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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
JOINDER AND REPLY IN SUPPORT OF
MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

TABLE OF AUTHORITIES

CASES

5-Star Mgmt, Inc. v. Rogers, 940 F. Supp. 512 (E.D.N.Y. 1996) 3

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ARGUMENT

Defendant Continental Casualty Company ("Continental"), by its counsel Elenius Frost & Walsh and David Christian Attorneys LLC, submits this joinder to the *Reply in Support of Certain Term Lenders' Rule 12 Motions* ("Certain Term Lenders' Reply") and separate reply in support of *Defendant Continental Casualty Company's Motion to Dismiss Plaintiff's Amended Complaint* [Docket No. 310] (the "Continental Motion") 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].

Continental hereby joins in Certain Term Lender's Reply and replies separately to address matters in the AAT in particular response to the Continental Motion. The AAT's *Omnibus Memorandum of Law in Opposition to Defendants' Motion to Dismiss and for Judgment on the Pleadings* [Docket No. 427] (the "Opposition") addresses the Continental Motion by incorrectly characterizing Continental's argument as a challenge to the AAT's standing to bring this action. *See* Opposition, pp. 48–49. Continental's motion does not argue that the Court has not granted the AAT standing. Instead, the Continental Motion asserts that the Amended Complaint together with the files and records in this case fail to establish a cause of action for avoidance of postpetition transfers to Continental, whether brought by the AAT or anyone else acting on behalf of the estate.

Specifically, to avoid a postpetition transfer under 11 U.S.C. § 549(a), the AAT must show that the transfer was "not authorized." In an attempt to plead this essential element of its cause of action against Continental, the AAT asserts that the postpetition transfers to Continental were "provisionally" authorized. *See* Amended Complaint, ¶¶ 593, 596. But that word appears nowhere in the DIP Order[1] that expressly authorized the postpetition transfers to Continental. Thus, on the face of the papers before the Court, the AAT cannot make out the elements contained in the statute for avoidance of the postpetition transfers to Continental (assuming the funds transferred were ever property of the estate, which they were not). As a result, the Amended Complaint must be dismissed with prejudice at to Continental pursuant to Fed. R. Civ. P. 12(b)(6).

In making this argument, Continental does not ask the Court to make a rule that the payoff of secured claims from DIP loan proceeds can never be clawed back later in appropriate circumstances. Continental recognizes that at least some of the parties to the heavily negotiated DIP Order in this case intended to provide a vehicle for clawing back repayment of the term loan lenders. If the Court's express authorization of the postpetition transfers (at the insistence of the DIP lender, the United States Treasury) had

[1] *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) 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 Case No. 09-50026 [Docket No. 2529]. 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 . . . .").

been differently arranged, this might be a different case. But Continental—a stranger to these bankruptcy proceedings, aside from being a buyer and seller of GM secured debt in the secondary market—was entitled to accept repayment of its share of GM's debt, then move on with its business, in reliance on a DIP Order of this Court containing express authorization for such repayment.

Moreover, the Amended Complaint shows that the AAT has proceeded in a manner never contemplated by the DIP Order or the Court's express authorization of the postpetition transfers. In particular, the DIP Order contemplated the possibility of an action by the creditors committee by July 31, 2009—more than six years before Continental was ever brought into this litigation by the AAT. The AAT's only answer to this point is to say that the subsequent chapter 11 plan and other orders of the Court created new facts on the ground. But that cannot undo the express authorization for repayment of Continental. *Cf. In re Johns-Manville Corp.*, 600 F.3d 135, 154–57 (2d Cir. 2010) (holding that party without constitutionally sufficient notice not bound).

The circumstances of this case sharply contrast with cases where the estate can avoid a non-fraudulent postpetition transfer under Section 549(a). For example, in *In re Photo Promotion Assoc., Inc.*, 881 F.2d 6 (2d Cir. 1989), the debtor entered into an arrangement with a vendor performing necessary services for its operation under chapter 11 protection whereby the debtor's customers were instructed to remit payment directly to the vendor. *See id.* at 7. After conversion of the case to chapter 7, the trustee sued to recover these postpetition transfers to the vendor. *See id.* Looking to the equities of the case, the Second Circuit noted that the vendor made a "self-enhancing" arrangement with the debtor: "the terms of the . . . agreement strongly suggest that the parties knew that the

arrangement was unauthorized by the Code, otherwise they would not have concealed it," and the debtor faced no emergency requiring the arrangement. *Id.* at 9–10. Although the vendor asserted that subsequent orders did or should retroactively authorize the transfers and claimed administrative expense priority status for its arrangement, *see id.* at 9, the Second Circuit affirmed avoidance of the postpetition transfers to the vendor under Section 549(a). *See id.* at 11.

In contrast, repayment of Continental in this case came at the insistence of the U.S. Treasury as part of one of the greatest business restructuring emergencies ever faced in the United States, not based on some self-serving arrangement negotiated by Continental, and was fully disclosed, expressly authorized, and in complete good faith. As observed by the Second Circuit in *Photo Promotion*, "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." *Id.* at 9 (quoting *In re American* Cooler, 125 F.2d 496, 497 (2d Cir. 1942)). In this case, there can be no dispute that both the debtor and Continental were sure that the postpetition transfers to Continental were authorized. Thus, the Amended Complaint should be dismissed with prejudice as to Continental.

CONCLUSION

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
March 30, 2016

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CERTIFICATE OF SERVICE

I, William P. Lalor, hereby certify that on March 30, 2016, 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 30th day of March, 2016:

/s/ William P. Lalor
William P. Lalor