Hearing Date and Time: To be determined by the Court
Objections Due (per Scheduling Order): January 20, 2016
Reply Due (per Scheduling Order): February 15, 2016

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

MOTORS LIQUIDATION COMPANY, f/k/a GENERAL MOTORS CORPORATION, *et al.*,

Debtors.

Chapter 11

Case No. 09-50026 (REG)
(Jointly Administered)

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MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST, by and through the Wilmington Trust Company, solely in its capacity as Trust Administrator and Trustee,

Plaintiff,

against

JPMORGAN CHASE BANK, N.A., *et al.*,

Defendants.

Adversary Proceeding
Case No. 09-00504 (REG)

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DEFENDANT CONTINENTAL CASUALTY COMPANY'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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TO: THE HONORABLE ROBERT E. GERBER
UNITED STATES BANKRUPTCY JUDGE

Defendant Continental Casualty Company ("Continental"), by its counsel Elenius Frost & Walsh and David Christian Attorneys LLC, submits this memorandum in support of its simultaneously filed motion pursuant to Fed. R. Civ. P. 12(b)(2), 12(b)(5), and 12(b)(6), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7012(b), for an order dismissing with prejudice the *First Amended Adversary Complaint for (1) Avoidance of Unperfected Lien, (2) Avoidance and Recovery of Postpetition Transfers, (3) Avoidance and Recovery of Preferential Payments, and (4) Disallowance of Claims by Defendants* (the "Amended Complaint") filed by Plaintiff Motors Liquidation Company Avoidance Action Trust (the "AAT") on May 20, 2015 [Docket No. 91].

PRELIMINARY STATEMENT

Continental's Motion should be granted for reasons stated in the *Term Loan Investor Defendants' Memorandum of Law* filed on November 16, 2016 [Docket No. 226-1] and in the *Motion of Ad Hoc Group of Term Lenders (1) to Vacate Certain Prior Orders of the Court; and (2) to Dismiss the Adversary Proceeding* filed on November 19, 2015 [Docket No. 262]. First, Continental did not receive proper notice of this adversary proceeding – much less service of the Amended Complaint – until more than six years after commencement of the adversary proceeding. Such denial of due process alone warrants dismissal with prejudice pursuant to Fed. R. Civ. P. 12(b)(2) and (b)(5). Also, upon information and belief, Continental did not receive any prepetition transfers within the preference period, and so the aspects of the Amended Complaint addressed to

avoidance of prepetition transfers should be dismissed with prejudice as to Continental pursuant to Fed. R. Civ. P. 12(b)(6).[1]

Additionally, the Court expressly authorized the postpetition transfer to Continental. Thus, the AAT cannot establish an essential element for avoidance of the postpetition transfer under 11 U.S.C. § 549(a). As a result, the Amended Complaint must be dismissed with prejudice at to Continental pursuant to Fed. R. Civ. P. 12(b)(6).

ARGUMENT

I. THE AAT CANNOT AVOID A POSTPETITION TRANSFER TO CONTINENTAL AUTHORIZED BY THE COURT.

Assuming that the postpetition transfer to Continental was ever property of the estate (which it was not),[2] the AAT may only avoid the transfer "that occurs after the commencement of the case and . . . (B) that is not authorized under this title or by the court." 11 U.S.C. § 549(a). The Amended Complaint asserts that Continental received a postpetition transfer on account of principal and interest owned under the Prepetition Term Loan Agreement. This transfer to Continental was expressly authorized by the *Final Order Pursuant to Bankruptcy Code Sections 105(a), 361, 362, 363, 364 and 507 and Bankruptcy Rules 2002, 4001 and 6004 (A) Approving a DIP Credit Facility and Authorizing the Debtors to Obtain Post-Petition Financing Pursuant Thereto, (B)*

[1] The AAT elected not to provide any detail about the allegedly avoidable transfers received by Continental in the version of the Amended Complaint available to Continental at this time. Based on Continental's books and records, Continental did not receive any prepetition transfers from the debtor within the preference period. In any event, the publicly available copy of the Amended Complaint fails to establish Continental's receipt of a prepetition transfer, and the Amended Complaint fails to provide Continental with sufficient information about the AAT's alleged cause of action to allow for a meaningful response. *See* Fed. R. Civ. P. 12(e).

[2] *See In re Westchester Tank Fabricators Ltd.*, 207 B.R. 391, 397 (Bankr. E.D.N.Y. 1997) (holding that earmarking doctrine precludes claw-back of postpetition transfer).

Granting Related Liens and Super-Priority Status, (C) Authorizing the Use of Cash Collateral and (D) Granting Adequate Protection to Certain Pre-Petition Secured Parties [the "DIP Order"] in the main bankruptcy case, Case No. 09-50026 (the "Main Case") [Docket No. 2529],[3] which provided for:

> . . . the application of a portion of the proceeds of the DIP Credit Facility toward payment in full of all principal, interest, letter of credit reimbursement obligations (including obligations to cash collateralize undrawn letters of credit) and other amounts due or outstanding under (A) that certain Term Loan Agreement, dated as of November 29, 2006, among GM, Saturn Corporation and JP Morgan Chase Bank, N.A. as administrative agent, and the lenders party thereto from time to time (as may be amended, restated, supplemented, or otherwise revised from time to time, and together with all related agreements and documents, the "Prepetition Term Loan Agreement") secured by a first-priority lien on certain Property (the "Prepetition Term Loan Collateral").

Thus, the AAT cannot establish that the Court did not authorize the postpetition transfer to Continental, as required for avoidance under Section 549(a). *See Westchester Tank*, 207 B.R. at 396; *cf. In re Centennial Textiles, Inc.*, 227 B.R. 606, 610 (Bankr. S.D.N.Y. 1998).

II. THE AAT IS WRONG THAT THE POSTPETITION TRANSFER TO CONTINENTAL WAS ONLY "PROVISIONALLY" AUTHORIZED OR OTHERWISE QUALIFIED BY THE DIP ORDER.

[3] In considering a motion to dismiss under Fed. R. Civ. P. 12(b), a court may consider the public record, including pleadings and other papers filed with the court. *See Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 426 (2d Cir. 2008) (noting that "matters judicially noticed by the District Court are not considered matters outside the pleadings"); *5-Star Mgmt, Inc. v. Rogers*, 940 F. Supp. 512, 518-19 (E.D.N.Y. 1996) ("When presented with a motion to dismiss, this Court is permitted to take judicial notice of matters of public record . . . ."). Continental hereby requests pursuant to Fed. R. Evid. 201 that the Court take judicial notice of the public files and records in this adversary proceeding and the Main Case in connection with the Continental Motion to Dismiss.

In order to circumvent this basic infirmity in the Amended Complaint, the AAT alleges that the postpetition transfers at issue were only "provisionally" authorized. *See* Amended Complaint, ¶¶ 593, 596. But that word appears nowhere in the DIP Order, and neither does any other qualification on the Court's authorization for the postpetition transfers to the prepetition term lenders.[4]

Of course, the DIP Order does authorize the official committee of unsecured creditors (the "Committee") to investigate the liens of any Prepetition Senior Facilities Secured Parties (which includes the prepetition term lenders such as Continental), and the DIP Order provides the Committee with authority to bring actions based on its investigation no later than July 31, 2009. *See generally* DIP Order, ¶ 19. By their plain terms, these provisions do not qualify the authority granted to make the postpetition transfers to Continental and the other prepetition term lenders. Indeed, the only reference in the DIP Order to Section 549 relates to the new DIP lenders' liens, not the debtor's prepetition lenders. DIP Order, ¶ 6.

Moreover, even if the provisions of paragraph 19 in the DIP Order could be read as imposing some sort of provisional or other qualification on the authority to make the postpetition transfers, the AAT's Amended Complaint does not satisfy its provisions. As explained in the memoranda supporting the motions to dismiss in which Continental joins, the AAT is not the Committee, and the Committee is not pursuing these causes of action in accordance with paragraph 19 of the DIP Order. Worse yet, Continental received no notice of the claims until more than 6 years after the deadline imposed by the

[4] Black's Law Dictionary defines "provisional" as "[t]emporary; preliminary; tentative; taken or done by way of precaution or *ad interim*." *Black's Law Dictionary* 1224 (6th ed. 1990).

DIP Order. Simply put, whatever provisions existed in the DIP Order for bringing this action against Continental elapsed long ago according to their terms.

If the Court were to agree with the AAT that the provisions of the DIP Order qualified this Court's authorization for the postpetition transfers, such provisional authorization does not bind Continental in any event. Continental was not a party to the DIP Order. And Continental's interests are adverse to the interests of the agent for the prepetition term lenders who participated in negotiating in the DIP Order; JPM is now a co-defendant against whom Continental holds cross-claims in this adversary proceeding. *See Answer and Cross-Claims of Term Loan Lenders* [Docket No. 241]. At the same time, Continental had no notice of the DIP Order or its terms. *Cf. In re Johns-Manville Corp.*, 600 F.3d 135, 154–57 (2d Cir. 2010) (holding that party without constitutionally sufficient notice not bound by prior orders).

Thus, this case does not resemble those cases where the transferee had some reason to suspect that the postpetition transfer may not be authorized. *See In re Photo Promotion Assoc., Inc.*, 881 F.2d 6, 9 (2d Cir. 1989) (reasoning that "a judge should take into account as bearing on the good faith of the debtor and lender, whether or not they honestly believed that they had authority to enter into the transaction"). In fact, the postpetition transfer to Continental was authorized, and Continental had no reason to think anyone thought otherwise until more than 6 years later. To the contrary, the record of these proceedings is clear that the DIP lenders would have insisted on repayment in full of the prepetition term loan at the time of the U.S. Government bailout even if doubts had existed at the time about any of the prepetition term loan liens. *See Motion of Debtors for Entry of an Order Pursuant to 11 U.S.C. §§ 361, 362, 363, and 364 (i)*

Authorizing the Debtors to Obtain Postpetition Financing, Including on an Immediate, Interim Basis; (ii) Granting Superpriority Claims and Liens; (iii) Authorizing the Debtors to Use Cash Collateral; (iv) Granting Adequate Protection to Certain Prepetition Secured Parties; (v) Authorizing the Debtors to Prepay Certain Secured Obligations in Full Within 45 Days; and (vi) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001 [Main Case, Docket No. 64] (stating that "the Debtors determined that the requisite financing is only available from the U.S. Treasury, and only on the terms described herein . . . [including that] repayment of the Revolver Facility and the Term Loan will avoid unnecessary fees and expenses and potential default rate interest. In addition, it will increase the ease of administration of the Debtors' cases and assist in the ultimate implementation of the 363 Transaction."); *cf. In re General Growth Properties, Inc.*, 423 B.R. 716, 725 (Bankr. S.D.N.Y. 2010) ("Substantially all of the Debtors' prospective DIP lenders required a first lien on the Goldman collateral . . . the Goldman loan had to be repaid to allow the Goldman collateral to be used for the DIP loan. These actions made the DIP financing possible. . . .").

WHEREFORE, Continental Casualty Company respectfully requests that the Court grant the Continental Motion to Dismiss and dismiss the Amended Complaint as against Continental with prejudice; and for such other and further relief as the Court deems just and proper.

New York, New York
December 11, 2015

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CERTIFICATE OF SERVICE

I, William P. Lalor, hereby certify that on December 11, 2015, I caused a copy of the foregoing to be served via electronic service by the court's CM/ECF system on all counsel of record.

New York, New York, this 11th day of December, 2015

/s/ William P. Lalor
William P. Lalor