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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a General Motors Corp., *et al.* Debtors	:	Case No. 09-50026 (REG) (Jointly Administered)
TOYOTA MOTOR CORPORATION, Plaintiff. vs. MOTORS LIQUIDATION COMPANY, f/k/a General Motors Corp., Defendant.	:	Adversary Proceeding Case No. 10-05015 (REG)

TOYOTA MOTOR CORPORATION'S OPPOSITION TO
<u>MOTORS LIQUIDATION COMPANY'S MOTION TO DISMISS</u>

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Toyota Motor Corporation ("TMC"), hereby submits this Opposition ("Opposition") to Motors Liquidation Company's ("MLC" or "Debtor") Motion to Dismiss the NUMMI and Toyota Adversary Complaints ("Motion"). In support of this Opposition, TMC states as follows:

INTRODUCTION

In 1984, MLC and TMC created New United Motors Manufacturing, Inc. ("NUMMI"), a 50/50 joint venture between the automotive giants. NUMMI introduced MLC to the Toyota manufacturing process and operated as a testing ground for the Toyota manufacturing process on the American workforce. To facilitate the goals of the joint venture, TMC, MLC and NUMMI entered into several contracts governing the rights and obligations of the parties. The interrelated contracts managed the complex design, manufacture, purchase and supply arrangement between the parties. Under this flexible framework, NUMMI manufactured vehicles for MLC and TMC for over 25 years. At its inception and for a long time after, NUMMI was one of a kind.

MLC now seeks to rewrite this 25 year relationship by disingenuously relying on discreet and partial clauses in the two contracts at issue in TMC's Complaint: (1) the Vehicle Supply Agreement, as amended, dated February 21, 1984 (the "VSA"); and (2) the Memorandum of Understanding, dated March 22, 2006 (the "2006 MOU"). Consistent with the special relationship between TMC, MLC and NUMMI, these contracts provided a flexible standard for the manufacture, purchase and sale of vehicles to allow NUMMI to control its vast and complex supply network. Despite purchasing almost 2 million vehicles from NUMMI and modifying the terms of its agreements with NUMMI to ensure NUMMI's viability, **MLC now claims that the VSA and 2006 MOU do not require – and never did require – MLC to purchase one single vehicle from NUMMI**. MLC is wrong. MLC's Motion should be denied because, at worst, the contracts contain inconsistent provisions that cannot be reconciled on a motion to dismiss.

ARGUMENT

I. The Motion To Dismiss Standard.

In considering a motion to dismiss, the Court must accept all factual allegations in the complaint as true and construe all reasonable inferences in favor of the plaintiff. *See Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 127 (2d Cir. 2009); *Friedl v. City of New York*, 210 F.3d 79, 83 (2d Cir. 2000). Under Rule 8(a)(2) of the Federal Rules of Civil Procedure ("FRCP"), a compliant must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). MLC bears the burden of showing that the Complaint fails to state a claim for relief. As explained in *Ashcroft v. Iqbal*, "to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." -- U.S. --, 129 S. Ct. 1937, 1949 (2009). TMC's Complaint contains ample factual allegations to state a claim for relief against MLC.

The VSA and 2006 MOU are unambiguously consistent with TMC's allegations in its Complaint (detailed below). However, the VSA and 2006 MOU are, at worst, ambiguous contracts, the interpretation of which cannot be resolved in the context of a motion to dismiss.[1] *See Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 897 (2d Cir. 1976) ("the intent of the parties was too ambiguous to be totally gleaned from only the contract…"); *Teevee Toons, Inc. v. Gerhard Schubert GMBH*, 2002 WL 498627, at *3 n. 1 (S.D.N.Y. March 29, 2002) ("Where the parties disagree as to meaning of the contract, or where the contract terms are ambiguous, it is inappropriate to dismiss the allegation."); *Microtel Franchise and Dev. Corp. v. Country Inn Hotel*, 923 F. Supp 415, 420 (W.D.N.Y. 1996) ("Where the parties disagree as to meaning, or the

[1] The VSA and 2006 MOU impose an unambiguous obligation on MLC to purchase vehicles on a continuous and stable basis. However, in resolving MLC's Motion, the Court need not resolve whose interpretation is correct.

contract terms are ambiguous, it is inappropriate to dismiss the allegation."); *Lee v. General Nutrition Cos., Inc.*, 2001 WL 34032651, at *12 (C.D. Cal. Nov. 26, 2001) ("Defendants are raising issues of contract interpretation and other highly factual issues that are inappropriate for resolution on a motion to dismiss."). As detailed below, MLC has raised issues of contract interpretation and other highly factual issues can do no more than create ambiguity. As the interpretation of an ambiguous contract is a question of fact, the Motion must be denied.

Further, MLC's reliance on facts that do not appear on the face of the Complaint cannot be considered by the Court without converting the Motion to a motion for summary judgment and allowing TMC the chance to take discovery. *See* Fed. R. Civ. P. 12(d); *Friedl*, 210 F.3d at 83; *Leonard F. v. Israel Dis. Bank of New York*, 199 F.2d 99, 107 (2d Cir. 1999). The purpose of a FRCP 12(b)(6) motion is "to test, in a streamlined fashion, the formal sufficiency of the plaintiff's statement of a claim for relief *without* resolving a contest regarding its substantive merits." *Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 155 (2d Cir. 2006) (emphasis in original); *see also Chambers v. Time Warner, Inc.*, 282 F.3d 147, 154 (2d Cir. 2002) ("Consideration of extraneous material in judging sufficiency of complaint is at odds with liberal pleading standard" of FRCP 8(a)(2)). Thus, the Court's consideration of MLC's Motion is limited to "the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." *DiFolco v. MSNBC Cable LLC,* 622 F.3d 104, 111 (2d Cir. 2010); *see also Friedl*, 210 F.3d at 83-84.

Contrary to this black letter law, MLC relies on inaccurate extrinsic factual allegations that do not appear on the face of the Complaint. These include, among others:

- "As discussed in more detail below, the Pontiac brand, which was the only line of MLC vehicles manufactured at NUMMI prior to the Petition Date, was discontinued after MLC and the United States Government (the "Federal Government") and Export Development Canada ("EDC," and

together with the Federal Government, the "Government Lenders"), MLC's lenders of last resort, determined that MLC needed to phase out Pontiac and its other non-core brands as a central component of its comprehensive business reorganization." Mot. to Dismiss ¶ 19.

- "While MLC did not believe it had any contractual obligation to do so, MLC also attempted to soften the impact of its decision to discontinue the Pontiac brand on NUMMI in light of NUMMI's importance to the local economy in which it is situated…" *Id.* ¶ 30.

- "To the contrary, and as set forth in the Objection and herein, the decision to discontinue the manufacture of *all* Pontiac vehicles (and not just the Vibe) was made in a time of unprecedented financial crisis after the Government Lenders – MLC's lenders of last resort – determined that MLC needed to phase out Pontiac and its other non-core brands as a key component of the reorganization process." *Id.* ¶ 46 n. 10 (emphasis in original).

- "In fact, as discussed above, MLC made a good faith effort to substitute a replacement vehicle for the Pontiac Vibe on commercially reasonable terms." *Id.* ¶ 53.[2]

These extraneous and contested facts require that MLC's Motion be denied or converted to a motion for summary judgment under FRCP 56 and considered only after TMC is given the opportunity to conduct appropriate discovery.

II. California Rules of Contract Construction and Interpretation.

California law[3] requires that a "contract is to be construed as a whole, 'so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.'" *McCaskey v. Cal. State Auto. Ass'n*, 189 Cal. Rptr. 3d 34, 52 (Cal. Ct. App. 2010) (citing Cal. Civ. Code § 1641). This rule of interpretation is intended to "disfavor constructions of contractual provisions that would render other provisions surplusage." *Boghos v. Certain Underwriters at Lloyd's of London*, 115 P.3d 68, 72 (Cal. 2005). Moreover, the "interpretation of a contract 'must be fair

[2] The following paragraphs from the Motion also contain extraneous facts not contained in the Complaint: ¶ 10; ¶ 15 n.4; ¶ 17; ¶¶ 23-29; ¶ 32; and ¶¶ 57-58.

[3] Pursuant to Section 7.6 of the VSA, the VSA is governed under California law.

and reasonable not leading to absurd conclusions.'" *Kashmiri v. Regents of Univ. of Cal.*, 67 Cal. Rptr. 3d 635, 660 (Cal. Ct. App. 2007) (quoting *Transamerica Ins. Co. v. Sayble*, 239 Cal. Rptr. 201, 203 (Cal. Ct. App. 1987). In this vein, California courts have held that "'[i]ndividual clauses and particular words must be considered in connection with the rest of the agreement, and all of the writing and every word of it will, if possible, be given effect.'" *Ajax Magnolia One Corp. v. S. Cal. Edison Co.*, 334 P.2d 1053, 1057 (Cal. Ct. App. 1959) (citing *Hunt v. United Bank & Trust Co.*, 291 P. 184, 187 (Cal. 1930)); *see also Advanced Dev. Holdings, Inc. v. Brea Cañon Oil Co., Inc.*, 2010 WL 5072522, at *9 (Cal. Ct. App. Dec. 14, 2010) ("contradictory or inconsistent provisions of a contract are to be reconciled by interpreting the language in such a manner that will give effect to the entire contract" and an interpretation of a contract "that creates conflicts between its provisions must be rejected when another interpretation serves to harmonize all provisions within the [contract].") (internal quotations and citations omitted); Cal. Civ. Code § 1652 ("Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract."); *Larsen v. Nissan N. Am., Inc.*, 2009 WL 1766797, at *6 (Cal. Ct. App. June 23, 2009) ("Plaintiffs' argument … is plainly contrary to the intent of the booklet's drafters and, given the detail in the booklet, an absurd interpretation."). MLC's interpretation of the VSA and 2006 MOU fails to construe them as whole contracts and leads to an absurd result.

Another goal of contract interpretation under California law is to "give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Cal. Civ. Code § 1636; s*ee also U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc.*, 281 F.3d 929, 934 (9th Cir. 2002) (applying California law); *Spinks v. Equity Residential Briarwood Apartments*, 90 Cal. Rptr. 3d 453, 469 (Cal. Ct. App. 2009). If possible,

the parties' intent is "to be ascertained from the writing alone." Cal. Civ. Code § 1639. Additionally, Section 1650 of the California Civil Code provides that "[p]articular clauses of a contract are subordinate to its general intent."

As detailed below, MLC's myopic view of the VSA and 2006 MOU fails to read them as a whole, fails to give effect to the mutual intentions of the parties, and results in repugnancy and an absurd result. It is within this legal framework that the Court must consider MLC's Motion.

III. NUMMI Is a Unique Joint Venture That Established a Special Relationship Between TMC and MLC.

The Complaint details the unique nature of the NUMMI joint venture and the resulting special relationship between TMC and MLC. Compl. ¶¶ 8-21. MLC's Motion argues that the special relationship created as a result of the joint venture, has "no bearing on the parties' legal rights and obligations…" Mot. to Dismiss, ¶ 4. MLC is wrong.

MLC has reaped immense benefits from this unique joint venture. Compl. ¶¶ 13, 14, 16, 17. Even the Federal Trade Commission, in approving this extraordinary transaction, noted these benefits. *Id.* ¶¶ 14-15. Recognizing this, California law holds that the existence of a joint venture gives rise to a special or fiduciary relationship between the joint venturers. *See Oakland Raiders v. Nat'l Football League*, 32 Cal. Rptr. 3d 266, 273-74 (Cal. Ct. App. 2005); *Celador Int'l Ltd. v. Walt Disney Co.*, 347 F. Supp 2d 846, 853 (C.D. Cal. 2004).

Plainly, as TMC's joint venture partner, MLC has a "special relationship" with TMC that is unlike routine Tier 1 and other customer-supplier relationships in the automotive industry. This fiduciary relationship between "joint adventurers" holds the parties "to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior." *Wolf v. Super. Ct. of Los Angeles County*, 130 Cal.

Rptr. 2d 860, 863-64 (Cal. Ct. App. 2003); Compl. ¶ 8. The VSA and 2006 MOU must be read and interpreted in the context of this special relationship.

IV. TMC Adequately Stated a Claim that MLC Breached the VSA.

TMC's Complaint alleges sufficient facts establishing MLC's breach of the VSA to satisfy the pleading standard of FRCP 8. Under California law, a cause of action for breach of contract requires: (1) a contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) damages to plaintiff. *Durell v. Sharp Healthcare*, 108 Cal. Rptr. 3d 682, 697 (Cal. Ct. App. 2010). In the Motion, MLC only attacks one element: MLC's breach. There is no dispute that MLC stopped purchasing Vibes from NUMMI, therefore, the only issue is whether TMC adequately pled that MLC's decision to cease purchasing vehicles from NUMMI constituted a breach.

In the Complaint, TMC alleges that:

- MLC breached the VSA by rejecting the contract. Compl. ¶ 60.
- MLC breached § 4.1(b) of the VSA by failing to purchase vehicles on a "continuous and stable basis" as required by the VSA. *Id.* ¶¶ 61-62.
- MLC breached § 4.1(c) of the VSA by failing to accommodate NUMMI's manufacture of the Vibe. *Id.* ¶ 63.

MLC does not challenge TMC's allegations that MLC breached the VSA by rejecting it or that its failure to accommodate NUMMI constituted a breach. Compl. ¶ 60, 63. Instead, MLC argues only that the VSA did not require MLC to purchase ***any*** vehicles from NUMMI – not a single one. As detailed below, pursuant to the VSA, MLC had an obligation to purchase vehicles from NUMMI on a "continuous and stable basis" and MLC's decision to cease ordering Vibes from NUMMI constituted a breach of the VSA. Moreover, MLC breached the VSA by rejecting the VSA and failing to comply with Section 4.1(c) of the VSA. Reading the VSA as a whole, and taking into account the parties' intent and the special relationship between TMC and MLC as

joint venturers, these provisions establish an ambiguity that cannot be resolved in a motion to dismiss. *See Teevee Toons*, 2002 WL 498627, at *3 n. 1.

A. TMC has Adequately Plead That MLC Breached the VSA – A Requirements Contract.

1. MLC's Rejection of the VSA Constitutes a Breach.

MLC argues that the VSA does not require MLC purchase to "any specific or minimum amount of products manufactured by NUMMI." Mot. to Dismiss ¶ 22. However, in the Eleventh Omnibus Motion Pursuant to 11 U.S.C. § 365 to Reject Certain Executory Contracts ("Eleventh Rejection Motion"), MLC argued to this Court that the VSA was an executory contract. Compl. Ex. J. An executory contract is "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." *In re Wireless Data, Inc*., 547 F.3d 484, 488 n. 1 (2d Cir. 2008). For the VSA to be an executory contract, as contended by MLC and accepted by this Court, MLC must have an obligation under the VSA. MLC's executory obligation under the VSA is the requirement that MLC purchase vehicles on a "continuous and stable basis." MLC's Eleventh Rejection Motion was granted and the VSA was rejected. *See* Compl. ¶ 60. MLC's argument that it has no obligation to purchase vehicles from NUMMI is inconsistent with MLC's prior position that the VSA constituted an executory contract. As a result, MLC is judicially estopped from now asserting that the VSA did not impose any obligations on MLC. *See, e.g., Bates v. Long Island R.R. Co.,* 997 F.2d 1028, 1037 (2d Cir. 1993) ("judicial estoppel prevents a party in a legal proceeding from taking a position contrary to a position the party has taken in an earlier proceeding.").

Pursuant to Section 365(g) of the Bankruptcy Code, the rejection of an executory contract "constitutes a breach of such contract." 11 U.S.C. § 365(g). As MLC has admitted that obligations under the VSA exist, there can be no dispute that MLC breached its obligations under the VSA. Upon rejection, the non-debtor parties are entitled to rejection damages. 11 U.S.C. § 502(g). Here, TMC timely filed its proofs of claim for rejection damages under the VSA. Accordingly, the Motion to Dismiss Count I must be denied.

2. The VSA Requires MLC to Purchase Vehicles on a Continuous and Stable Basis from NUMMI.

MLC claims that its commitment to purchase Vibes in the VSA is governed by "market demand." Mot. to Dismiss ¶ 43. At the same time, MLC claims that it has no commitment to purchase any Vibes pursuant to the VSA. *Id.* ¶ 44. These claims are themselves inconsistent, in addition to being inconsistent with the full language of the VSA.

First, MLC's claim that "market demand" determines its purchase obligations actually supports TMC's Complaint because TMC has pled that there was market demand at the time that MLC breached the VSA. Compl. ¶ 18. MLC clearly found there to be market demand in 2006 because MLC entered into the 2006 MOU which aspired to annual Vibe production of 65,000 vehicles. Compl. ¶¶ 18, 26, 37. In fact, MLC bought 60,000 Vibes in 2006, 50,000 in 2007 and over 70,000 in 2008 – market demand increased and surpassed contractual goals. *Id.* ¶ 18. Even MLC admits that market demand in 2008 was 46,551 Vibes – well above ***zero***. Mot. to Dismiss ¶ 25. At best, MLC's reliance on facts outside the Complaint to argue that "market demand" excused MLC's breach creates a question of fact, not grounds for dismissing the Complaint.

Moreover, the contractual agreement that "market demand" will govern purchase commitments must be read in context, not as an excised clause of the VSA standing alone. *See McCaskey*, 189 Cal. Rptr. 3d at 52. The full provision requires that:

> The parties hereto are establishing supply and purchase arrangements under which **[NUMMI] shall supply and [MLC] shall purchase the Products on a continuous and stable basis**. It is acknowledged that [NUMMI] is making substantial amounts of capital expenditures in its facilities relying upon [MLC]'s present projection that market demand for the Vehicles will exceed 200,000 units per annum. However, it is further acknowledged that market demand for the Products that can be generated in the areas in which [MLC] expects to sell them will govern the purchase commitments of the parties as to all Products. VSA § 4.1(b) (emphasis added).

The VSA expressly requires that GM purchase Vibes "on a continuous and stable basis" consistent with market demand. MLC has never tried to reconcile – nor could it – MLC's obligation to purchase "on a continuous and stable basis" with MLC's unsupported argument that market demand was zero, thus allowing MLC to purchase no Vibes.

Second, MLC's reliance on Section 4.2 of the VSA addressing "Individual Sales Contracts" is similarly misplaced. MLC focuses solely on the phrase "[MLC] has no obligation to purchase any Products until the parties enter such a contract." Mot. to Dismiss ¶ 44. Under MLC's analysis, MLC was never obligated to buy one single vehicle – not one. Likewise, NUMMI had no obligation, ever, to supply one vehicle. In fact, under MLC's analysis, MLC could have submitted an Individual Sales Contract, and NUMMI could have refused to supply the vehicles to MLC. Such an interpretation makes a mockery of the joint venture that supplied cars to MLC over more than 25 years. MLC's contention is also inconsistent with MLC's agreement to purchase vehicles "on a continuous and stable basis." Lastly, MLC's position ignores the entire relationship of the parties which demonstrates that the clauses on which MLC relies simply allow the parties to adequately manage purchasing, manufacturing, supply and inventory through a cooperative effort, as pled in detail in the Complaint. Compl. ¶¶ 30-35; *see also Woodbine v. Van Horn*, 173 P.2d 17 (Cal. 1946) ("a construction given the contract by the acts and conduct of the parties with knowledge of the terms, before any controversy has arisen as

to its meaning, is entitled to great weight and will, when reasonable, be adopted and enforced by the court.”).

Unlike MLC’s interpretation, TMC’s interpretation of the VSA is consistent with California law requiring that the VSA be read as a whole consistent with the parties’ intent. *See generally,* § II, *supra*. The California Court of Appeals decision in *McCaskey* is instructive here. There, the court interpreted the terms of employment agreements between three salesmen (the plaintiffs) and their insurance company employer (the defendant). The amended employment agreement provided, among other things, reduced minimum sales quotas which the plaintiffs were required to meet to remain employed. 189 Cal. Rptr. 3d at 38. The employment agreement also provided that “either party could terminate the agreement either ‘forthwith’ or ‘without prior notice.’” *Id*. Despite plaintiffs meeting the reduced quotas, the company terminated all three plaintiffs. *Id*. at 38-40. The company asserted that “because the plaintiffs’ employment was terminable at will, no liability could be predicated on discharging them for failing to satisfy, or agree to, the full production quotas.” *Id*. at 51-52. The court disagreed, explaining that the contract must be construed as a whole and the at will clause and the quota reduction clause “must be read together.” *Id*. at 52. The court explained:

> [i]f the at-will clause empowered [the company] to discharge employees for failing to meet the full quotas, notwithstanding their having qualified for the reduced ones, it would render the promise of reduced quotas wholly illusory. This would deny effect to that promise, offending the principal that where two provisions conflict, the resulting ‘[r]epugnancy … must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract.’

Id. (citing Cal. Civ. Code § 1652).

Similar to the defendant in *McCaskey*, MLC attempts to escape its promises by relying on clauses in a vacuum and ignoring all other provisions of the VSA. Instead, the VSA must be read as a whole, giving effect to each provision consistent with the intent of the parties. As pled

in the Complaint, MLC was obligated to purchase vehicles from NUMMI on a "continuous and stable basis" and ensure NUMMI's future success. Compl. ¶ 30; VSA § 4.1(b). The proper interpretation of the VSA, giving effect to all provisions of the contract, is that the parties recognized that some flexibility would necessary to accommodate the sale and production schedules of both MLC and NUMMI. Compl. ¶¶ 30-35. Thus, although MLC agreed to purchase 200,000 or more vehicles per year under the VSA (and later reduced its purchasing to approximately 65,000 Vibes per year), the contracts permitted MLC's individual purchases to vary. Compl. ¶ 30. MLC's interpretation would render the majority of the VSA mere surplusage and MLC's (and NUMMI's) obligations illusory because MLC could simply buy zero products on its whim. Therefore, MLC's interpretation of the VSA must be rejected.

Moreover, California law requires that particular clauses of a contract are subordinate to the intent of the contract and the interpretation of a contract should not yield an absurd result. Cal. Civ. Code §§ 1638, 1650. The VSA recites MLC's commitment to purchase vehicles from NUMMI on a "continuous and stable basis." Compl. ¶ 30; VSA § 4.1(b). Under the VSA, MLC "acknowledged that [NUMMI] is making substantial amounts of capital expenditures … relying on [MLC]'s present projection that market demand for the Vehicles will exceed 200,000 per annum." VSA § 4.1(b). Additionally, the intent to create a viable and sustainable NUMMI is reflected in Section 4.3(e) of the VSA: "If it is anticipated that continuation of the foregoing methods for determination of the selling prices of the Products would cause those prices to be at such levels as [NUMMI] would incur losses which could endanger its normal operation, Toyota, [NUMMI] and [MLC] shall negotiate and take necessary measures." VSA § 4.3(e). Although the express terms of the VSA provide MLC with some flexibility in its purchasing, they do not

give MLC sole discretion to purchase any chosen number of Vibes. Any other interpretation would lead to an absurd result, and, thus, would be contrary to California law.

MLC's reliance on *In re Netia Holdings S.A.* is misplaced because the contract interpreted in *Netia* is distinguishable. 278 B.R. 344, 355 (Bankr. S.D.N.Y. 2002). In *Netia*, this Court explained that:

> … the Foreign Debtors have shown both serious issues going to the merits and a likelihood of success … that the arrangement granted the Objecting Bondholders a lien. Contractual provisions granting such a lien are conspicuously absent. Provisions that might be regarded as substitutes are conspicuously absent as well. As importantly, or more so, the language of section 12 expressly negates such an intent. The Investment Agreement states clearly and unambiguously that no security interest is to be created, and effect must be given to that expressed intent.

Id.[4] Unlike the agreement in *Netia*, the VSA contains potential ambiguity since it provides that MLC shall purchase vehicles on a "continuous and stable basis" and that MLC had "no obligation to purchase" vehicles. These provisions demonstrate that the VSA is, at worst, ambiguous and can only be reconciled by applying the rules of contract interpretation and taking into account the parties' intent. The ambiguity cannot be resolved and the parties' intent cannot be determined in a motion to dismiss. *See Teevee Toons*, 2002 WL 498627, at *3 n. 1.

3. Section 4.2 of the VSA Obligates MLC to Purchase Vibes.

Contrary to MLC's flawed interpretation, Section 4.2 of the VSA actually requires (not excuses) MLC to perform. *See* Cal. Com. Code § 2306(1); *Shea-Kaiser-Lockheard-Healy v. Dept. of Water & Power of Los Angeles*, 140 Cal. Rptr. 884, 888-90 (Cal. Ct. App. 1977); *Tri-State Generation and Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 874 F.2d 1346 (10th Cir. 1989) ("*Tri-State*"). In *Tri-State*, the defendant entered into a requirements contract

[4] The *Netia* decision was issued in connection with a motion for a preliminary injunction, not a motion to dismiss. Therefore, the Court was permitted to consider the parties' intent. Here, the Court is limited to the facts contained in the Complaint.

with the plaintiff whereby the defendant promised to purchase all of its power-electricity needs from the plaintiff co-operative. *Id.* at 1349. After the plaintiff built generation and transmission facilities and obtained loans to service its members' electricity needs, economic conditions dipped dramatically, leading to an oversupply of electric power and stagnant demand. *Id.* at 1350. The defendant thereafter attempted to sell its assets to a third-party, which would have effectively eliminated the defendant's purchase of electric power from the plaintiff. *Id.*

In holding that the sale of the defendant's business constituted a breach of the requirements contract, the *Tri-State* court noted the inter-relatedness of the parties and that the plaintiff's investments were made in reliance on the defendant's commitment to purchase its electric power needs from the plaintiff. Although the contract did not forbid the defendant from terminating its business, the court stated that such an obligation was implied in the contract: "We believe that the promise to purchase requirements for a definite term … implies that Shoshone will remain in business and maintain requirements throughout the term of the contract…" *Id.* at 1356. The court explained further that the purpose of the contract would be frustrated if the defendant could simply walk away:

> The parties obviously expected that Shoshone would continue purchasing electric power from Tri-State throughout the term of the contract … If Shoshone is able to eliminate its requirements by simply transferring its member subscriptions to Pacific, the contract cannot be carried out in the way it was expected. If Shoshone puts itself in a position in which it cannot carry out the all-requirements contract, it breaches the contract. *Id.* at 1357-58.

Finally, the court noted that because of the parties' inter-relatedness, the defendant realized unique benefits beyond the purchase of electric power, and that by selling its business, the defendant was not "sharing the burden that has come with the benefits it has received under" the contract. *Id*. at 1360.

Likewise, as detailed in the Complaint, NUMMI was a unique joint venture between MLC and TMC which conferred upon MLC significant direct and indirect benefits. Compl. ¶¶ 8-17. Just as in *Tri-State*, TMC and NUMMI made significant investments in reliance on MLC's commitment to purchase Vibes for a definite term. The purpose of NUMMI was frustrated (if not eviscerated) when MLC abandoned NUMMI. MLC cannot walk away from its obligations to NUMMI and TMC by terminating the Vibe. Instead, MLC must share the burden that has come with the benefits it has received under the VSA.

As in *Tri-State*, Section 4.2 of the VSA does not provide MLC with a defense for its breach for the following reasons. First, MLC and TMC, as joint venture partners have a special relationship that is stricter than the morals of the market. Compl. ¶ 8-9; § III, *supra*. Second, MLC cannot order a "quantity unreasonably disproportionate to any stated estimate." Cal. Comm. Code § 2306(1). It is undisputable that ordering ***zero*** Vibes is "unreasonably disproportionate" to the stated requirement that MLC would order "at least 65,000" Vibes. *Simcala, Inc.* v. *Am. Coal Trade, Inc.*, 821 So. 2d 197, 203 (Ala. 2001) (interpreting the same provision of the Alabama Commercial Code, held that unreasonably disproportionate decreases of orders under a requirements contract constituted a breach, regardless of good faith). Third, MLC's decision to terminate the Vibe and MLC's failure to work with TMC and NUMMI to find a suitable replacement was not in good faith. Cal. Com. Code § 2306, cmt. 2 ("A shut-down by a requirements buyer for lack of orders might be permissible when a *shut-down merely to curtail losses would not*.") (emphasis added). It is indisputable that MLC's termination of the Vibe was not because of a lack of orders. Therefore, MLC was required to purchase Vibes from NUMMI on a continuous and stable basis. MLC's failure to do so constitutes a breach of the VSA. Accordingly, the Motion to Dismiss Count I must be denied.

B. The Force Majeure Clause Does Not Excuse MLC's Breach of the VSA[5].

In general, the assertion of a force majeure defense is inappropriate in the context of a motion to dismiss because it is a highly factual question. *See Stinnes Interoil, Inc. v. Apex Oil Co.*, 604 F. Supp. 978, 982 (S.D.N.Y. 1985) ("Thus, what transpired here could legally have been covered by the force majeure clause of the contract. Whether it was in fact so covered … presents yet another factual question which can not be decided on a motion to dismiss."). In fact, the Complaint presents no facts which demonstrate a force majeure event. Because MLC's arguments rely on extrinsic facts which cannot be considered in the context of a motion to dismiss, *see* § I, *supra*, MLC's Motion must be denied.

Moreover, the specific terms of the force majeure clause are inapplicable to MLC's decision to cease purchasing Vibes from NUMMI and therefore the force majeure clause of the VSA does not excuse MLC's breach. Section 6.1 of the VSA provides:

> Any delay in of failure of the performance of any party hereunder shall be excused if and **to the extent caused by occurrences beyond such party's control**, including, but not limited to, acts of God; fire or flood; war; government regulation, policies or actions; closure of foreign exchange markets; any labor, material, transportation or utility shortage or curtailment; **discontinuance or curtailment of the *manufacture* of the Products ordered**; or any labor trouble in the manufacturing plants of [NUMMI] in Fremont, California or its suppliers. (emphasis added).

MLC's unilateral decision to cease purchasing Vibes is not force majeure. At no time prior to MLC's breach did any discontinuance or curtailment of the **manufacture** of Vibes occur. Instead, MLC elected to discontinue the **ordering** of Vibes. NUMMI was ready, willing and able to continue the manufacture of the Vibe. Unfortunately, MLC's unilateral decision to cease purchasing Vibes left NUMMI without a customer to purchase Vibes. Only then did NUMMI

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[5] Only the VSA contains a force majeure clause. The 2006 MOU does not include such a clause. Therefore, even if force majeure excused MLC's breach of the VSA, which it does not, MLC's breach of the 2006 MOU would not be excused.

discontinue the manufacture of the Vibe. Therefore, MLC cannot rely on the force majeure clause to excuse its breach of the VSA.

Additionally, the force majeure clause cannot be used to excuse a breach within MLC's control. Both the express terms of the force majeure clause ("to the extent caused by occurrences beyond such party's control") and California law require that force majeure apply only to unforeseen circumstances such as, "typhoons, citizens run[ning] amok, [or] Hannibal and his elephants at the gates." *Watson Labs, Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1111 (C.D. Cal. 2001) (citing *URI Cogeneration Partners, L.P. v. Bd. of Governors for Higher Educ.*, 915 F. Supp. 1267, 1287 (D.R.I. 1996)) ("*Watson Labs*"). Notably, *Watson Labs* explains that "California law requires (not 'permits') that each event claimed to be a 'force majeure' be beyond the control of the breaching party." 178 F. Supp. 2d at 1111 (citing *Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530 (5th Cir. 1984)) (applying California Law). Here, MLC had complete control and made an economic decision to discontinue purchasing Vibes from NUMMI. MLC's economic decision was not beyond its own control. Even if MLC's improper extrinsic facts could be considered, economic impracticality is not sufficient to trigger a force majeure clause under California law. *See Butler v. Nepple*, 354 P.2d 239, 244-45 (Cal. 1960) (the "fact that compliance with his contract would involve greater expense than he anticipated would not excuse defendant."); *Ellison v. City of San Buena Ventura*, 122 Cal. Rptr. 167, 173 (Cal. Ct. App. 1975) ("[i]t is elemental that a person may not escape a voluntarily assumed contractual obligation merely because performance would be more expensive than contemplated unless it arises to the point of impossibility") (internal citation omitted); *Miranda v. Williams*, 2008 WL 4636445, at *3 (Cal. Ct. App. Oct. 21, 2008) ("[t]he impossibility that excuses performance under a contract must be in the nature of the thing to be

done and not in the inability of the promisor to do it. Mere unforeseen difficulty or expense does not constitute impossibility and ordinarily will not excuse performance"). For these reasons, MLC's force majeure defense is without merit, and, accordingly, the Motion must be denied.

V. TMC Adequately Stated a Claim that MLC Breached the 2006 MOU.

As stated, a cause of action for breach of contract requires the following elements: (1) a contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) damages to plaintiff. *Durell*, 108 Cal. Rptr. 3d at 697. Similar to its arguments regarding the VSA, MLC only attacks one element of TMC's breach of contract claim: MLC's breach. As with the VSA, there is no dispute that MLC stopped purchasing Vibes from NUMMI, therefore, the only issue is whether TMC adequately pled that MLC's decision to cease purchasing vehicles from NUMMI constituted a breach of the 2006 MOU.

In the Complaint, TMC alleges that:

- MLC breached the 2006 MOU by rejecting the contract. Compl. ¶ 68.
- MLC breached Sections 1(3) and 1(4) of the 2006 MOU by failing to purchase Vibes consistent with the estimates contained in the 2006 MOU. *Id.* ¶ 69.
- MLC breached Section 1(2) of the 2006 MOU by failing to use best efforts to maximize the production volume at NUMMI. *Id.* ¶ 70.
- MLC breached Section 1(5) of the 2006 MOU by failing to agree with TMC and NUMMI regarding production levels and allocations at NUMMI. *Id.* ¶ 71-72.
- MLC breached Section 7 of the 2006 MOU by failing to conduct an annual review regarding production at NUMMI. *Id.* ¶ 73-74.

MLC does not challenge that it breached the 2006 MOU by rejecting the 2006 MOU nor does MLC even address its failure to: (1) use best efforts to maximize production at NUMMI; (2) agree with NUMMI regarding production levels and allocation; or (3) conduct an annual review regarding production at NUMMI did not constitute a breach of the 2006 MOU. Instead, MLC

relies on a single clause of the 2006 MOU to support its flawed argument that MLC did not have an obligation to purchase any Vibes from NUMMI. When read as a whole, it is clear that MLC did have an obligation to purchase vehicles from NUMMI and MLC's decision to cease ordering Vibes from NUMMI constituted a breach of the 2006 MOU. At a minimum, these provisions establish an ambiguity that cannot be resolved in a motion to dismiss. *See Teevee Toons*, 2002 WL 498627, at *3 n. 1.

A. MLC's Rejection of the 2006 MOU Constitutes a Breach.

As with the VSA, MLC argues that the 2006 MOU did not obligate MLC to purchase a set number of Vibes from NUMMI. Mot. to Dismiss ¶ 47. However, as with the VSA, MLC has admitted through its prior filings that the 2006 MOU is an executory contract pursuant to which MLC had obligations. Compl. Ex. K, ¶ 68; *see* § IV(A)(1), *supra*. Therefore, MLC is judicially estopped from now arguing that it has no obligation to purchase vehicles from NUMMI because MLC's argument is inconsistent with MLC's prior argument (accepted by this Court) that the 2006 MOU constituted an executory contract. *See Bates*, 997 F.2d at 1037.

The rejection of an executory contract "constitutes a breach of such contract." 11 U.S.C. § 365(g). Therefore, there can be no dispute that MLC breached the 2006 MOU. Upon rejection, the non-debtor parties are entitled to file a claim for rejection damages. 11 U.S.C. § 502(g). Here, TMC timely filed its proofs of claim for rejection damages under the 2006 MOU.

B. The 2006 MOU Requires MLC to Purchase Vehicles on a Continuous and Stable Basis from NUMMI.

The 2006 MOU, read as an entire document, makes it clear that TMC, MLC and NUMMI sought to establish a framework for allocation of NUMMI vehicle production. They each agreed that production of new models of the Vibe and Corolla would begin in January 2008. 2006 MOU § 1(1). They further agreed to an overall vehicle production goal of 225,000, with 28.89%

of those units being Vibes. *Id.* §§ 1(3), 1(4). In support of the production goal and with a need to manage supply, production, inventory, etc., the parties agreed to annually meet and "decide the planned production volume," noting that "a final allocation plan will be established that is mutually agreeable to the Parties, consistent with the spirit of this Joint Venture." *Id.* § 1(5). As with the VSA, TMC, MLC and NUMMI understood that market fluctuations were acute in the automobile industry. Therefore, they established an "Annual Review" process:

> The Parties understand that changes in the market conditions for the Products might make the contents described in this [MOU] inconsistent with the continued viability of NUMMI and the profitability on sales of the Products. Therefore, the Parties agree that they will annually review all the contents described herein to ensure that NUMMI will remain viable, and that the results from NUMMI's operations continue to be acceptable to TMC and [MLC]. *Id.* § 7.

Thus was established in 2006 a tri-parte agreement to allocate vehicle production, allow the management of supply and inventory, and thereby succeed in the ultimate goal: "ensure that NUMMI will remain viable…" *Id.* § 7. Consistent with the agreed upon goal of NUMMI's viability, MLC committed to "make best effort to maximize the production volume during the model life in consideration of maintaining the stability of operations at NUMMI." *Id.* § 1(2). In the face of all these contractual obligations to which MLC agreed, MLC offers in a contextual void the clause "TMC and [MLC] will have a right to, but not an obligation, to purchase the Products from NUMMI." *Id.* § 1(3).

MLC's proposed interpretation of the 2006 MOU makes the contract illusory. It also renders MLC's obligation to use best efforts and maintain NUMMI's viability meaningless. It makes no sense to require MLC to use best efforts to maintain NUMMI stability, annually plan production, mutually agree to a final allocation plan, desire to have more vehicles allocated to itself, and work toward the common goal of NUMMI viability when MLC could destroy NUMMI simply by unilaterally deciding to purchase zero Vibes. MLC was concerned enough

about NUMMI that it negotiated into the 2006 MOU that all the parties acknowledge that "NUMMI represents the single plant manufacturing Vibe for [MLC]." *Id.* § 1(4). MLC's argument that it had no obligation to purchase vehicles from NUMMI is the antithesis of MLC's obligation to ensure NUMMI's viability.[6]

MLC's interpretation of the 2006 MOU does not give effect to the parties' intent. Cal. Civ. Code § 1636; s*ee also U.S. Cellular*, 281 F.3d at 934 (applying California law); *Spinks*, 90 Cal. Rptr. 3d at 469. Further, MLC's interpretation does not construe the 2006 MOU as a whole or give effect to every part of the 2006 MOU. *McCaskey*, 189 Cal. Rptr. 3d at 52. MLC fails to consider the one clause on which it relies in connection with the rest of the agreement. *Ajax Magnolia*, 334 P.2d at 1057 ("all of the writing and every word of it will, if possible, be given effect") (internal citation omitted); *see also Advanced Dev. Holdings*, 2010 WL 5072522, at *9. Finally, MLC's reading leads to the absurd conclusion, as with the VSA, that MLC could on a whim at any time simply decide to stop buying any Vibes. *Kashmiri,* 67 Cal. Rptr. 3d at 660.[7]

MLC's interpretation would render the vast majority of the 2006 MOU mere surplusage and MLC's obligations illusory. Instead, the proper interpretation, giving effect to all provisions of the 2006 MOU, is that the parties recognized that flexibility would be necessary to assist the sale and production schedules of both MLC and NUMMI. Compl. ¶¶ 30-35. Thus, MLC's Motion to Dismiss Count II should be denied.

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[6] It is absurd to think that if TMC had unilaterally elected to purchase zero Corollas or Tacomas, thus shutting down NUMMI, that MLC would have simply acknowledged TMC's right to do so and walked away.

[7] The analysis and holding in *McCaskey*, 189 Cal. Rptr. 3d 34, is as applicable to the 2006 MOU as it was to the VSA. *See* § IV(A)(2), *supra*.

C. MLC Breached Its Obligation to Purchase Vibes on a Continuous and Stable Basis.

As with the VSA and contrary to MLC's flawed interpretations, the 2006 MOU is an enforceable requirements contract breached by MLC. Compl. ¶¶ 66, 68-74. As such, Section 1(3) of the 2006 MOU, upon which MLC relies, actually requires (not excuses) MLC to perform. *See* Cal. Com. Code § 2306(1); *Shea-Kaiser-Lockheard-Healy*, 140 Cal. Rptr. at 888-90. *See also* § IV(A)(3) and the discussion of *Tri-State*, 874 F.2d 1346, and *Simcala, Inc.*, 821 So. 2d 197, incorporated herein by reference.

D. MLC Breached the Sections 1(5) and 1(7) of the 2006 MOU.

TMC also alleged that MLC breached Sections 1(5) and 7 of the 2006 MOU. Compl. ¶¶ 71-74. MLC's obligations under these sections are separate and distinct from MLC's obligation to purchase Vibes under other sections of the 2006 MOU. MLC does not dispute that TMC adequately pled MLC's breach of Sections 1(5) and 7 of the 2006 MOU. In fact, MLC says nothing about them at all. Therefore, MLC's Motion must be denied with respect to TMC's claim for breach of Sections 1(5) and (7) of the 2006 MOU.

E. MLC Breached the Best Efforts Clause of the 2006 MOU.

TMC also adequately pled that MLC breached the best efforts clause of the 2006 MOU. Compl. ¶ 70. Pursuant to Section 1(2) of the 2006 MOU, MLC is required to use its best efforts "to maximize the production volume during the model life in consideration of maintaining the stability of operations at NUMMI." *Id*. MLC does not argue that it complied with the best efforts clause of the 2006 MOU[8] or that TMC failed to fully plead that MLC breached the best

[8] Nor could MLC sustain that argument. MLC's decision to allocate its resources and efforts to focus on other lines of vehicles cannot comport with its obligations to use its "best efforts" to ensure NUMMI's stability. *Benson v. Rhino Indus., Inc.*, 2008 WL 1813127 (Cal. Ct. App. April 23, 2008). In *Benson*, the Court of Appeals sustained a bench trial finding of breach of a contractual promise to use its

efforts clause of the MLC. Additionally, the determination of "whether a defendant used its best efforts under the circumstances is generally a factual issue." *U.S. Ecology, Inc. v. Cal.*, 111 Cal. Rptr. 2d 689, 707 (Cal. Ct. App. 2001). Thus, the determination of whether MLC used its best efforts is not appropriate in a motion to dismiss. Accordingly, MLC's Motion must be denied.

VI. TMC Stated a Claim for Breach of Covenant of Good Faith and Fair Dealing.

As an initial matter, a breach of the duty of good faith and fair dealing is generally a question of fact and cannot be determined in the context of a motion to dismiss under FRCP Rule 12(b)(6). *See Weddington v. United Nat'l Ins., Co.*, 2008 WL 590592, at *4 (N.D. Cal. February 29, 2008). Notably, none of the cases upon which MLC relies were decided in the context of a motion to dismiss. *Sutherland v. Barclays Am./Mortgage Corp.*, 61 Cal. Rptr. 2d 614, 617 (Cal. Ct. App. 1997) (motion for summary judgment); *Harm v. Frasher*, 5 Cal. Rptr. 367, 369 (Cal. Ct. App. 1960) (appeal of judgment); *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal.*, 826 P.2d 710 (Cal. 1992) (appeal of judgment). Accordingly, MLC's Motion to Dismiss Count III is not ripe for consideration under FRCP 12(b)(6) and must be denied.

MLC's reliance on facts outside of the Complaint provides further evidence that MLC's Motion is not appropriate under FRCP 12(b)(6). For example, in the Motion, MLC makes the claim (which TMC contests) that MLC "made a good faith effort to substitute a replacement vehicle" for the Vibe. Mot. to Dismiss ¶ 53. This factual claim is outside of the facts pled in the

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"best efforts to ensure reasonable growth in sales of the … products." *Id.* at *1. Rejecting the defendant's arguments that it had abandoned the product line because it was unprofitable, the court found that "the real reason for its abandonment appears to be a decision … to focus its energy and resources on other more profitable products." *Id.* at *4. This allocation of resources was incompatible with a contractual promise to exercise its best efforts towards the promotion of the product. *Id.* at *4 n.1; *see also Gilmore v. Hoffman*, 266 P.2d 833, 837 (Cal. Ct. App. 1954). MLC similarly abandoned the Vibe to focus its energy and resources on more profitable products.

Complaint. As detailed above, these extrinsic facts cannot be considered on MLC's Motion. *See DiFolco*, 622 F.3d at 111, and § I, *supra*. Therefore, MLC's motion must be denied.

Moreover, TMC adequately pled MLC's breach of the covenant of good faith and fair dealing. The covenant of good faith and fair dealing imposes on each party the duty "not to do anything which will deprive the other parties thereto of the benefits of the contract." *Harm*, 5 Cal. Rptr. at 374. The Complaint alleges facts that MLC deprived TMC of the opportunity to recoup hundreds of millions of dollars in research and development costs incurred in connection with the Vibe. Compl. ¶ 49-50. Thus, TMC pled the precise deprivation necessary for a breach of the covenant of good faith and fair dealing.

Further, MLC mischaracterizes TMC's claim for breach of good faith and fair dealing by arguing that the claim is based solely on MLC's failure to purchase Vibes from NUMMI. In fact, TMC's claim that is not based solely on MLC's decision to cease purchasing Vibes. Rather, TMC's claim is based on MLC's misleading statements to TMC and NUMMI (Compl. ¶ 78), MLC's failure to work with TMC to seek alternatives to the Vibe (Compl. ¶ 21), and MLC's attempt to extort commercially unreasonable terms from TMC on a MLC badged Tacoma truck (Compl. ¶ 47). *See also* Compl. ¶¶ 43-48, 51. Each of these allegations, which must be accepted as true, are sufficient to demonstrate that MLC did not act in good faith, thus breaching the covenant of good faith and fair dealing. *See* § I, *supra*; *Iqbal*, 129 S. Ct. at 1949.

Finally, courts routinely uphold claims for violations of the implied covenant of good faith and fair dealing, where a party to a requirements contract discontinues a line of business or failed to act in good faith in fulfilling the terms of a requirements contract. *See, e.g., Speakman v. Allmerica Fin. Life Ins.*, 367 F. Supp. 2d 122, 138 (D. Mass. 2005); *407 East 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 244 N.E. 2d 37, 40 (N.Y. Ct. App. 1968) ("a promise to remain in

business will be implied particularly where the promise has undertaken certain burdens or obligations in expectation of an[d] reliance upon the promisor's continued activity"); *Milton v. Hudson Sales Corp.*, 313 P.2d 936, 940-44 (Cal. Dist. Ct. App. 1957). Here, MLC, a party to requirements contracts, failed to act in good faith by unilaterally and abruptly discontinuing the Vibe and walking away from NUMMI. MLC's failure to act in good faith and fulfill the express and implied terms of the VSA and 2006 MOU constitute a breach of the covenant of good faith and fair dealing. For all of these reasons, MLC's Motion to Dismiss Count III must be denied.

VII. TMC Adequately Stated A Claim For Promissory Estoppel.

The determination of whether promissory estoppel exists is a question of fact that cannot be considered in a motion to dismiss. *See Henry v. Weinmann*, 321 P.2d 117, 121 (Cal. Ct. App. 1958). Both of the cases upon which MLC relies were decided only after full discovery and not in the context of a motion to dismiss. *See Salawy v. Ocean Towers Housing Corp.*, 2006 WL 2391067, at *1 (Cal. Ct. App. Aug. 21, 2006) (appeal of judgment); *NCC Sunday Inserts, Inc. v. World Color Press, Inc.*, 759 F.Supp. 1004, 1006 (S.D.N.Y. 1991) ("this is hardly a run-of-the-mill contract dispute. Discovery having finally been completed, we are now presented with extremely voluminous summary judgment motions…"). Therefore, MLC's Motion to Dismiss Count IV should be denied.

Under California law, promissory estoppel requires the enforcement of "'[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee … and which does induce such action or forbearance.'" *Kajima/Ray Wilson v. Los Angeles County Metro. Transp. Auth.*, 1 P.3d 63, 66 (Cal. 2000) (citing Rest. 2d Contracts, § 90, subd. (1), p. 242). Consistent with the procedures developed over the entire course of TMC's and MLC's relationship, MLC promised in 2006 that, beginning in 2008 – and ending no earlier than 2012 – MLC would purchase tens of thousands of Vibes per year from NUMMI. This

promise was given in the context of the 25 year relationship between the parties during which TMC designed and MLC purchased approximately 2 million vehicles sold under various MLC brands. Compl. ¶¶ 29, 31, 32, 34, 35. In reliance on MLC's promise, TMC incurred hundreds of millions of dollars in research and development costs for the Vibe. *Id.* ¶¶ 49-50. In addition, MLC collaborated with TMC on the design of the Vibe. *Id.* ¶ 27. Thus, based on the 2 plus decade relationship between TMC and MLC, MLC promised to purchase and TMC promised to design the 2008 and the 2011 Vibe.

MLC's claim that it was not contractually obligated to purchase a single Vibe by any agreement actually supports TMC's alternatively pled promissory estoppel claim. It is nonsensical that TMC would enter the NUMMI joint venture and invest billions of dollars over 25 years without any promise from MLC inducing TMC to do so. Compl. ¶¶ 8-14, 17, 20, 28. MLC's argument flies in the face of the special relationship between the parties that was created by the joint venture. *See* § III, *supra*. TMC's actions investing hundreds of millions of dollars in designing vehicles for MLC, both before and after the 2006 MOU, belies MLC's claim that it never made a single promise to induce TMC into these actions. Compl. ¶¶ 20, 27-28, 84.

Unlike MLC, TMC fulfilled its promise. Compl. ¶¶ 20, 49-50. These factual allegations, which must be accepted as true, state a claim for promissory estoppel upon which relief can be granted. *See* § 1, *supra*. Accordingly, MLC's Motion must be denied.

VIII. TMC Adequately Stated A Claim For Statutory Environmental Liability and Declaratory Relief.

It is undisputed that MLC, as the prior owner of NUMMI's land and plant, is liable for environmental clean up costs required at the NUMMI plant as a result of MLC's dumping or disposal of hazardous substances at the plant while it was owned and operated by MLC. *See* 42 U.S.C. 9607(a)(2) ("any person who at the time of disposal of any hazardous substance owned or

operated any facility at which such hazardous substances were disposed of, … shall be liable for - all costs of removal or remedial action"). Moreover, TMC adequately alleged facts that MLC caused environmental contamination at NUMMI during its ownership and operation of NUMMI's plan. Compl. ¶ 87. These allegations must be accepted as true and are sufficient to satisfy the liberal pleading standard under FRCP 8.

The environmental remediation costs are a potentially sizeable component of NUMMI's wind down costs and MLC, as a prior owner, is obligated to pay those remediation costs. *See* 42 U.S.C. 9607(a)(2). The facts regarding the potential environmental liability at NUMMI will require the parties to engage in factual investigations to determine the cause and timing of the pollution. Therefore, because determining the appropriate amount of MLC's obligation to TMC will require a factual investigation and determination, MLC's Motion must be denied.

Moreover, MLC's Motion fails to argue that TMC did not adequately state a claim for declaratory relief (or that TMC is not entitled to such relief). "The Declaratory Judgment Act provides: '[i]n a case of actual controversy within its jurisdiction … any court of the United States … may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.'" *Rosen v. Mega Bloks Inc.*, 2009 WL 929474, at *3 (S.D.N.Y. April 7, 2009) (citing 28 U.S.C. § 2201(a)). As *Rosen* explained:

> The declaratory judgment statute thus incorporates 'the case or controversy limitation on federal jurisdiction found in Article III of the Constitution.' *Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians,* 94 F.3d 747, 752 (2d Cir. 1996). To meet this standard, the court must be presented with "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Olin Corp. v. Consol. Aluminum Corp.,* 5 F.3d 10, 17 (2d Cir. 1993) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.,* 312 U.S. 270, 273 (1941)) (emphasis omitted); *accord Niagara Mohawk Power Corp.,* 94 F.3d at 752.

Id. Here, TMC has sufficiently alleged each of these elements. Compl. ¶ 92-95. Due to the ongoing liquidation of MLC and dissolution of NUMMI, it is essential that this Court issue a

declaratory judgment regarding the parties' obligations with respect to the environmental liability at NUMMI prior to the complete wind down of both MLC and NUMMI. Therefore, MLC's Motion must be denied.

IX. TMC Adequately Stated A Claim For Statutory Workers' Compensation Liability and Declaratory Relief.

MLC is liable for NUMMI's workers' compensation liabilities if NUMMI is unable to cover its workers' compensation costs. Pursuant to Section 3717 of the California Labor Code, if an employer fails to make the required workers' compensation payments and the California Department of Industrial Relations is required to make that employers' workers' compensation payments, the employer shall be jointly and severally liable for the payments with all substantial shareholders. A substantial shareholder is a shareholder who owns more than fifteen percent (15%) of the corporation. Cal. Labor Code § 3717(b). Thus, MLC, as a fifty percent (50%) shareholder of NUMMI, is jointly and severally liable with NUMMI for any unpaid workers' compensation payments under California law.

TMC's decision to guarantee NUMMI's workers' compensation liability was not "voluntary," as MLC claims. In fact, TMC's guarantee provided MLC with the benefit of being a shareholder of a company that could conduct an orderly liquidation rather than a forced liquidation. Pursuant to Section 3720 of the California Labor Code, the Department of Industrial Relations can obtain a blanket lien on all of an employer's assets if it suspects that such employer is unable to meet its workers' compensation liability. That is what occurred at NUMMI and, but for TMC's guarantee, it is highly likely that the Department of Industrial Relations would have obtained a blanket lien on NUMMI's assets and forced NUMMI into an immediate liquidation and sought additional recovery from NUMMI's substantial shareholders: MLC and TMC. Moreover, TMC's guarantee of NUMMI's workers' compensation required

TMC to take on a $100 million plus liability, thus injuring TMC. Therefore, MLC's Motion must be denied.

Just as with the environmental liability, MLC does not argue that TMC failed adequately plead the elements of a declaratory relief action. Therefore, MLC's Motion must be denied.

CONCLUSION

Over 25 years ago MLC and TMC entered a joint venture never before contemplated in the automotive industry. For those 2.5 decades, MLC claims that it was never obligated to purchase a single vehicle, and that NUMMI was never obligated to sell MLC a single vehicle. MLC's defense rests on three contractual clauses read in a vacuum with no consideration to the contract as a whole, the intent of the parties, or the absurd result that occurs. MLC conveniently ignores contractual provisions inconsistent with MLC's argument and even neglects to refute contractual obligations specifically and particularly pled by TMC. Reading all these provisions consistent with California law and the special relationship created by the joint venture it becomes clear that MLC's abandonment of NUMMI by refusing to buy a single vehicle is a breach of the VSA and 2006 MOU. MLC's Motion at most highlights contractual ambiguities that cannot be resolved on a Motion to Dismiss. TMC has identified specific provisions of the VSA (§§ 4.1(b) & 4.1(c)) and 2006 MOU (1(2), 1(3), 1(4), 1(5) & 7) breached by MLC, in addition to the facts necessary to support TMC's other claims. Therefore, MLC's Motion to Dismiss should be denied in its entirety.

Dated: January 18, 2011

FOLEY & LARDNER LLP

/s/ Matthew J. Riopelle

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a General Motors Corp., *et al.* Debtors	Chapter 11 Case No. 09-50026 (REG) (Jointly Administered)
TOYOTA MOTOR CORPORATION, Plaintiff. vs. MOTORS LIQUIDATION COMPANY, f/k/a General Motors Corp., Defendant.	Adversary Proceeding Case No. 10-05015 (REG)

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF SAN DIEGO)

I, Raechelle Hurst, being duly sworn depose and state:

1. I am employed by Foley & Lardner LLP, attorneys for Toyota Motor Corporation in the above-captioned Chapter 11 case. Our business address is 402 W. Broadway, Suite 2100; San Diego, CA 92101.

2. On January 18, 2011, I caused service of the following document filed in the above-captioned case to be effected on the parties listed on **Exhibit A** by electronic mail:

TOYOTA MOTOR CORPORATION'S OPPOSITION TO MOTORS LIQUIDATION COMPANY'S MOTION TO DISMISS

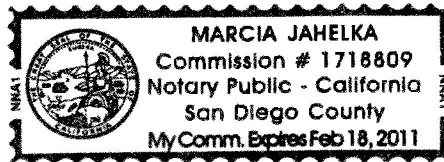
3. On January 18, 2011, I caused service of the documents listed above to be effected on the parties as noted on **Exhibit B** via first class, postage prepaid by depositing same in a mail box maintained by the U.S. Postal Service.

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

Dated: January 18, 2011

Raechelle Hurst

Subscribed and sworn to before me this 18th day of January, 2011



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