Fed. R. Civ. P. 15(a)(1)). That assertion is incorrect as a matter of law. Rule 15(a)(1) states that, if a pleading requires a responsive pleading, a party may amend its pleading, once as a matter of course, 21 days after service of the responsive pleading. *See* Fed. R. Civ. P. 15(a)(1). However, after *any* party files and serves a responsive pleading, the 21 days to amend as a matter of course starts to run. *See Quiles v. City of New York*, No. 01 CIV. 10934 LTS THK, 2002 WL 31886117, at *1 (S.D.N.Y. Dec. 27, 2002) (holding that since at least one of the other defendants had filed a responsive pleading, plaintiff was required to obtain leave of court to file the amended complaint). Plaintiff admits it filed the Amended Complaint almost six years after JPM filed its answer to the Original Complaint. Therefore, as a matter of law, Plaintiff was required to seek leave of court to amend the Original Complaint.

Plaintiff alternatively argues that the Court granted it leave to amend the complaint to correct misnamed Term Loan Lenders and that was all that it did when it named the GIFT Trust in the Amended Complaint. Opp'n at 8 [Adv. Proc. Docket No. 760]. However, Plaintiff's own exhibits and filed complaints contradict this position. In its Original Complaint, Plaintiff named "Lehman GMAM Inv FDS TR" and "Pension Inv Comm of GM for GM" as defendants. *See* Original Compl. [Adv. Proc. Docket No. 1]. The Amended Complaint changed or "corrected" these abbreviations or acronyms to "Lehman GMAM Investment Funds Trust" and "Pension Inv Committee of GM for GM Employees Domestic Group Pension Trust." *See* Am. Compl. [Adv. Proc. Docket No. 91]. Significantly, those defendants remained in the Amended Complaint. In contrast, the GIFT Trust was not named in the Original Complaint, and its inclusion in the Amended Complaint was obviously to add it as a new defendant.

Plaintiff never sought leave of court to amend the complaint to add new defendants, and therefore, such leave was never granted by Judge Gerber. JPM's co-counsel submitted a letter ("**Letter**") [Adv. Proc. Docket No. 89] to the Court advising it that Plaintiff intended to file an amended complaint that would, among other things, substitute Plaintiff in the Action and "update the names of certain defendants." Letter at 2. The Court entered the proposed order attached to the Letter on that basis. Pl.'s Stip. & Order ("**2015 Stipulation**") [Adv. Proc. Docket No. 90]. The 2015 Stipulation ordered that Plaintiff file "an amended complaint in this Action that, among other things, substitutes the AAT as the named plaintiff in the above-captioned action for the Official Committee of Unsecured Creditors of Motors Liquidation Company f/k/a General Motors Corporation (the 'Committee')." Pl.'s Stip. & Order ¶ 1. Nowhere in the Letter or the 2015 Stipulation does it state that Plaintiff would be adding new defendants, nor is there anything granting Plaintiff permission to do so.

Importantly, had Plaintiff taken the proper steps to amend the Original Complaint to add the GIFT Trust in 2015, the Court should have denied the request. In fact, Plaintiff had actual knowledge as early as October of 2009, *via* JPM's answer, that the GIFT Trust was viewed by JPM as a Term Loan Lender, but had not been named as a defendant. Plaintiff's failure to act on this knowledge for nearly six years resulted in undue delay and prejudice to the GIFT Trust. *See Briarpatch Ltd. L.P. v. Geisler Roberdeau, Inc.*, 148 F. Supp. 2d 321, 326-27, 330 (S.D.N.Y. 2001) (holding that there was no excuse for inordinate delay in joining new defendant where plaintiff had been on notice of facts to support proposed claims against such defendant for approximately 18 months). Moreover, as described in Section 1(B) hereof, Plaintiff would not have been able to carry its burden under the "relation back" provisions of Rule 15(c)(1) if it had sought such relief in May 2015.

B. The Amended Complaint Does not Relate Back to the Original Complaint

As shown in Section 3, Plaintiff is estopped from asserting a "relation back" argument because it represented to the Court that, if the Extension Orders were not affirmed, it would be time barred from suing the defendants.

In any event, Plaintiff has not satisfied its burden to establish the two prong "relation back" test under Rule 15(c)(1) because: (i) the GIFT Trust will be prejudiced in defending on the merits if it is added to the Action at this late date; and (ii) Plaintiff has not shown that the GIFT Trust knew or should have known that the Action would have been brought against it, but for a mistake concerning the proper party's identity. Fed. R. Civ. P. 15(c)(1)(C)(ii).

First, as to prejudice in defending on the merits: (a) fact discovery has essentially concluded, and (b) various motions to dismiss have been argued and decided without the GIFT Trust's participation. Thus, Plaintiff's extreme untimeliness in joining the GIFT Trust as a defendant is clear prejudice, particularly when it knew that JPM considered the GIFT Trust to be a Term Loan Lender in October 2009, yet took no action to add it to the Action for 6 years.

Just as important, during this six year delay before Plaintiff added it as a defendant in the Action, the GIFT Trust underwent foundationally sweeping changes highlighting the prejudicial nature of Plaintiff being allowed to amend its complaint at this late date to add the GIFT Trust as a defendant. As noted, at the time the Action was commenced in 2009, the GIFT Trust was a Collective Investment Fund Trust holding separate, specific investment funds (the Promark Funds) offered by Promark Trust Bank, N.A. Reply Aff. ¶ 3. Only one of the Promark Funds, the "Promark High Yield Bond Fund", held an investment in the Term Loan. *Id.* at ¶ 4. That fund was invested in by various defined contribution plan participants, defined benefit plans and other Promark Funds. *Id.* at ¶ 3. Moreover, only one of the 2011 investors in the GIFT Trust

that was an investor in the Promark High Yield Bond Fund (which terminated in 2011) is presently an investor in the GIFT Trust. *Id.* at ¶ 9. Similar to how mutual funds operate, the investment in the Term Loan contained within the Promark High Yield Bond Fund was only one of a variety of investments. *Id.* at ¶ 5. As such, profits or losses were unallocated among the differing investments and were reflected in the Net Asset Value per Unit for the entities participating in that specific fund. *Id.* When the Promark High Yield Bond Fund was terminated in 2011, all of the investors in that fund had their interests redeemed. Reply Aff. ¶ 9.

Significantly, also in 2011, the trustee for the GIFT Trust, Promark Trust Bank, N.A., resigned as trustee, was liquidated, and State Street Bank & Trust Company became the trustee of the GIFT Trust. *Id.* at ¶ 6. Coinciding with the resignation of Promark Trust Bank, N.A, as the trustee, the GIFT Trust completely changed the nature of its operations from being a Collective Investment Funds Trust to a custodial trust for certain GM pension plans. *Id.* at ¶ 7. As part of this transformation, Promark Trust Bank, N.A terminated all of the Promark Funds in the GIFT Trust, including the Promark High Yield Bond Fund which held a position in the Term Loan. *Id.*[3] As a result, the GIFT Trust has not held any interest in the Promark Fund that held an interest in the Term Loan for over five years. All the investors in such fund that received the benefit of any alleged payment on the Term Loan have long since redeemed their units in the particular fund and all but one are, in fact, no longer part of the GIFT Trust. *Id.* at ¶ 9. Thus, any recovery today against the GIFT Trust for payments made to a now, non-existent Promark Fund and ultimately to former investors in such fund would be highly prejudicial to the existing investors in the GIFT Trust. Neither the remaining 2011 investor in the GIFT Trust, nor the new investors in the GIFT Trust (after 2011) are responsible for Term Loan proceeds paid to the

[3] At the time of the commencement of the Action, the only way to participate in the GIFT Trust was through one of the Promark Funds (each of which was operated independently). Reply Aff. ¶ 8.

defunct Promark High Yield Bond Fund. Any remedy against a pension plan that either did not exist as of the time of the Term Loan repayment, or never received the Term Loan repayment, would cause issues under ERISA.[4] Simply put, ERISA does not permit one pension plan to pay the liabilities of another pension plan. In other words, prejudice to the GIFT Trust is firmly established since, especially at this late date, due to the significant change in circumstances, including: (i) a change in trustee (5 years ago); (ii) closing of the Promark High Yield Bond Fund (5 years ago); (iii) material change in structure of the GIFT Trust (5 years ago); (iv) redemption from the Promark Fund by all the investors which received the benefit of any Term Loan proceeds (more than 5 years ago); and (v) ERISA issues. As such, it is not practicable for the GIFT Trust to go back and trace and recover the proceeds of the Term Loan repayment from all, or even most, of the investors involved in the Promark High Yield Bond Fund.

Decisively, on this issue of prejudice, all of this could have been avoided had the Plaintiff timely and properly brought the GIFT Trust into the Action when it had actual knowledge in October, 2009 that JPM viewed the GIFT Trust as a Term Loan Lender. Its deliberate failure to do so has caused prejudice to the GIFT Trust which defeats Plaintiff's "relation back" argument.

Plaintiff also fails to satisfy its burden under the second prong of the "relation back" test under Rule 15(c)(1)(C)(ii). In particular, Plaintiff has not presented any admissible evidence that the GIFT Trust had knowledge of the Action. Instead, it makes the purely speculative argument that it is "inconceivable" that the GIFT Trust, as a General Motors-related pension fund, was not aware of the developments of the Action. Opp'n at 9 [Adv. Proc. Docket No. 760]. To the contrary, as is common in the industry, the GIFT Trust does not, and would not, have explicit knowledge of every litigation related to investments its independent investment managers make.

[4] Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*

Reply Aff. ¶ 10. From a knowledge or notice perspective, for insurance coverage purposes the GIFT Trust would have had reporting requirements to insurers relating to litigation it became aware of and/or was brought against it. *Id.* at ¶ 11. This Action was not included in any of those reports until after the GIFT Trust became aware of the default judgments in 2016 and when it took immediate action to vacate those defaults. *Id.* Because notice to the insurer, which is a standard practice of the GIFT Trust, did not occur until 2016, it confirms that the GIFT Trust was unaware that it was a defendant in this Action until calendar year 2016. *See Id.*

Further, Plaintiff's attempt to satisfy its burden by reliance on the fact that the Original Complaint was publicly filed and available on the Motors Liquidation Company website clearly has no merit. Plaintiff cites no authority for the proposition that a publicly filed lawsuit is determined to be knowledge for an unnamed defendant to that litigation for purposes of Rule 15(c)(1). At most, it shows only what the Moving Defendants could have known, and not whether they should have known that the proceeding would have been brought against them, but for a mistake as require by Rule 15(c)(1)(C)(ii). *See In re Bernard L. Madoff Inv. Sec. LLC*, 468 B.R. 620, 631 (Bankr. S.D.N.Y. 2012) (extensive media coverage of trustee's actions from which the defendants allegedly benefited went only to what the defendants could have known and not whether they knew or should have known).

Plaintiff's claim of its purported diligence in ascertaining the proper defendants in this Action rings hallow. Opp'n at 1 [Adv. Proc. Docket No. 760] ("The AAT properly identified and named the GIFT Trust . . . after conducting extensive due diligence and taking discovery from [JPM] . . . ."). By October 2009, JPM had told Plaintiff that in its view the GIFT Trust was a Term Loan Lender, and Plaintiff concedes that it took no action whatsoever for over 66 months to add the GIFT Trust to this matter. *See* Decl. of Eric B. Fisher in Supp. of Pl.'s Opp'n to the

GIFT Trust's Mot. to Dismiss the Am. Compl. ¶ 12 & Ex. C [Adv. Proc. Docket No. 761]. The fact that Plaintiff was allegedly going to investigate the identities of the Term Loan Lenders also provides no evidence or proof that the GIFT Trust knew or should have known that it was mistakenly omitted from the Action. *See In re Bernard L. Madoff Inv. Sec. LLC*, 468 B.R. 620, 630-31 (Bankr. S.D.N.Y. 2012) (allowing implication that defendants knew or should have known they were mistakenly omitted from the proceeding due to continuing nature of trustee's investigation and analysis of transfers would eviscerate the statute of limitations).

Additionally, Plaintiff makes reference to information that JPM made available to Term Loan Lenders *via* an *Intralinks* site for named defendants. Plaintiff has not provided any admissible evidence that the GIFT Trust knew or even should have known of the JPM *Intralinks* site let alone actually logged into it during the relevant period. Nor is it logical for the GIFT Trust to have done so since Plaintiff elected not to name the GIFT Trust as a party until May 2015. A court may consider a plaintiff's post filing conduct during the Fed. R. Civ. P. 4(m) ("**Rule 4(m)**") period to the extent it "informs the prospective defendant's understanding of whether plaintiff initially made a 'mistake concerning the proper party's identity.'" *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 554, 130 S.Ct. 2485, 177 L.Ed.2d 48 (2010). Here, Plaintiff was aware that in JPM's view, the GIFT Trust was a Term Loan Lender in October 2009 during the Rule 4(m) period when it received the JPM answer. The fact that Plaintiff purposefully did not act on this knowledge at the time is informative of whether the GIFT Trust knew or should have known there was a mistake in it not being named.

Plaintiff also makes a generic policy argument that the purpose of Rule 15(c)(1) is to prevent defendants from taking advantage of the statute of limitations defense and obtaining a windfall from Plaintiff's error. Opp'n at 10 [Adv. Proc. Docket No. 760]. This simplistic policy

argument ignores the substantive law of why limitation periods exist. *See City of Pontiac Gen. Employees' Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 175 (2d Cir. 2011) (identifying the purpose of the statute of limitations as preventing plaintiffs from unfairly surprising defendants by resurrecting stale claims by extinguishing plaintiff's remedy after he has slept on his claim for a prolonged period of time and, more generally, putting an end to the prospect of litigation and to protect parties from the cost and risk of defending ancient claims) (citations omitted)).

Moreover, it is axiomatic that a sophisticated defendant like the GIFT Trust, with notice that it had been named as a defendant, would not feign ignorance to such an extent that it would allow a default to be entered against it. As noted here, the GIFT Trust contains pension funds with substantial assets which are subject to ERISA and it has fiduciary duties to its beneficiaries. Reply Aff. ¶ 12. That a default was entered against the GIFT Trust in the Action is extremely telling of the fact that not only did the GIFT Trust not know that it had been named in the Amended Complaint, but also that it was not aware of the Action and the potential for it to be named as a defendant from the start. As a matter of standard practice, the GIFT Trust does not, and has not defaulted in litigation brought against it (except for the reasons set forth herein relating to the Action due to the Plaintiff's service errors). *Id.*

Based on the foregoing, Plaintiff has completely failed to carry its burden to prove either prong of the Rule 15(c)(1)(C) "relation back" requirements, let alone both. As such, there is no relation back under Rule 15(c)(1)(C). Plaintiff acknowledges that without that relation back, the statute of limitations bars this Action as to the Moving Defendants. Accordingly, the Motion to Dismiss should be granted for Plaintiff's failure to state a claim upon which relief can be granted.

2. **Service Was Improper**

A. The Mailing of the Summons and Complaint Was Deficient

Plaintiff's service of the Amended Summons and Amended Complaint on the GIFT Trust was clearly and facially defective. Tellingly, although it purported to have effectuated service on the Moving Defendants numerous times at numerous locations, Plaintiff now relies solely on service of the GIFT Trust at the One Lincoln Street, 1st Floor, Boston, MA 02111 address (the "**Lincoln Street Address**"). *See* Opp'n at 1, 11-12 [Adv. Proc. Docket No. 760]. However, the mailing label was indisputably made out to "GMAM Investment Funds Trust, Attn President, Managing or General Agent", One Lincoln Street, 1st floor, Boston, MA 02111. Adv. Proc. Docket No. 94 at 22. No particular person or individual was identified in this label. The mailing label neither references nor includes the name State Street, or State Street as trustee, or in any capacity whatsoever, on behalf of the GIFT Trust.

The GIFT Trust has no president, managing or general agent, but rather a trustee which is State Street. Glass Aff. ¶ 3 [Adv. Proc. Docket No. 701-10]. Significantly, the GIFT Trust never had an office at the Lincoln Street Address. Glass Aff. ¶ 5 [Adv. Proc. Docket No. 701-10]. The Lincoln Street Address is the address of State Street. *Id.*; Kennedy Aff. ¶ 2 [Adv. Proc. Docket No. 701-11]. Further, the mailing label listed neither the term "Trustee" nor "State Street." Decisively, Plaintiff has never attempted or purported to have served State Street as trustee of the GIFT Trust at the Lincoln Street Address, or any other address. These undisputed facts are fatal to Plaintiff's proper service argument.

Surprisingly, Plaintiff elected to not use a standard method of service that would prove receipt by the named defendant. Had it done so and obtained a valid signed receipt of service, this would be a non-issue. Plaintiff chose differently. And, while Federal Rule of Bankruptcy Procedure 7004(b) ("**Rule 7004(b)**") authorizes service by first class mail to a defendant, or an

authorized agent of a defendant, the use of the abbreviated procedure of service by regular mail in bankruptcy proceedings requires a higher standard of care to effectuate proper service. *In re Sheppard*, 173 B.R. 799, 805 (Bankr. N.D. Ga. 1994). Strict compliance with Rule 7004(b) requires that service by mail be made using the correct address for the defendant. *Id.* That did not happen here since the GIFT Trust never had an office at the Lincoln Street Address.

Also, while Rule 7004(b) does permit service on an agent (like a trustee), it requires that the agent's name and capacity *via* the principal be explicit. *LeDonne v. Gulf Air, Inc.*, 700 F. Supp. 1400, 1413 n.24 (E.D. Va. 1988) ("the summons served on C.T. Corporation for Aviation Services was not directed in any way to Gulf Air or even to Aviation Services as an agent for Gulf Air."). Plaintiff concedes that was not done here.

The case law in this district makes clear that these failures are not a mere technical defect, but go to the very heart of due process and service. Judge Bernstein in an avoidance action arising in the *Teligent* bankruptcy cases involving similar mailing and service of process failures noted as follows:

> Furthermore, Savage's [plaintiff's] failure was not a mere technical violation of a Bankruptcy Rule; the method of notice deprived 1737 Corp. [the moving defendant] of due process of law. Savage sued eighteen unrelated defendants, including Insignia/ESG, and mailed process only to "1201 Owner Corp. c/o Insignia/ESG." She did not address a mailing in the name of 1737 Corp. "c/o Insignia/ESG," or send the summons and complaint directly to the defendant. By Savage's logic, the mail room clerk that received the envelope containing the summons and complaint at Insignia/ESG was expected to open it, peruse the list of defendants, conclude that the mailing was also intended for 1737 Corp., and forward the summons and complaint to 1737 Corp. in San Jose, California where it is located.

In re Teligent Inc., 485 B.R. 62, 69 (Bankr. S.D.N.Y. 2013).

Critically, State Street never received the Amended Summons. Connolly Aff. ¶ 4 & 5 [Adv. Proc. Docket No. 701-12]. Even if it had, Plaintiff's errors rendered the Amended Summons defective and insufficient as a matter of law. Contrary to the express requirements of Rule 7004(b), Plaintiff failed to identify the GIFT Trust (or any defendant) in the Amended Summons, and further failed to identify State Street as a trustee or in any capacity on behalf of the GIFT Trust. Accordingly, had State Street received the Amended Summons (it did not), State Street could not know it was receiving it on behalf of the GIFT Trust. *In re Teligent Inc.*, 485 B.R. at 69.

B. The Presumption of Receipt Has Not Been Established

Plaintiff has not invoked the presumption of receipt of mailing and, in any event, the GIFT Trust has sufficiently rebutted the presumption. While there can be a presumption that an addressee receives a mailed item when it has been *properly addressed*, stamped and deposited in the postal system, *Hagner v. United States*, 285 U.S. 427, 430 (1932), here, as just demonstrated, Plaintiff failed to properly address the mailings to the GIFT Trust. As such, it simply cannot invoke the presumption of receipt.

With respect to GIFT Trust, the Amended Complaint Affidavit of Service alleges that the GIFT Trust was served *via* regular, first class mail at 767 5th Avenue, New York, NY 10153 (the "**Fifth Avenue Address**"). In the Opposition, Plaintiff acknowledges that the GIFT Trust was not at that address when the Amended Complaint was purportedly served and, therefore, does not rely on effective service based on that address. As noted in Moving Defendants Memorandum of Law, it is instructive that Plaintiff chose not to mail the Application for Default Judgment on the GIFT Trust to the Fifth Avenue Address in 2016. The only credible reason for this change is that it became aware that this address was not proper.

Plaintiff's entire argument relies on effective service because of the Lincoln Street Address.[5] However, it is telling that Plaintiff argues that it determined that the Lincoln Street Address was somehow proper for the GIFT Trust using a single company profile generated by a third party listing the Lincoln Street Address as the GIFT Trust's office. But as proven in the Glass Affidavit, that is patently wrong. The Lincoln Street Address is not and has never been the address of the GIFT Trust; it is the address of State Street. Glass Aff. ¶ 5 [Adv. Proc. Docket No. 701-10]. Plaintiff then failed to reference State Street at the Lincoln Street Address because it believed that the GIFT Trust itself was located there. And, this failure is why Plaintiff did not use State Street's name and capacity in the mailing label and Amended Summons which would have been necessary to effectuate proper service on the GIFT Trust.

Although Plaintiff has now abandoned any argument that service was proper on Pens Inv Comm, its clear service failure there weighs against Plaintiff's invocation of the presumption of receipt for the GIFT Trust. Plaintiff's alleged service on Pens Inv Comm at 245 Summer St, Boston, MA 02210 and 82 Devonshire Street, Boston, MA 02109 is revealing. As set forth in the Cahill Affidavit and the Condron Affidavit, the Fidelity entity at the Summer St. address was not authorized in 2015 to accept service for the Pens Inv Comm (and it never did so). *See* Cahill Aff. ¶ 2 [Adv. Proc. Docket No. 701-13]; Condron Aff. ¶ 2 [Adv. Proc. Docket No. 701-14]. Further, that Fidelity entity was never located at 82 Devonshire Street in Boston. Condron Aff. ¶ 7 [Adv. Proc. Docket No. 701-14]. Significantly, Plaintiff claims to have served the Amended Complaint on that Fidelity entity at 82 Devonshire Street, even though it was never located there. Presumably, the Amended Complaint addressed to the 82 Devonshire Street address was never returned to it since, a year later, Plaintiff purportedly served a certificate of default on that same

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[5] *See* Decl. of Eric B. Fisher in Supp. of Pl.'s Opp'n to the GIFT Trust's Mot. to Dismiss the Am. Compl. [Adv. Proc. Docket No. 761] Ex. H.

Fidelity entity at that same wrong 82 Devonshire Street address. Having so blatantly erred in service, Plaintiff has no credible argument that it can invoke the presumption of service with regard to the GIFT Trust.

Plaintiff's multiple failures to properly address mailings and serve the various pleadings is further illustrated by the facts related to formerly named defendant "RBC Dexia Investor Services Trust as Trustee for GM Canada Foreign Trust" ("**RBC Dexia Trustee**"). Counsel for the Moving Defendants filed a related motion to dismiss with respect to RBC Dexia Trust, by and through State Street Trust Company of Canada ("**State Street Canada**", as the final trustee on behalf of the GM Canada Foreign Trust ("**Canada Trust**"). *See* Canada Trust's Mem. of Law in Supp. of its Mot. to Dismiss [Adv. Proc. Docket No. 702-1]. There, Plaintiff purported to serve RBC Dexia Trustee at Canadian addresses that omitted any city, province or postal code. *Id.* at 12. One of the addresses did not even contain a street address. The address that did have a street address had never been the address of RBC Dexia Trustee. *Id.* Moreover, RBC Dexia Trustee had ceased to serve as the trustee four years before it was purportedly served. *Id.* at 13. Nevertheless, Plaintiff claimed the alleged service on it was proper. And, like Pens Inv Comm, Plaintiff presumably never received any return mail for the Amended Complaint since, one year later, it sought a default judgment against the Canada Trust by serving the wrong trustee of a defunct entity at that same wrong address. Tellingly, Plaintiff agreed to dismiss the Action against RBC Dexia Trustee and the Canada Trust. Adv. Proc. Docket No. 757. These numerous mailing and service errors prove that there were serious failures of service by Plaintiff in this Action. Accordingly, Plaintiff has not and cannot invoke the presumption of receipt upon proper mailing.

3. **Plaintiff Should not be Granted Leave to Re-Serve**

Finally, Plaintiff argues that if the Court finds service was insufficient (as it should), it nevertheless should grant it leave now to re-serve by retroactively extending Plaintiff's time for service under Rule 4(m) for "good cause" or, alternatively, in the Court's discretion. However, Plaintiff is barred from requesting leave to re-serve on either of these grounds by virtue of, among other things, the doctrine of judicial estoppel. Judicial estoppel applies if: (i) a party's later position is 'clearly inconsistent' with its earlier position; (ii) the party's former position has been adopted in some way by the court in the earlier proceeding; and (iii) the party asserting the two positions would derive an unfair advantage against the party seeking estoppel. *In re Adelphia Recovery Trust*, 634 F.3d 678, 695-96 (2d Cir. 2011) (citing *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)). In the Second Circuit, the case law states that judicial estoppel applies where the earlier tribunal accepted the accuracy of the litigant's statements. *Id.* (citing *DeRosa v. Nat'l Envelope Corp.*, 595 F.3d 99, 103 (2d Cir. 2010)).

In its *Omnibus Memorandum of Law in Opposition to Defendants' Motions to Dismiss and For Judgment on the Pleadings* [Adv. Proc. Docket No. 427] in this Action (filed in response to certain groups of defendants' motions to dismiss), Plaintiff argued that the Court properly entered the Extension Orders,[6] and that it would suffer prejudice if the Court would not so hold since it would be unable to refile claims because they would be time barred. In Plaintiff's own words: "[a] newly filed action would be barred here because the statute of limitations has run and the time period specified for filing the action under the DIP Order has

[6] Omnibus Mem. of Law in Opp'n to Defs.' Mots. to Dismiss and For Judgment on the Pleadings ("**Omnibus Memorandum**") at 31-36 [Adv. Proc. Docket No. 427].

expired." Omnibus Mem. at 35 [Adv. Proc. Docket No. 427]. The Court adopted Plaintiff's position in its Dismissal Decision finding that:

> if the Court were to vacate the extension orders, Plaintiff would be unable to refile the Avoidance Action because it would be time barred due to the statute of limitations having run. The deadline specified for filing the action under the DIP Order has also expired. This represents an injustice to the [Plaintiff], as the [Plaintiff] relied on the Court's various extension orders in waiting to effectuate service of process on the other Term Loan Defendants.

Opinion and Order Denying Motions to Dismiss, for Judgment on the Pleadings, and to Vacate Prior Orders, dated June 30, 2016 ("**Dismissal Decision**") at 37 [Adv. Proc. Docket No. 643].

Having argued successfully for the affirmance of the Extension Orders based on the prejudice it would incur by not being able to refile the Action, Plaintiff is now estopped to argue that here to the contrary. Under these circumstances, Plaintiff has no "good cause" and the Court should not exercise its discretion to alleviate the consequences of Plaintiff's conduct in this matter. Accordingly, Moving Defendants' Motion to Dismiss should be granted.

CONCLUSION

Plaintiff was not authorized to add new defendants to the Action, and, as Plaintiff acknowledged to the Court, it is too late to do so now. The Action was commenced over 7 years ago. There have been many events in the Action, and with respect to foundational changes to the GIFT Trust and its investors, that would make it highly prejudicial to the GIFT Trust (and its current pension plan investors) to add it as a defendant at this time. In particular, more than 5 years ago, the specific Promark Fund that owned a portion of the Term Loan was terminated, and the investors in that fund were redeemed. All (but one) of the present investors in the GIFT Trust have never been an investor in that Promark Fund. For these and the other reasons set forth herein, the Court should grant the Moving Defendants' Motion to dismiss, and such other and further relief that is just under the circumstances.

Dated: New York, New York
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