SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CHARLES E. RAMOS Justice PART 53

Index Number : 600691/2010
TAP HOLDINGS, LLC,
vs
ORIX FINANCE CORP.,
Sequence Number : 015
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with accompanying memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: _____

_____ J.S.C.
CHARLES E. RAMOS

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

----------X

TAP HOLDINGS, LLC, IRVING PLACE CAPITAL PARTNERS II, L.P., IRVING PLACE CAPITAL INVESTORS II, L.P., IRVING PLACE CAPITAL MB-PSERS II, L.P., THE BSC EMPLOYEE FUND VII, L.P., and IPC MANAGER II, LLC,

Plaintiffs,

Index No. 600691/10

- against -

ORIX FINANCE CORP., MAPS CLO FUND I, LLC, MAPS CLO FUND II, LTD, WELLS FARGO BANK, N.A., UNION BANK OF CALIFORNIA, N.A., CIT LENDING SERVICES CORPORATION, BANK MIDWEST, N.A., BROWN BROTHERS HARRIMAN & CO., PRUDENTIAL INSURANCE COMPANY OF AMERICA, OFS FUNDING, LLC, OFSI FUND III, LTD., CIT CLO I LTD., TAP AUTOMOTIVE HOLDINGS, LLC,

Defendants.

----------X

Charles Edward Ramos, J.S.C.:

Motion sequence numbers 015 and 016 are consolidated for disposition.

In motion sequence number 016, those defendants which are referred to as the senior lenders (all but one of the defendants) move to dismiss the eighth cause of action in the second amended complaint (the SAC). In motion sequence number 015, the remaining defendant, TAP Automotive Holdings, LLC (TAP Auto), moves for the same relief.

Plaintiffs allege the following. TAP Auto is an entity created by the senior lenders. One of the senior lenders, Orix Finance Corp. (Orix), is the administrative agent for the senior

loans, and acts on behalf of the senior lenders. Plaintiff TAP Holdings, LLC (TAP Holdings) is the parent company of TAP Operating Company, LLC (TAP), an entity previously dismissed from this litigation. The other plaintiffs are the IPC Investors, owners of 88% of TAP Holdings, and the IPC Manager, assignee of the claims of holders of senior subordinated notes (subordinated notes) issued by TAP.

TAP is a leading seller of parts for trucks, Jeeps, and SUVs. In 2005-2006, the senior lenders lent TAP $110 million to enable it to acquire two companies. The rest of the purchase price came from $86 million in equity contributions by TAP Holdings, $76 million of which was invested by the IPC Investors, and from $28.4 million in subordinated notes sold by TAP. The senior lenders obtained security interests in all of TAP's assets and in the membership units of TAP Holdings.

After performing well in 2006 and 2007, TAP's sales began to suffer due to rising gas prices. Though unable to remain in compliance with certain technical covenants under the senior loans, TAP made all the payments for the loans and for the subordinated notes. Because of the technical defaults, Orix exercised its right to stop TAP from making payments to the subordinated note holders as of March 31, 2008. Orix granted TAP a forbearance for the defaults, on the condition that, if TAP defaulted on payments for the senior loans, Orix could demand

that the IPC Investors purchase $7 million worth of participation interests in the senior loans. The participation interests were referred to as "last out" interests because they would not be repaid until the senior loans were repaid. Once the senior loans were repaid in full, the senior lenders would repay the $7 million to the IPC Investors. It was further agreed that the senior lenders would take the $7 million repayment out of TAP's payment under the senior loans. The IPC Investors also had the right to seek repayment directly from TAP.

The senior lenders refused to extend the forbearance period and instead moved to take control of TAP. Citing to a technical default, the senior lenders exercised their right in the security interests that they held in TAP Holdings' membership units and in TAP's assets. They vested TAP Holdings' voting rights with Orix, removed all TAP's board members except one, and appointed other members to the board. As of December 1, 2008, the senior lenders controlled all of the voting interests in TAP and acted as its owner and dominated TAP's board.

It is alleged that the senior lenders then engineered a payment default when no such default existed. Based on certain technical defaults under the senior loans, Orix declared $7 million of the loans immediately due. Orix declared that, based on TAP's failure to pay the $7 million on the very day of the acceleration, TAP had engaged in a payment default. On the same

[* 5]

day, Orix demanded that the IPC Investors purchase the participation interests for $7 million. The IPC Investors did so, and Orix rescinded the acceleration demand on TAP.

TAP's performance improved dramatically during the third quarter of 2009. Allegedly, realizing that TAP was rebounding, the senior lenders devised a scheme to seize it. The senior lenders formed a new entity owned by them, TAP Auto. With the approval of TAP's board, which the senior lenders controlled, TAP and TAP Auto entered into an alleged sham foreclosure agreement, effective October 30, 2009. Pursuant to the foreclosure, TAP Auto purchased almost all of TAP's assets by giving TAP a note for $66 million (the TAP Auto note) and assuming only those TAP liabilities that were necessary to maintain the business as a going concern. TAP then assigned the Tap Auto note to Orix in return for which TAP was released from the senior loan obligations. All of this was done without notice to plaintiffs or the public.

Plaintiffs contend that the $66 million purchase price for TAP was significantly less than its fair value as of October 30, 2009. Allegedly, the senior lenders chose that sum because it approximated the balance owed under the senior loans and it excluded the $7 million in participation interests owed to the IPC Investors. Since the participation interests are last out, the IPC Investors have no chance of receiving payment from TAP,

which has become a mere shell entity. TAP has also been rendered incapable of repaying the subordinate noteholders. Plaintiffs allege that the senior lenders now own the actual business, for which they did not pay. The senior lenders can sell the business for much more than $66 million.

Plaintiffs demanded that TAP bring claims against the senior lenders. The demand was refused. Plaintiffs commenced this action in June 2010, seeking to recover on the subordinated notes and the participation interests and to have the transferred assets returned to TAP, on the basis of fraudulent transfer laws. The complaint asserted sixteen causes of action and named TAP as a nominal defendant. Several motions to dismiss the complaint ensued. This Court's decision of March 28, 2011 (the 2011 decision or judgment), which concerned the first amended complaint, dismissed some causes of action entirely and some partly.

The first amended complaint contained four causes of action concerning TAP, all of them derivative. The 2011 judgment determined that plaintiffs had no standing to assert derivative causes of action on behalf of TAP. Plaintiffs failed to show that TAP's refusal to institute litigation was wrong. The derivative causes of action were dismissed and TAP was dismissed from the action.

Plaintiffs then fashioned their SAC according to the Court's

decision. The SAC does not name TAP as a party. The remaining causes of action are: (1) breach of the duty of good faith and fair dealing in the Participation Agreement, IPC Investors against the senior lenders; (2) breach of the Participation Agreement, IPC Investors against the senior lenders; (3) violation of UCC Article 9, IPC Investors and TAP Holdings against the senior lenders; (4) breach of the duty of good faith and fair dealing in the Subordination Agreement, IPC Manager against the senior lenders; (5-7) violation of the Delaware Fraudulent Transfer Act, IPC Investors and IPC Manager against all defendants; and (8) breach of contract - successor liability, IPC Manager against all defendants. The previous complaint did not include a successor liability claim.

Defendants move to dismiss the eighth cause of action, which seeks recovery on the subordinated notes and is based on the following allegations. On October 30, 2009, the senior lenders used their control of all the equity and voting interest in TAP to make TAP transfer all its assets to TAP Auto, except for empty bank accounts and some unfavorable leases. TAP Auto assumed those of TAP's liabilities which are necessary to continue the business. TAP has effectively ceased operating and become an empty shell. TAP Auto's management, personnel, location, good will, web domain, phone number, and business operations are the same as TAP's before the transfer. The senior lenders own TAP

Auto, which carries on the same business as did TAP.

The eighth cause of action further alleges that the purpose of the transfer was to shear TAP of its assets while leaving it with its liability towards the subordinate noteholders. TAP Auto, as TAP's successor, and the senior lenders, as TAP Auto's alter ego, are severally and jointly liable for TAP's obligations under the subordinated notes.

Defendants argue that the eighth cause of action is precluded by the doctrine of res judicata and by the failure to adequately plead successor liability, pursuant to CPLR 3211 (a) (5) and (7), respectively. "In deciding a motion to dismiss directed at the sufficiency of the pleadings ... a court must accept their allegations as true, according them the benefit of every favorable inference to determine whether they come within the ambit of any cognizable legal theory" (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 274 [1st Dept 2005]).

Under the doctrine of res judicata, a "final judgment bars future actions between the same parties on the same cause of action" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]). To be accorded res judicata treatment, a judgment must be on the merits (*Springwell Nav. Corp. v Sanluis Corporacion, S.A.*, 81 AD3d 557, 557 [1st Dept 2011]). Res judicata bars not only claims that were actually litigated but also claims that

could have been litigated in the prior action if they arose from the same transaction or series of transactions (*UBS Sec. LLC v Highland Capital Mgt., L.P.*, 86 AD3d 469, 474-475 [1st Dept 2011]). When a claim has been "brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). A judgment with res judicata effect applies to the party with regard to whom it was issued and to those in privity with that party (*Simmons v New York City Health & Hosps. Corp.*, 71 AD3d 410, 411 [1st Dept 2010]).

TAP Auto argues that the 2011 judgment precludes any successor liability claims for the following reasons. The successor liability claim against TAP Auto depends on a finding that TAP is liable on the subordinated notes, but the Court already determined TAP's liability. The dismissal of the derivative claims has res judicata effect for the IPC Investors, who asserted it, and also for the IPC Manager, who is in privity with the IPC Investors. In addition, since none of the plaintiffs raised the successor liability issue in the earlier complaint, they should not be able to raise it now. TAP Auto does not urge res judicata in its own favor, but in favor of TAP, and only indirectly in its own favor.

Plaintiffs contend that res judicata does not apply to

judgments in the same action. Some cases that provide that res judicata cannot apply to judgments in the same action have such different factual and procedural patterns from this case that they are not helpful (*see Wisell v Indo-Med Commodities, Inc.*, 74 AD3d 1059, 1060 [2d Dept 2010]; *Matter of Willard v Meehan*, 35 AD3d 488, 490 [2d Dept 2006]). Other cases are more illuminating. A plaintiff was allowed to amend its complaint to add an oral contract claim, which the motion court had previously dismissed. The First Department held that "principles of res judicata are inapplicable when, as in this case, the two determinations arise in the same action" (*Moezinia v Damaghi*, 152 AD2d 453, 457 [1st Dept 1989]). It also determined that the motion court lacked jurisdiction to dismiss the claim and that the claim had merit (*id.* at 456). Where the First Department held that res judicata did apply in the same action and precluded an amended complaint, the claims in the previous complaint had been dismissed on the merits and not for "technical pleading defects" (*Feigen v Advance Capital Mgt. Corp.*, 146 AD2d 556, 558 [1st Dept 1989]; *see also US Bank N.A. v Greenpoint Mtge. Funding, Inc.*, 34 Misc 3d 1231[A]), 2012 NY Slip Op 50331[U], *1-2 [Sup Ct, NY County 2012][res judicata barred amended complaint, where earlier dismissal, based on finding that defendants were not third party beneficiaries, was based on merits of the action]).

TAP Auto cites *UBS* (86 AD3d at 475), in support of its argument that res judicata applies to judgments in the same action. In that case, the First Department determined that res judicata precluded a second action asserting new previously unpleaded claims against the same defendants dismissed from the first action. Although it is not discussed, it is clear that the claim in the first action was dismissed because it lacked merit. As the new claims in the second action were based on the same business deals and events as the claim that had been dismissed from the first action, the plaintiff should have asserted the new claims in the first action. The court applied the same reasoning to the plaintiffs' attempt to amend its complaint in the first action to add the new claims. Res judicata prevented claims from being added to an amended complaint when those claims should have been asserted in the first complaint, although both complaints were in one action. The conclusion is that res judicata based on a previous judgment will preclude an amended complaint in the same action, where the previous judgment was based on the merits.

In regard to pre-answer motions to dismiss the complaint, res judicata applies to judgments on the merits and not to dismissals based on technical defects in the pleading (*Jericho Group Ltd. v Midtown Dev., L.P.*, 67 AD3d 431 [1st Dept 2009]; *Heritage Realty Advisors, LLC v Mohegan Hill Dev., LLC*, 58 AD3d 435, 436 [1st Dept 2009]). Generally, dismissals pursuant to

CPLR 3211 motions for insufficiency of the pleading are not subject to res judicata treatment (*id.; see also 175 E. 74th Corp. v Hartford Acc. & Indem. Co.*, 51 NY2d 585, 590 n 1 [1980]).

A dismissal based on the plaintiff's lack of standing is not necessarily a judgment on the merits; the plaintiff may cure the lack of standing and assert the same claims in another action (*Springwell Navigation Corp. v Sanluis Corporacion, S.A.*, 81 AD3d 557 [1st Dept 2011]; *Tak Shing David Tong v Hang Seng Bank*, 210 AD2d 99, 100 [1st Dept 1994][lack of standing in a non-derivative suit not conclusive of standing in subsequent derivative suit]). In contrast, a determination of standing to bring a derivative action is subject to res judicata. A determination that the plaintiff cannot sue on behalf of a company because the board may properly make litigation decisions for the company is substantive, on the merits, and preclusive as to the derivative action (*see Levin v Kozlowski*, 13 Misc 3d 1236[A], 2006 NY Slip Op 52142[U], *11 [Sup Ct, NY County 2006], *affd* 45 AD3d 387 [1st Dept 2007]; *see also Henik v LaBranche*, 433 F Supp 2d 372, 377 [SD NY 2006]). The issue of whether the board acted properly will not be revisited. However, a determination that derivative claims cannot be maintained is not conclusive of all claims against a company. A plaintiff may bring direct claims against a company after derivative claims against the same company have been dismissed based on reasons that do not touch the merits of

the claims, such as a conflict of interest between direct and derivative claims (*see JFK Family Ltd. Partnership v Millbrae Natural Gas Dev. Fund 2005, L.P.*, 21 Misc 3d 1102[A]), 2008 NY Slip Op 51915[U], *17 [Sup Ct, Westchester County 2008]). Again, the pertinent question is whether the merits of the claims have been decided.

The 2011 judgment found that plaintiffs failed to show that TAP's board acted wrongly in refusing to sue on behalf of TAP. That meant that plaintiffs had no standing to sue for injuries to TAP. The 2011 judgment is preclusive as to plaintiffs' derivative standing to assert derivative claims on TAP's behalf. It is not preclusive as to other issues which were not determined on the merits or at all. The *UBS* holding that all claims arising out of the same or related circumstances and events must be brought together cannot be interpreted to mean that if plaintiffs have no standing to bring a derivative claim for a company, res judicata precludes them from bringing a subsequent successor liability claim against the company's successor. The claims that defendants seek to dismiss were not determined on the merits.

In the SAC, plaintiffs are not attempting another derivative suit involving TAP or even attempting to bring TAP back into the action as a defendant. It is correct, as TAP Auto states, that the successor liability claims against it implicate TAP, as plaintiffs claim that TAP Auto inherited those liabilities from

TAP. A successor liability claim may be pressed against the predecessor company, the successor company, or both (*Grant-Howard Assoc. v General Housewares Corp.*, 63 NY2d 291, 297 [1984]; *American Std., Inc. v Oakfabco, Inc.*, 26 Misc 3d 1216[A], 2008 NY Slip Op 52705[U], *3 [Sup Ct, NY County 2008], *affd as mod* 58 AD3d 485 [1st Dept 2009], *affd as mod* 14 NY3d 399 [2010]). The IPC Manager can recover from TAP Auto without obtaining a judgment against TAP.

The Court further notes that amendments to pleadings are allowed under a variety of circumstances. The First Department affirmed a decision to allow new allegations against a defendant, despite the prior order dismissing the complaint in its entirety as against that party (*Imprimis Invs., LLC v Insight Venture Mgt.*, 300 AD2d 109, 110 [1st Dept 2002]). In *Imprimis*, the motion resulting in the dismissal, although nominally for summary judgment, was directed to the sufficiency of the pleading and not to the proof. Similarly, where a party was dismissed from the action because of conclusory allegations that failed to state a cause of action, the plaintiff was allowed to amend the complaint (*Donovan v Rothman*, 253 AD2d 627, 630 [1st Dept 1998]). Res judicata was not raised in these cases, but they serve as examples of the liberality of courts in allowing amendments to pleadings.

Moreover, the first amended complaint alleged a wrongful

transfer of the entire business from TAP to TAP Auto and improper control and domination by the senior lenders and asked for recovery on the subordinated notes. The SAC amplifies those allegations and fashions them into a cause of action based on successor liability. The facts underlying the successor liability claim are not new to defendants. They can pose no surprise or prejudice.

Discussion turns to whether the SAC sufficiently alleges successor liability. The SAC alleges that TAP Auto, by purchasing TAP with the TAP Auto note, became liable for TAP's obligations under the subordinated notes. In general, purchasing a company's assets does not render the purchaser liable for the obligations and liabilities of the purchased company. A corporation may be held liable for the liabilities of its predecessor if (1) it expressly or impliedly assumed the predecessor's liability, (2) there was a consolidation or merger of the selling predecessor and the purchasing successor, (3) the purchaser successor is a mere continuation of the seller, or (4) the transaction is entered into fraudulently to escape obligations (*Schumacher v Richards Shear Co.*, 59 NY2d 239, 244-245 [1983]). Plaintiffs claim to have alleged facts supporting the second, third, and fourth kinds of transactions.

A de facto merger occurs where one corporation absorbs another, without adhering to the statutory requirements for a

merger (*Arnold Graphics Indus., Inc. v Independent Agent Ctr., Inc.*, 775 F2d 38, 42 [2d Cir 1985]). The elements showing a de facto merger between companies include: (1) continuity of ownership; (2) cessation of the ordinary business and dissolution of the predecessor, as soon as practical; (3) assumption by the successor of liability necessary for the uninterrupted continuation of the predecessor's business; and (4) continuity of management, personnel, assets, physical location and general business operations (*Matter of New York City Asbestos Litig.*, 15 AD3d 254, 255-56 [1st Dept 2005]).

A finding of de facto merger does not require the presence of each of these factors; however, the continuity of ownership factor is indispensable (*Id.* at 256, 258). The SAC alleges that as part of the transfer from TAP to TAP Auto, several officers who had ownership in TAP were given ownership in TAP Auto. During oral argument, plaintiffs' attorney stated that those who had ownership interest in TAP now have 10 to 20 percent ownership interest in TAP Auto. Continuity of ownership "exists where the shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation as the result of the successor's purchase of the predecessor's assets" (*Id.* at 256). Those who owned the predecessor and those who own the successor now both own the successor (*id.*).

Plaintiffs cite to *Perceptron, Inc. v Silicon Video, Inc.*

(2011 WL 4595003, *9, 2011 US Dist LEXIS 112523, *25-26 [ND NY 2011]), which held that providing the predecessor company's employees, who had ownership interests in the predecessor, with 18% ownership in the successor company as part of the asset purchase could be enough to establish continuity of ownership.

Plaintiffs also allege that the senior lenders became owners of TAP and then of TAP Auto, as the result of the transfer. Continuity of ownership can exist when the owner of the successor takes ownership of the predecessor as part of the successor's purchase of the predecessor's assets, and the owner of the successor comes to own both companies (*Trystate Mech., Inc. v Tefco, LLC*, 29 Misc 3d 1208[A], 2010 NY Slip Op 51751[U], *7 [Sup Ct, Kings County 2010]). The SAC sufficiently alleges continuity of ownership.

The SAC also alleges the other elements of a de facto merger: that TAP Auto took on the liabilities needed to continue the business and the equipment, supplies, employees, and locations and that it continued TAP's business. Defendants point out that TAP still exists. "So long as the acquired corporation is shorn of its assets and has become, in essence, a shell, legal dissolution is not necessary before a finding of a de facto merger will be made" (*Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 575 [1st Dept 2001]). The SAC alleges that TAP is an empty shell that carries on no business.

A successor company that absorbs and continues the operation of the predecessor is the mere continuation of the predecessor (*Kaur v American Tr. Ins. Co.*, 86 AD3d 455, 458 [1st Dept 2011]). Factors tending to show mere continuation include "transfer of management, personnel, physical location, good will and general business operation" (*id.*; *Burgos v Pulse Combustion*, 227 AD2d 295, 295-296 [1st Dept 1996]). Plaintiffs have alleged all these elements. They also state that TAP exists as an empty shell with a few liabilities and that its business has ended. Although one of the elements showing mere continuation is that the predecessor ceases to exist, the exception may still apply where the predecessor has been stripped of its assets and its business "effectively ended" (*Kaur*, 86 AD3d at 458; *see also McDarren v Marvel Entertainment Group, Inc.*, 1995 WL 214482, *8, 1995 US Dist LEXIS 4649, *23-24 [SD NY 1995][holding that the mere continuation exception applies where, although the predecessor company still exists, all its assets and its "business location, employees, management and good will" have been transferred]).

Plaintiffs also sufficiently allege that the transfer from TAP to TAP Auto was done with fraudulent intent, that is, to extinguish TAP's obligations to plaintiffs. The 2011 judgment determined that the first amended complaint stated a claim under the Delaware Fraudulent Transfer Act and that there were badges of fraud. This Court found that the complaint sufficiently

alleged that the senior lenders orchestrated a scheme to strip TAP of its assets by grossly undervaluing it so as to squeeze out plaintiffs, leaving TAP insolvent and unable to pay its debts. A claim of fraudulent conveyance can support successor liability (*Donald Dean & Sons, Inc. v Xonitek Sys. Corp.*, 656 F Supp 2d 314, 328, 330 [ND NY 2009]).

In regard to the senior lenders' argument that the SAC does not adequately allege alter ego liability, that was also determined in the 2011 judgment. This Court stated that whether TAP Auto's corporate veil could be pierced to place liability on the senior lenders was a fact-laden inquiry, which could not be resolved on a pre-answer motion to dismiss the complaint.

The senior lenders point to the waiver provision in the Subordination Agreement between the senior lenders and the subordinate noteholders, now represented by the IPC Manager. The agreement provides that the senior lenders are not liable in any manner to the noteholders for determining how the senior lenders will exercise any rights or remedies with respect to the senior loans. The senior lenders may take any appropriate action to enforce the senior debt. The senior lenders claim that the IPC Manager thus waived any objections to the transfer to TAP Auto. There is no waiver. Plaintiffs are alleging intentional wrongful conduct, which cannot be waived (*see Banc of Am. Sec. LLC v Solow Bldg. Co. II, L.L.C.*, 47 AD3d 239, 244 [1st Dept 2007]).

In conclusion, it is

ORDERED that motion sequence number 015 to dismiss the eighth cause of action in the second amended complaint by defendants Orix Finance Corp., MAPS CLO Fund I, LLC, MAPS CLO Fund II, Ltd., Wells Fargo Bank, N.A., Union Bank of California, CIT Lending Services Corporation, Bank Midwest, N.A., Brown Brothers Harriman & Co., Prudential Insurance Company of America, OFS Funding, LLC, OFSI Fund III, Ltd., and CIT CLO I Ltd. is denied; and it is further

ORDERED that motion sequence number 016 to dismiss the eighth cause of action in the second amended complaint by defendant TAP Automotive Holdings is denied; and it is further

ORDERED that defendants shall serve their answers to the second amended complaint within 20 days of service of a copy of this order with notice of entry.

Dated: April 11, 2012

ENTER:

J.S.C.
CHARLES E. RAMOS