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.

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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NOTICE OF DEFENDANT IMMIGON'S MOTION TO DISMISS

PLEASE TAKE NOTICE that Defendant immigon portfolioabbau ag (formerly known as Österreichische Volksbanken Aktiengesellschaft) ("**Immigon**") (the "**Moving Defendant**") hereby moves the Court pursuant to Rule 12(b) of the Federal Rules of Civil Procedure (made applicable to this Action pursuant to Rule 7012(b) of the Federal Rules of Bankruptcy Procedure), for an order dismissing the Action against them (the "**Motion**"). The Motion is supported by the Declaration of Dr. Stefan Süssenbach, dated December 22, 2016 ("**Süssenbach Declaration**"), and the accompanying memorandum of law.

PLEASE TAKE FURTHER NOTICE that a hearing on the Motion will be held before the Honorable Judge Martin Glenn, United States Bankruptcy Judge, in Room 523 of the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, New York,

New York 10004, on February 14, 2017 at 10:00 a.m. (Eastern Time), or as soon thereafter as counsel may be heard.

PLEASE TAKE FURTHER NOTICE that any responses to the Motion must be in writing, shall conform to the Federal Rules of Bankruptcy Procedure and the Local Rules of the Bankruptcy Court, and shall be filed with the Bankruptcy Court (a) electronically in accordance with General Order M-242 (which can be found at www.nysb.uscourts.gov) by registered users of the Bankruptcy Court's filing system, and (b) by all other parties in interest, on a 3.5 inch disk, preferably in Portable Document Format (PDF), WordPerfect, or any other Windows-based word processing format (with a hard copy delivered directly to Chambers), in accordance with General Order M-182 (which can be found at www.nysb.uscourts.gov), and served in accordance with General Order M-242, and on Lewis Baach PLLC, 1899 Pennsylvania Avenue, Washington, D.C. 20006 (Attn: Bruce Grace) so as to be received no later than **January 31, 2017** ("**Objection Deadline**").

PLEASE TAKE FURTHER NOTICE that if no responses or objections are timely filed and served with respect to the Motion, Moving Defendant may, on or after the Objection Deadline, submit to the Bankruptcy Court an order, which may be entered with no further notice or opportunity to be heard offered to any party.

Dated: December 23, 2016

Respectfully submitted,

LEWIS BAACH PLLC

By: /s/ Bruce R. Grace

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Attorney for immigon portfolioabbau ag

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Defendants.	

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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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December 23, 2016

Attorney for immigon portfolioabbau ag

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Defendant immigon portfolioabbau ag (formerly known as Österreichische Volksbanken Aktiengesellschaft) ("**Immigon**"), submits this memorandum of law ("**Memorandum of Law**"), together with the Declaration of Dr. Stefan Süssenbach, dated December 22, 2016, in support of its motion, dated December 23, 2016 ("**Motion**"), to dismiss pursuant to Rules 12(b)(2), 12(b)(4) and 12(b)(5) of the Federal Rules of Civil Procedure, made applicable to the above-captioned adversary proceeding ("**Action**") pursuant to Federal Rules of Bankruptcy Procedure 7012(b).

PRELIMINARY STATEMENT

This Court cannot exercise personal jurisdiction over Immigon, a company organized and headquartered in Vienna, Austria. There are no facts to support a finding – required to establish general jurisdiction over Immigon – that Immigon is "essentially at home" in the United States. Nor can any transaction by Immigon involving the Term Loan support jurisdiction under a specific jurisdiction theory. By receiving repayment of the Term Loan, Immigon neither purposefully availed itself of the protection of the U.S. law nor conducted business in the United States. Nor did any provision of the DIP Order create consent to jurisdiction. In addition, even if specific jurisdiction could be established, subjecting Immigon to jurisdiction would not comport with traditional notions of fair play and substantial justice. Accordingly, this Court lacks personal jurisdiction over Immigon. Dismissal also is warranted because Plaintiff failed to serve Immigon with the Amended Complaint in a timely fashion. The Plaintiff's extreme lateness in serving Immigon is not consistent with an orderly litigation process. For these two independent reasons, Immigon respectfully requests that this Court dismiss Immigon.

FACTUAL BACKGROUND

I. Immigon

Immigon is a wind-down company pursuant to section 162 of the Austrian Federal Act on the Restructuring and Resolution of Banks (Bundesgesetz über die Sanierung und Abwicklung von Banken ("**BaSAG**"). *See* Declaration of Stefan Süssenbach ¶ 5 ("**Süssenbach Declaration**"). Until 4 July 2015 the corporate name of the company was Österreichische Volksbanken-Aktiengesellschaft. *Id.* ¶ *6.* The abbreviation of Österreichische Volksbanken-Aktiengesellschaft was OEVAG ("**OEVAG**"). *Id.* ¶ 7. For ease of reference, this memorandum will at times use Immigon to refer collectively to Immigon in its current state, as well as OEVAG.

OEVAG was the central institute of the Austrian co-operative banks named Volksbanken. *Id*. ¶ 8. OEVAG had its seat in Vienna, Austria. *Id*. OEVAG, a licensed bank, operated under the authority of the Austrian banking authorities. *Id.* Its business focus was the Austrian and the European market. *Id.* ¶ 10. OEVAG did not have offices, employees, or property in the United States. *Id.* ¶ 11. It did not hold itself out as doing business in New York or anywhere in the United States. *Id.* ¶ 12. OEVAG did not have a postal address or a telephone number in the United States. *Id.* ¶ 13. OEVAG was not registered to and did not conduct business in the United States. *Id.* ¶ 14. OEVAG did not offer any financial or other services in the United States. *Id.* ¶ 15. Nor did it advertise in the United States. *Id.* ¶ 16. These statements are equally true for Immigon. *Id*. ¶ 17.

As of July 4, 2015 OEVAG's function as a central organization and central institution of the association of Austrian Volksbanken (Volksbanken-Verbund) was transferred by way of a de-merger to Volksbank Wien AG (formerly: Volksbank Wien-Baden AG). *Id.* ¶ 18. Such

demerger was the result of a reorganization plan implemented by OEVAG, with regulatory approval. *Id.* This demerger was undertaken largely as a result of a comprehensive assessment carried out in 2014 that showed a large capital shortfall for future years and because it was believed that the conditions to ensure OEVAG's continued existence as a bank were no longer in place. *Id.* The demerger became effective on July 4, 2015, and involved the transformation of Immigon from a credit institution into a pure wind-down company pursuant to the BaSAG without a banking license. *Id.* ¶ 19. The company goal is to wind down its assets (including the repayment of liabilities) to a large extent by the end of 2017, and to ultimately implement the liquidation of the entity. *Id.* ¶ 20.

In keeping with its winding-down function, Immigon has greatly reduced its staffing. *Id.* ¶¶ 22-23. The individuals who were involved with the transactions concerning the Term Loan are no longer employed at Immigon. *Id.* ¶ 25.

II. The Term Loan

A full discussion of the background of the case is given in this Court's prior opinion, *In re Motors Liquidation Co.*, 552 B.R. 253, 258-63 (Bankr. S.D.N.Y. 2016) (the "**Dismissal Opinion**"). A brief description of the facts most relevant to Immigon's Motion to Dismiss follows.

Plaintiff Motors Liquidation Company Avoidance Action Trust ("**Plaintiff**" or "**Trust**") filed a complaint initiating this Action ("**Original Complaint**") on July 31, 2009, against JPMorgan Chase Bank, N.A. ("**JPM**"), and more than 400 other defendants alleged to be lenders ("**Term Loan Lenders**") under a $1.5 billion syndicated term loan ("**Term Loan**") to General Motors Corporation, Pl.'s Orig. Compl. (Adv. Proc. ECF No. 1). Until 2015, JPM was the only entity that was served with the summons for the Original Complaint.

The Term Loan was a syndicated commercial financing that was completed in 2006, pursuant to which a number of financial institutions (the "**Bank Lenders**") committed to fund the loan upfront. Dismissal Opinion at 7. The Bank Lenders then had the right to sell interests in the Term Loan in the secondary market to a variety of investors. *Id.* The secondary market provides a number of systemic benefits to commercial financing. The ability to trade debt instruments on the secondary market makes the debt less expensive on the primary market. The modern syndicated lending market has given rise to a fast, efficient, and flexible distribution network that is able to finance syndicated loan transactions in large volumes. The more lenders there are in a financial system, including lenders on the secondary market, the lower the likelihood of systemic risks triggered by the solvency problems of any given lender. Broad distribution of corporate credit across numerous investors, including investors on the secondary market, makes the financial system safer.

OEVAG is one of the entities that purchased an interest in the Term Loan on the secondary market. OEVAG made its purchases in two separate trades of $5,000,000 each in September 2007. Süssenbach Declaration ¶ 26. Records maintained by Immigon reflect that the two secondary market transactions were arranged by an employee of OEVAG in Vienna, Austria. This person is no longer employed by Immigon. *Id*. ¶ 25. The counterparty was JPMorgan Chase Bank, N.A. *Id*. ¶ 27.

On June 1, 2009 ("the **Petition Date**"), GM and certain of its subsidiaries filed voluntary petitions for relief under Chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**") in this Court. As of the Petition Date, the outstanding principal balance under the Term Loan Agreement was in excess of $1.4 billion. (Am. Compl ¶ 573.)

The Court approved a Debtor-in-Possession ("**DIP**") facility, first on an interim and then on a final basis. (Interim DIP Order (Main Proceeding ECF No. 292) and the DIP Order (Main Proceeding ECF No. 2529). Among other things, the DIP Order authorized repayment in full of the Term Loan. (Am. Compl. ¶ 578.)

Following the entry of the DIP Order, according to the Amended Complaint, the Debtors paid $1,481,656,507.70 to the Term Loan Lenders in full satisfaction of all claims arising under the Term Loan. (Am. Compl. ¶ 578.) OEVAG received $9,893,347.29 on or about June 30, 2009, three business days after entry of the DIP Order. Exhibit 3 to Amended Complaint, ECF No. 91-1. This repayment was made by JPM, which paid the amount to OEVAG's account with the Bank of New York Mellon. *See* Süssenbach Declaration ¶ 29.

After this Action was initiated on July 1, 2009, the Plaintiff served only JPM, and the Plaintiff and JPM litigated whether the security interest relating to the Term Loan Agreement was perfected as of the Petition Date. There followed a series of court rulings and appeals that are fully described at pages 11-13 of this Court's Dismissal Opinion.

On April 20, 2015, the Second Circuit's mandate issued [2d Cir. Dkt. No. 183], and this action was returned to this Court. On May 20, 2015, the Trust filed its Amended Complaint.

III. Service On Immigon

It was not until June 15, 2015 that Plaintiff applied for the issuance of a Letter Rogatory to effect service on Immigon in Austria. ECF No. 97. On June 29, 2015, the Court granted the application. ECF No. 107. Nearly a month later, on July 24, 2015, the Plaintiff submitted the Letter Rogatory to the United States Department of State. Declaration of Eric B. Fisher in Support of Plaintiff's Application for Second Letter Rogatory, ECF No. 599 ("**Fisher Declaration**") ¶ 3. The Plaintiff apparently took no further steps during 2015 to monitor the

process by which Immigon was to be served with the first Letter Rogatory. *Id.* On January 15, 2016 the Plaintiff was informed, it is not clear by whom, that the Austrian Ministry of Foreign Affairs had rejected the first Letter Rogatory because the enclosed summons referenced a pretrial conference scheduled for August 13, 2015, *i.e.*, only three weeks after the date on which the first Letter Rogatory was submitted to the United States Department of State. *Id.* ¶ 4.

The Plaintiff then waited two additional months, until March 25, 2016, to request that this Court issue a Fourth Summons. *Id.* ¶ 5. The Fourth Summons was issued on April 1, 2016. *Id.* ¶ 6. More than a month after that, on May 11, 2016, the Plaintiff applied to this Court for the issuance of a second Letter Rogatory. *Id.* ¶ 7. The Court granted that application on May 26, 2016. ECF No. 620. Immigon does not know when the Plaintiff provided the second Letter Rogatory to the State Department. The second Letter Rogatory was served on Immigon in Austria on September 23, 2016, over seven years since the filing of the Original Complaint. Süssenbach Declaration ¶ 31.

ARGUMENT

I. This Court Lacks Personal Jurisdiction Over Immigon

To sustain an action over a foreign defendant, the plaintiff "bears the burden of showing that the court has jurisdiction over the defendant." *In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 206 (2d Cir. 2003); *see also In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 659 (2d Cir. 2013). "Conclusory" allegations are not sufficient to carry the plaintiff's burden. *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 184 (2d Cir. 1998); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the [legal elements], supported by mere conclusory statements, do not suffice."). Thus, dismissal is required where, as here, a plaintiff cannot establish specific facts to support personal jurisdiction. See, e.g., *Cedar*

Petrochems., Inc. v. Dongbu Hannong Chem. Co., No. 06-cv-3972(LTS)(JCF), 2009 WL 666780 (S.D.N.Y. Mar. 6, 2009).

To establish personal jurisdiction, a plaintiff must demonstrate facts sufficient to establish either a general (*i.e.*, all-purpose) or specific (*i.e.*, transaction-specific) basis for jurisdiction. *See Goodyear Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915, 919 (2011). To proceed under a general jurisdiction theory, which permits a plaintiff to pursue any and all claims regardless of where or how they arise, the plaintiff must establish that a defendant's contacts with the forum "are so continuous and systematic as to render [the defendant] essentially at home in the forum state." *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014), quoting *Goodyear*, 564 U.S. at 919. Plaintiff does not contend that this Court has general jurisdiction over Immigon and in any event there is no factual support for general jurisdiction.

Specific jurisdiction requires the plaintiff to establish that the defendant's purposeful contacts with the forum "g[a]ve rise to the liabilities" that are the basis of the plaintiff's claim. *Daimler*, 134 S. Ct. at 754 (quotation omitted). To establish specific jurisdiction, the plaintiff must establish that the defendant purposely "avail[ed] itself of the privilege of conducting activities within the forum . . . thus invoking the benefits and protections of its laws" and that the plaintiff's cause of action arises out of those same activities. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 n.18 (1985). Moreover, a defendant's "merely coincidental" connections with the forum are "insufficient to support [specific] jurisdiction." *Weisberg v. Smith*, 473 F. Supp. 2d 604, 606 (S.D.N.Y. 2007).

A. Plaintiff Cannot Establish Specific Jurisdiction Over Immigon

As the Supreme Court emphasized in *Walden v. Fiore*, "[f]or a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014). The question of whether minimum contacts are present to justify the assertion of specific jurisdiction over a nonresident defendant "focuses on 'the relationship among the defendant, the forum, and the litigation." *Id*. (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984)). "First, the relationship must arise out of contacts that the 'defendant himself creates with the forum State." *Walden*, 134 S. Ct. at 1122 (emphasis in original). Second, the "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Id*. Third, "the plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him." *Id*. Because specific jurisdiction requires that the contacts with the forum supporting jurisdiction be the same as the contacts giving rise to the claim, specific jurisdiction must be established on a claim-by-claim basis. *See Bank of N.Y. v. First Millennium, Inc.*, No. 06 Civ 13388 (CSH), 2007 WL 1404433, at *7 (S.D.N.Y. May 9, 2007) ("Because specific jurisdiction is based on the relationship between defendants' contacts and each particular claim, plaintiff's claims must be analyzed separately.") (citation omitted).

The Amended Complaint is devoid of any allegations supporting specific jurisdiction. Instead, the sole basis for jurisdiction identified in the Amended Complaint is that "[p]ursuant to paragraph 19(d) of the DIP Order, the Defendants that accepted payment after the Petition Date consented to the jurisdiction of this Court." Amended Complaint, ¶ 579. In *Brown v. Lockheed*

Martin Corp., 814 F.3d 619 (2d Cir. 2016), the Second Circuit recently discussed the constitutional restraints upon a court's exercise of jurisdiction on the basis of alleged consent. The allegation against Immigon does not pass muster under that analysis.

The Second Circuit addressed whether registering to conduct business in Connecticut constituted sufficient consent for the exercise of personal jurisdiction. The exercise of personal jurisdiction is, of course, "informed and limited by the U.S. Constitution's guarantee of due process, which requires that any jurisdictional exercise be consistent with 'traditional notions of fair play and substantial justice.'" *Brown*, 814 F.3d at 625 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 316, 316 (1945). As a result, the Due Process clause may limit the State's assertion of jurisdiction even "when exercised pursuant to a corporation's purported 'consent.'" *Brown*, 814 F.3d at 641.

Due process concerns are made "more acute" when jurisdiction is predicated upon consent that is not "explicit." *Id.* at 626. In that respect, it is important that a corporation be "alert[ed]" to the consequence that by registering it was consenting to personal jurisdiction. *Id*. at 636. Applying these principles, the Second Circuit declined to find "actual" consent to jurisdiction based upon a corporation registering to do business and appointing an agent for service of process within the state.

The due process limitations upon the exercise of jurisdiction predicated upon consent are applicable here and weigh categorically in favor of dismissal. Simply put, Plaintiff cannot rely upon a so-called consent to jurisdiction, absent any evidence of actual and explicit notice to OEVAG and agreement by OEVAG. Nowhere does Plaintiff even allege that OEVAG was advised of paragraph 19(d) of the DIP Order, or was otherwise put on notice that receipt of

repayment of the loan would result in a determination that it had consented to the jurisdiction of this Court.

Moreover, the chronology of the relevant events makes such notice virtually impossible. The DIP Order was entered after 3:00 p.m. on June 25, 2009, a Thursday, and the post-petition payment was made, according to the Plaintiff, on June 30, the following Tuesday. The Plaintiff gives no indication of any mechanism by which OEVAG was advised of ¶ 19(d) of the DIP during these three business days. And Immigon has searched for any documentation that would reflect such notice, and has found none. Süssenbach Declaration at ¶ 30. Absent a *prima facie* showing that Immigon was given notice of and agreed to ¶ 19(d) of the DIP, there is no basis to find personal jurisdiction by consent. *See also Cedar Petrochems., Inc. v. Dongbu Hannony Chemical Co., LTD.*, No. 06 Civ. 3972(LTS)(JCF), 2009 WL 666780 (S.D.N.Y. Mar. 6, 2009).

Even if the Plaintiff could show notice to and agreement by OEVAG of ¶ 19(d) -- and nothing in the Amended Complaint suggests it can make any showing, much less a plausible showing -- it is inconsistent with due process to require a foreign debtor to agree to relinquish the defense of personal jurisdiction in order to receive payment on a legal debt.

Other than the argument based upon ¶ 19(d) of the DIP, Plaintiff alleges no other basis for specific personal jurisdiction. Plaintiff alleges no facts in the Amended Complaint establishing that Immigon "purposefully direct[ed] [its] activities at residents of the forum," *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) or that Immigon "purposefully availed itself of the privilege of doing business in the forum and could foresee being 'haled into court' there." *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 127 (2d Cir. 2002) As part of this inquiry, "courts have required a defendant to have purposefully reached out beyond their State and into another by, for example, entering a contractual

relationship that envisioned *continuing and wide-reaching contacts* in the forum state…." *Sledziejowski v. MyPlace Development SP Z.O.O. (In re Sledziejowski)*, Ch. 7 Nos. 13-22050, 13-22748 (RDD), Adv. Nos. 15-08207, 15-08208 (SHL), 2016 WL 6155929, at *6 (Bankr. S.D.N.Y. Oct. 21, 2016) (quoting *Walden v. Fiore*, 134 St. Ct. 1115, 1121 (2014) (internal quotations omitted). To the extent Plaintiff seeks, in an opposition to this motion, to bolster its very minimal jurisdictional allegations by pointing to OVEAG's purchase of an interest in a loan to General Motors, the case law makes clear that a lender relationship is not sufficient.[1] In *Sledziejowski*, for example, the Court determined that the obligation of the foreign entity, MyPlace, to repay loans to TWSIP, which was located in the United States, was not sufficient to establish specific personal jurisdiction. *Id*. at *6. *See also Colson Servs. Corp. v. The Bank of Baltimore*, 712 F. Supp. 28 (S.D.N.Y. 1989), which involved an alleged double payment of principal and interest to the purchaser of a participation in a jumbo certificate of deposit. There, the defendant, Metropolitan, agreed to buy a participation in a certificate of deposit from a California bank whose collection and paying agent was located in New York. The defendant wired the purchase price to the New York agent. This was not sufficient to establish personal jurisdiction. *Id*. at 33.

A recent decision by the New York Court of Appeals further elucidates the type of conduct that can create specific jurisdiction for purposes of New York's Long Arm Statute CPLR 302(a)(1). *Al Rusaid v. Pictet & Cie*, 2016 WL 6837930, 2016 N.Y. Slip Op. 07834. In that case, the defendant's intentional and repeated use of New York correspondent bank accounts to launder its customer's fraudulently obtained funds constituted purposeful business activity that

[1] Immigon does not concede that it is open for Plaintiff, at this late date, to add or argue additional grounds for jurisdiction that appear nowhere in its Amended Complaint. In any event, the liability at issue in this suit does not arise out of OEVAG's 2007 purchases of interests in the Term Loan.

was related to plaintiffs' claims. The defendant, a private bank located in Geneva, Switzerland, used a correspondent bank account in New York as "an essential step in the money-laundering scheme." *Id*. at *7. The scheme involved vendors in Saudi Arabia who wired kickbacks to the defendant's New York correspondent bank account, which then credited the funds to a Geneva-based account in the name of a bogus off-shore company. Payments were then made from that account to the unfaithful employees who took the kickbacks. Thus, the use of the New York bank account was central to the entire fraudulent scheme. That set of facts is worlds apart from what is present here.

Simply put, there is no basis to conclude that by buying an interest in the Term Loan in the secondary market or in receiving the proceeds thereof in June 2009, OEVAG "purposefully avail[ed] itself of the privilege of conducting activities" within the United States. *Hanson*, 357 U.S. at 253. Indeed, were this Court to accept such an argument, it would widely expand the jurisdictional reach of U.S. courts. Such an expansive jurisdictional approach is wholly contrary to the Supreme Court's repeated direction that comity considerations require U.S. courts to be modest in exercising jurisdiction over foreign defendants and adjudicating conduct that occurs abroad. *See Daimler*, 134 S. Ct. at 763 (expansive approach to jurisdiction poses risks to international comity); *Asahi Metal Indus. Co. v. Superior Court of Calif., Solano,* 480 U.S. 102, 115 (1987) ("Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." (internal quotations omitted)); *In re Amaranth Nat. Gas Commodities Litig.*, 587 F. Supp. 2d 513, 527 (S.D.N.Y. 2008) (noting the Second Circuit's observation that courts should be cautious in exercising personal jurisdiction, "particularly in an international context").

B. Subjecting Immigon To Personal Jurisdiction Would Not Comport With Traditional Notions Of Fair Play And Substantial Justice

The second stage of the due process inquiry asks whether the assertion of personal jurisdiction comports with "traditional notions of fair play and substantial justice -- that is, whether it is reasonable under the circumstances of the particular case." *Metro. Life*, 84 F.3d 560, 568 (2d Cir. 1996); *citing Int'l Shoe*, 326 U.S. at 316 The traditional "reasonableness" factors are (i) the burden that the exercise of jurisdiction will impose on the defendant; (ii) the interests of the forum state in adjudicating the case; (iii) the plaintiff's interest in obtaining convenient and effective relief; (iv) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (v) shared interest of the states in furthering substantive social policies. *See Metro. Life*, 845 F.3d at 568; *see e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). *Aerogroup Int'l, Inc. v. Marlboro Footworks, Ltd.*, 956 F. Supp. 427, 441 (S.D.N.Y. 1996). Where the analysis involves a foreign defendant, instead of the fourth and fifth factors set forth above, courts look to the interests of the foreign nation and principles of comity. *See id*; *In re Commodore Int'l, Ltd.*, 242 B.R. 243, 256 (Bankr. S.D.N.Y. 1999) (noting that comity is especially important in the context of the Bankruptcy Code).

When a foreign defendant such as Immigon is involved, the Court must "make a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case … tempered by an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of plaintiff or the forum state." *Gmurzynska v. Hutton*, 257 F.Supp.2d 621, 627-28 (S.D.N.Y. 2003). The Supreme Court stressed the importance of this principle in *Asahi Metal Industry Co. Ltd. v. Superior Court of California, Solano*, 480 U.S. 102, 114 (1987), when it stated that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal

system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."

Exercising jurisdiction over Immigon would not comport with traditional notions of fair play and substantial justice. Immigon is a foreign company that has essentially no contacts with United States. All of Immigon representatives reside in Austria. Thus, it would be burdensome for Immigon employees and officers to travel to New York for trial. In addition, Immigon is going through a winding up process pursuant to Austrian bank regulations and under the supervision of Austrian banking authorities. Subjecting Immigon to this litigation at this late date will plainly add burden and complexity to the winding up process. Austria has an interest in an orderly, efficient, and predictable winding-up process for the financial institutions subject to its regulations. Requiring Immigon to respond to a lawsuit in 2016 concerning events that occurred in 2009, and where suit has been pending for seven years, and where there is no wrong doing ascribed to Immigon, will disrupt and hinder that winding up process. Immigon would be unduly burdened by having to defend itself in a distant country with a different legal system (Austria is a civil law country) in proceedings conducted in a foreign language. Immigon respectfully suggests that the Court should take all these factors into account and conclude that exercising jurisdiction at this time and in this manner is not consistent with traditional notions of fair play and substantial justice.

While the interests of the forum state in adjudicating the case and the plaintiff's interest in obtaining convenient and effective relief will often militate in favor of personal jurisdiction, they are outweighed by the burden to Immigon of defending itself in this forum. Moreover, the Supreme Court has admonished courts to take into consideration the procedural and substantive interests of other nations when deciding whether to exercise personal jurisdiction over an alien

defendant. *See Asahi*, 480 U.S. at 115 (reminding the Courts that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field" (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965)).

As is further discussed in the next section, Plaintiff's extreme delay in serving Immigon in a timely fashion is an independent basis to dismiss. But even on this 12(b)(2) motion, the Court should consider the delay in service in evaluating the weight to be given to the Plaintiff's interest in maintaining this suit. Plaintiff is in a particularly poor position to argue its own interest, when it waited seven years to serve the summons and notice on Immigon. That delay is convincing evidence that the Plaintiff itself does not consider Immigon's participation in this lawsuit as a matter of high or even medium priority. This Court need not give greater weight to Plaintiff's interest than Plaintiff itself has demonstrated by its own delay and inaction.

II. The Amended Complaint Should Be Dismissed For Untimely Service Of Process (Fed. R. Civ. P. 12(b)(5))

Immigon also seek dismissal under Rule 12(b)(5), which provides that a complaint should be dismissed if there has been insufficient service of process.[2] This covers timing of service and incorporates the service mechanisms under Fed. R. Civ. P. 4. *Osrecovery, Inc. v. One Group Int'l, Inc.*, 234 F.R.D. 59, 60-61 (S.D.N.Y. 2005); *see generally*, Charles Alan Wright & Arthur R. Miller, 5B Fed. Prac. and Proc. Civ. § 1353 (3d ed. 2004). Plaintiff here failed to timely serve Immigon and thus dismissal is proper.

Plaintiff has the burden of proof that timely service has taken place. *See Dickerson v. Napolitano*, 604 F.3d 732, 752 (2d Cir. 2010). Plaintiff here cannot carry its burden. While the Court's Dismissal Decision ruled on certain issues as to the timing requirements of Rule 4(m),

[2] So that there is no argument of a waiver, Immigon seek dismissal under Rule 12(b)(4), to the extent applicable, as well as Rule 12(b)(5).

that ruling does not affect Immigon's current motion, since Immigon was not served until months after the Dismissal Decision.

Fed. R. Civ. P (4)(h)(2), made applicable by Fed. R. Bankr. P. 7004, governs the service of process on Immigon. Although a plaintiff must ordinarily serve the summons and complaint within 90 days of the filing of the complaint, the 90 day limitation does not apply to service in a foreign country under Fed. R. Civ. P. 4(h)(2). This does not mean that the plaintiff enjoys an unlimited amount of time to effectuate service. A court may still dismiss a case involving the failure to serve a foreign defendant within a reasonable time under the "flexible due diligence" standard. *Official Comm. of Unsecured Creditors of Southold Dev. Corp. v. Mittemyer (In re Southold Dev. Corp.*), 148 B.R. 726, 730 (E.D.N.Y. 1992).

Courts have dismissed complaints where service on a foreign defendant was untimely. *See*, *e.g.* the decision earlier this year in *Allstate Ins. Co. v. Hewlett-Packard Co.*, No. 1:13-cv-02559, 2016 WL 613571 (M.D. Pa. Feb. 16, 2016) which cites cases and discusses the "flexible due diligence" standard.[3] Interestingly, in that case, the plaintiff retained the services of a third-party company to assist in service abroad. *Id*. at *4. Here, in contrast, the Plaintiff's actions did not rise even to that level of diligence.

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) the district court affirmed the dismissal of a suit for failure to serve a foreign defendant in a timely fashion. The court noted "the basic notion that in the interest of due process and judicial efficiency, defendants should be served in a timely manner."

[3] As the *Allstate v. Hewlett-Packard* decision noted, the Second Circuit has "held inapplicable the foreign country exception to Federal Rule of Civil Procedure 4(m)'s 120-day time limit for service where a party did not attempt service within the 120-day limit and 'ha[d] not exactly bent over backward to effect service.'" *DEF v. ABC*, 366 F. App'x 250, 253 (2d Cir. 2010) (quoting *Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737, 740 (2d Cir. 1985)).

166 B.R. at 552. The court also noted that "after a certain period of time, it is unfair to require the defendant to attempt to piece together his defense to an old claim." *Id*. at 551 (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 (1980). There, the court found actual prejudice as a result of the death of the president and chairman who would have testified. *In re Cryson/Montenay* at 551. Here, the vast majority of Immigon's managers and employees are no longer employed. Süssenbach Declaration ¶ 23.

Plaintiff failed to exercise due diligence in effecting service upon Immigon. The Second Circuit's mandate was issued on April 20, 2015. Plaintiff waited till June 15, 2015, nearly two months, to apply for Letters Rogatory. ECF No. 97. The Court granted the application on June 29 (ECF No. 107), and Plaintiff waited three weeks, until July 24, 2015, to submit the Letter Rogatory to the Department of State. Fisher Declaration ¶ 3. The Letter Rogatory enclosed a summons showing a pretrial conference on August 13, 2015, and thus, the Letter Rogatory was rejected. Plaintiff apparently did nothing for the next several months, until January 15, 2016, when Plaintiff was informed that the first Letter Rogatory was rejected. *Id.* ¶ 4. Plaintiff then waited till the end of March 2016 to take any further steps. This court issued a Furth Summons on April 1, 2016, less than a week after Plaintiff's request. ECF No. 471. Plaintiff then waited till May 11, 2016 to apply for a Second Letter Rogatory. ECF No. 597. We do not have the date when Plaintiff submitted the Second Letter Rogatory to the Department of State.[4]

The chronology establishes a demonstrable lack of diligence. Whenever the ball was in Plaintiff's court, the Plaintiff allowed weeks or months to elapse before taking the next step. There is no indication of any follow-up between the submission of the First Letter Rogatory to

[4] Plaintiff has not filed a proof of service, as required by Fed. R. Civ. P. 4(l)(2)(B), so Immigon does not have those details regarding the service of the Second Letter Rogatory. This rule is applicable pursuant to Fed. R. Bankr. P. 7004(a)(1).

the State Department on July 24, 2015, and the Plaintiff learning, nearly a full six months later, that the Austria Ministry had rejected the First Letter Rogatory. It appears from the Plaintiff's counsel's affidavit that the Plaintiff simply waited passively, rather than actively monitoring the progress. Fisher Declaration ¶ 4. There is no indication that Plaintiff retained local counsel in Austria to monitor the process, or retained a third-party service provider to monitor and expedite the process. If a due diligence standard is to have any teeth, this record of unexcused, extensive, and repeated delay must fall far short.

In addition, Plaintiff failed to seek alternative methods of serving Immigon. For example, pursuant to F.R.C.P. 4(f)(3), Plaintiff could have sought court approval to effect services upon Immigon "by other means not prohibited by international agreement, as the court orders." This provision gives the court discretion to authorize service, even if the method contravenes foreign law. *See Freedom Watch, Inc. v. OPEC*, 766 F.3d 74, 84 (D.C. Cir. 2014) for a discussion of Fed. R. Civ. P. 4(f)(3). Plaintiff could also have tried to seek a waiver from service, via Fed. R. Civ. P. 4(d). That Plaintiff failed to even attempt to utilize these alternative service methods is further evidence of Plaintiff's lack of diligence.

Immigon respectfully suggests that the Court should weigh a number of factors in considering whether Plaintiff exercised adequate due diligence in effecting service upon Immigon. These factors should include the length of time the suit has been pending, the sophistication of the counsel representing the Plaintiff, the amount that Plaintiff claims Immigon owes, the progress of the suit during the period when Immigon was not served, the interference the suit will cause to Immigon's winding-up process, Plaintiff's failure to prepare in the first instance a Letter Rogatory that would meet Austrian state requirements, and Plaintiff's failure to

take minimal steps, such as hiring Austrian counsel or a third-party provider, to monitor the progress of service.

This Court, in its decision earlier this month refusing to permit the Plaintiff to re-serve certain domestic plaintiffs, commented as follows:

> [O]ver six years have passed since the filing of the Original Complaint. An orderly litigation process justified multiple extensions of time to serve defendants other than JPMC; but it was incumbent on Plaintiff to properly serve all defendants before the last service extension expired. It did not do so with respect to the Moving Defendants. Under these circumstances, exercise of this Court's discretion to permit the Plaintiff to re-serve is not warranted.

Memorandum Opinion and Order Granting Motion to Dismiss, ECF No. 806, at 21**.** These comments apply with equal, if not more force, to Immigon. The Plaintiff's lack of diligence in serving Immigon implicates basic concepts of fair play. Waiting seven years after the filing of the Complaint, and seventeen months after the Second Circuit's mandate issued, to serve a foreign defendant with no U.S. contacts who is claimed to owe $10,000,000 is oppressive and inequitable. Basic considerations of fair play and substantial justice counsel against permitting such a result to stand.

CONCLUSION

For the foregoing reasons, Immigon respectfully requests that this Court dismiss all claims against Immigon and dismiss Immigon from this action.

Dated: December 23, 2016

Respectfully submitted,

/s/ Bruce R. Grace
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Attorney for immigon portfolioabbau ag

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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DECLARATION OF DR. STEFAN SÜSSENBACH
IN SUPPORT OF IMMIGON'S MOTION TO DISMISS

Stefan Süssenbach declares the following:

1. I am a citizen of Austria. I am employed by immigon portfolioabbau ag ("**Immigon**"), which is located in Vienna, Austria. I am a Prokurist (holder of proxy) and head of the legal department of Immigon. I am authorized to make the statements in this Declaration.

2. I made this declaration in support of Immigon's motion to dismiss the Amended Complaint against it on the grounds of lack of personal jurisdiction and untimely service of process.

3. I have been employed at Österreichische Volksbanken-Aktiengesellschaft (now Immigon, *see* ¶ 6 below) since 30 July 2012.

4. I make the statements herein based on my own personal knowledge, as well as a review of business records available to me.

5. immigon portfolioabbau ag is a wind-down company pursuant to section 162 of the Austrian Federal Act on the Restructuring and Resolution of Banks (Bundesgesetz über die Sanierung und Abwicklung von Banken ("**BaSAG**").

6. Until 4 July 2015 the corporate name of the company was Österreichische Volksbanken-Aktiengesellschaft. On that date, the name was changed to immigon portfolioabbau ag.

7. The abbreviation of Österreichische Volksbanken-Aktiengesellschaft was OEVAG ("**OEVAG**").

8. OEVAG was the central institute of the Austrian co-operative banks named Volksbanken. OEVAG had its seat in Vienna, Austria. OEVAG had a full banking license and operated under the authority of the Austrian banking authorities.

9. OEVAG's function as the "central institution" of the association of Austrian Volksbanken included, in particular, liquidity management, credit risk policy, business directives, advertising, and acting as the point of contact for the Austrian supervisory authorities.

10. OEVAG's business focus was the Austrian and the European market.

11. OEVAG did not have offices, employees, or property in the United States.

12. OEVAG did not hold itself out as doing business in New York or anywhere in the United States.

13. OEVAG did not have a postal address or a telephone number in the United States.

14. OEVAG was not registered to, and did not, conduct business in the United States.

15. OEVAG did not offer any financial or other services in the United States.

16. OEVAG did not advertise in the United States.

17. The statements in ¶¶ 11-16 are true of Immigon as well.

18. As of 4 July 2015 OEVAG's function as a central organization and central institution of the association of Austrian Volksbanken (Volksbanken-Verbund) was transferred by way of a demerger to Volksbank Wien AG (formerly: Volksbank Wien-Baden AG). Such demerger was the result of a reorganization plan implemented by OEVAG, with regulatory approval. This demerger was undertaken largely as a result of a comprehensive assessment carried out in 2014 that showed a large capital shortfall for future years and because it was believed that the conditions to ensure OEVAG's continued existence as a bank were no longer in place.

19. The demerger became effective on 4 July 2015, and involved the transformation of OEVAG from a credit institution into a pure wind-down company pursuant to the BaSAG without a banking license. As part of this demerger, OEVAG's legal name was changed to immigon portfolioabbau ag.

20. The company goal is to wind down its assets (including the repayment of liabilities) to a large extent by the end of 2017, and to ultimately implement the liquidation of the entity.

21. The winding-down process is supervised by the Austrian Financial Market Authority (Österreichische Finanzmarktaufsicht).

22. In keeping with its winding-down function, Immigon has greatly reduced its staffing.

23. Immigon currently employs approximately 87 persons. In 2007 to 2009 OEVAG employed approximately 400 to 500 persons.

24. In the course of preparing this Declaration, I or persons under my supervision have researched the circumstances relating to OEVAG's purchase of an interest in the Term Loan that is the subject matter of this lawsuit.

25. The individuals who were involved with the transactions concerning the Term Loan are no longer employed at Immigon.

26. In September 2007, OEVAG purchased two interests in the Term Loan, each in the amount of $5,000,000.

27. Records maintained and/or available to Immigon reflect that the two transactions relating to the Term Loan were arranged by an employee of OEVAG in Vienna, Austria. This person is no longer employed by Immigon. The counterparty was JPMorgan Chase Bank, N.A.

28. OEVAG received a repayment totaling $9,893,347.29 on or about June 30, 2009.

29. This repayment was made by JPMorgan, which paid the amount to OEVAG's account in New York maintained at the Bank of New York Mellon.

30. The Amended Complaint in this matter states at Paragraph 579 that a provision of the DIP Order provides that Defendants that accepted payment after the Petition Date consented to the jurisdiction of this Court. A search has been conducted for any documentation that might reflect notice to OEVAG of the DIP Order or this provision of the DIP Order. No such documentation has been located.

31. The Fourth Summons together with the First Amended Adversary Complaint was provided to Immigon on 23 September 2016 by the competent court in Austria (Bezirksgericht Josefstadt, Vienna).

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on: 22 December 2016

By: _____
Dr. Stefan Süssenbach