

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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: **Chapter 11 Case No.**
: **09-50026 (REG)**
: **(Jointly Administered)**
: **Debtors.**
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: **MOTORS LIQUIDATION COMPANY,**
: *et al.,*
: **Plaintiffs,**
: **Adversary No. 10-5006**
: **vs.**
: **BAYERISCHE MOTOREN WERKE**
: **AKTIENGESELLSCHAFT,**
: **Defendant.**
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FIRST AMENDED ADVERSARY COMPLAINT

Motors Liquidation Company (f/k/a General Motors Corporation) (“**MLC**”) and its affiliated debtors, as debtors in possession (collectively, the “**Debtors**” or “**Plaintiffs**”), allege against Bayerische Motoren Werke Aktiengesellschaft (“**BMW**”) as follows:

PRELIMINARY STATEMENT

General Motors Corporation (“**GMC**”) entered into a contract with BMW for the development, production, and sale of transmissions in May 2004. The contract and its exhibits provide extensive specifications regarding the technical requirements for the transmissions. GMC, its Powertrain Group (“**GMPT**”), and its subsidiary GM Strasbourg SAS (“**GM Strasbourg**”), located in Strasbourg, France, fully complied with their obligations under the contract, developing and thereafter supplying transmissions to BMW in compliance with the

specifications. For its part, BMW was obligated, under the terms of the contract, to purchase a minimum of 1.9 million transmissions from GMC by December 31, 2015.

In late 2008, BMW requested an amendment to the contract under which GMC would supply different transmissions incorporating new technology that is not required by or provided for in the contract. GMC—and later MLC—negotiated in good faith with BMW, offering technological solutions and terms that, if accepted, would have met BMW’s requests. BMW, however, repeatedly rejected every solution proposed by GMC and MLC, and ultimately informed MLC that it did not intend to comply with its purchase obligations under the contract, but rather that it would shift production of transmissions to an alternate supplier. Remarkably, BMW further threatened to seek, through this Court, to recover damages from MLC.

Accordingly, a substantial controversy exists between the parties regarding MLC’s performance under the contract that warrants declaratory judgment. Moreover, because MLC has fully performed its obligations under the contract, the Court, applying German law, should order BMW to specifically perform its obligations under the contract. In the alternative, the Court should find that BMW, through its repudiation of the agreement, has breached the contract and caused MLC to incur significant and substantial damages, leaving MLC with no alternative but to seek redress from this Court.

PARTIES

1. Plaintiffs are Debtors in the above-captioned bankruptcy proceeding by virtue of having filed a voluntary petition for relief under chapter 11 of title 11, United States Code (the “**Bankruptcy Code**”) on June 1, 2009.

2. Defendant BMW is, upon information and belief, a German corporation doing business in Munich, Germany.

JURISDICTION & VENUE

3. This Court has jurisdiction to hear this matter under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O).

4. Venue is proper in this Court under 28 U.S.C. § 1409.

5. This proceeding is initiated pursuant to Rule 7001(1) of the Federal Rules of Bankruptcy Procedure.

6. This Court has personal jurisdiction over BMW because BMW has continuous and systematic contacts in the United States and in this federal judicial district.

BACKGROUND

7. GMC and BMW entered into the 6L45 Development and Delivery Agreement (the “**Delivery Agreement**”) on May 6, 2004. General Motors Corporation thereafter changed its name to Motors Liquidation Company; MLC accordingly is the entity entitled to enforce the Delivery Agreement.

8. From its opening paragraphs, the Delivery Agreement makes clear its specific subject matter, a 6-speed automatic transmission to be developed and produced by GMPT and MLC’s subsidiary, GM Strasbourg:

1.1 Subject of the agreement is the development, design, production and supply, by GMPT to BMW, of a 6-speed automatic transmission system, specifically the 6L45 transmission. The system . . . is to include an integrated electronic controller and related software as described in the list of specifications

The “list of specifications” for the transmissions is the “Lastenheft,” a 101-page, detailed recitation of technical requirements, attached as Exhibit I to the Delivery Agreement.

9. The Delivery Agreement required BMW to pay GMC 19 million euros for development of the 6L45 transmissions between 2003 and 2006. The Delivery Agreement also

set forth a cost structure for the transmissions BMW was required to purchase from 2007 to 2010.

10. Starting in 2008, the Delivery Agreement required that BMW purchase an average of 200,000 to 220,000 transmissions per year from GMC. In addition to the annual purchase requirements, the Delivery Agreement requires that BMW purchase a total of at least 1.9 million transmissions from GMC before the contract expires on December 31, 2015. GMC fully complied with its obligations to design, develop, and produce the 6L45 transmission. From time to time during the design and development process, BMW initiated discussions with GMC concerning potential additional requirements for the 6L45 transmission, but the Lastenheft was never amended and BMW ultimately directed GMC to use the Lastenheft, in its original form, as the specifications for the transmission. In particular, in 2006 BMW expressed interest in incorporating into the 6L45 a technology commonly known as “ETRS,” or “shift-by-wire,” and GMC responded by devoting technical resources to developing ETRS solutions as requested by BMW. Thereafter, however, BMW informed GMC that it was no longer interested in implementing ETRS technology into the 6L45, and at BMW’s direction, GMC ceased its efforts to develop such a solution.

11. To enable GMC to accomplish the complex planning and capacity utilization necessary to meet its substantial obligations, the Delivery Agreement also requires BMW to provide GMPT with annual forecasts regarding the number of transmissions it will require for the following three-year period. Since 2007, BMW has ignored this requirement, consistently failing to provide GMPT with the required forecast.

12. In late 2008, BMW changed course, and informed GMC that it would like to add ETRS and, in addition, “Start-Stop” technology, neither of which is required by the Delivery

Agreement. GMC met with BMW concerning these new technological requirements, and worked diligently to prepare a commercial solution for what would have constituted an amendment to the Delivery Agreement. By letter dated December 11, 2008, BMW escalated its requests into a demand that ETRS and Stop-Start technology be incorporated into all future 6L45 transmissions.

13. Although GMC provided multiple proposals in an attempt to satisfy BMW's continuously-changing demands for new technology so that the Delivery Agreement could be amended, BMW rebuffed each such proposal.

14. Ultimately, BMW sent MLC a letter repudiating the contract (the "**November 19, 2009 Letter**"). In the November 19, 2009 Letter, BMW informed MLC that it does not intend to purchase the number of transmissions required by the Delivery Agreement in 2010 or thereafter. This repudiation of its obligations under the Delivery Agreement means that BMW will fall short—by more than 1 million transmissions—of the 1.9 million transmission minimum purchase requirement contained in section 5.1.1 of the Delivery Agreement.

15. MLC responded to the November 19, 2009 Letter with a letter dated December 2, 2009 (the "**December 2, 2009 Letter**"). In the December 2, 2009 Letter, MLC reiterated the obvious, that it had fully complied with the Delivery Agreement by providing transmissions with the technical specifications required by the contract. MLC further stated that it has the ability to continue fulfilling its obligations under the Delivery Agreement and that it intends to continue fulfilling its obligations under the Capacity Guarantee section of the Delivery Agreement.

16. In addition to explaining that it has not breached the Delivery Agreement and assuring BMW that it will continue to satisfy its contractual duties, MLC also refuted BMW's attempt to blame MLC for its repudiation of the Delivery Agreement. MLC noted that BMW

ordered fewer transmissions from MLC *solely because of BMW's business decision to switch away from the 6L45 automatic transmission*—the transmission MLC agreed to produce and BMW agreed to purchase under the Delivery Agreement. The parties did not contract for such a change, and BMW's decision to switch to a different transmission is not a valid basis for repudiating and breaching the Delivery Agreement.

17. After exchanging these letters, representatives from MLC and BMW met in person to discuss their future relationship under the Delivery Agreement. At the December 10, 2009 meeting (the “**December 10, 2009 Meeting**”), BMW informed MLC that it intends to terminate the Delivery Agreement and stop purchasing transmissions from MLC in 2010. BMW's representatives also said that a final letter regarding the termination will be provided to MLC in February 2010.

18. By its actions, including the sending of the November 19, 2009 Letter, BMW has repudiated and committed an anticipatory breach of the Delivery Agreement. MLC is informed, and on the basis of such information believes, that BMW intends to shift its purchases of a six-speed automatic transmission from MLC to another supplier—and to continue to purchase transmissions without the ETRS and Start-Stop technology that supposedly were requirements for future purchases of 6L45 transmissions from MLC. BMW's supposed negotiations with MLC for an amendment to the Delivery Agreement, and its subsequent stated reasons for canceling and repudiating the Delivery Agreement, were a pretext for an impermissible decision to terminate a contract with an entity involved in proceedings under Chapter 11 of the Bankruptcy Code.

19. Remarkably, BMW, having repudiated its obligations to purchase six-speed transmissions from one of its two suppliers of such transmissions, has actually threatened to seek

remuneration from MLC for its additional cost of acquiring substitute transmissions from the other, now-single-source supplier, which—having been freed of competition from MLC—is able to dictate pricing terms to BMW. BMW has further threatened MLC that it will take appropriate action in the Bankruptcy Court to protect its interests.

20. BMW is attempting to excuse its performance under the Delivery Agreement based on its allegations that MLC has not fully complied with the Delivery Agreement. Thus, MLC seeks declaratory judgment that it has satisfied its obligations under the agreement.

21. Moreover, because MLC has fully complied with the Delivery Agreement, the Court may order BMW to specifically perform its obligations to continue purchasing 6L45 transmissions under the Delivery Agreement. Specifically, BMW should be ordered to fulfill its obligation to purchase more than one million additional transmissions from MLC before December 31, 2015.

22. In the alternative, the Court should find that BMW has anticipatorily breached and unequivocally repudiated the Delivery Agreement by, among other actions, sending the November 19, 2009 Letter and orally informing MLC at the December 10, 2009 Meeting that it intends to stop purchasing transmissions under the Delivery Agreement in 2010. Accordingly, MLC is not required to wait until BMW fails to purchase transmissions during the remaining term of the Delivery Agreement to seek damages for BMW's breach.

COUNT I

Declaratory Judgment

23. Plaintiffs repeat and re-allege each and every allegation contained in the preceding paragraphs.

24. A substantial and actual justiciable controversy exists between the parties regarding whether MLC has fully performed its obligations under the Delivery Agreement.

25. MLC and BMW have adverse legal interests.

26. The dispute regarding MLC's performance under the Delivery Agreement is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

27. Accordingly, MLC seeks an order that it has fully satisfied its obligations under the Delivery Agreement.

COUNT II

Specific Performance

28. Plaintiffs repeat and re-allege each and every allegation contained in the preceding paragraphs.

29. The Delivery Agreement is a valid and enforceable contract.

30. MLC has substantially performed its obligations under the Delivery Agreement and is willing and able to perform its remaining obligations under the Agreement.

31. BMW's obligation to accept the goods is governed by German law according to the Delivery Contract. German law, in contrast to common law legal systems, provides for a claim for specific performance regardless of the satisfaction of further elements.

32. Accordingly, MLC seeks an order that BMW specifically perform its obligations under the Delivery Agreement.

COUNT III

Breach of Contract

33. Plaintiffs repeat and re-allege each and every allegation contained in the preceding paragraphs.

34. In the alternative, if the Court does not order BMW to specifically perform under the Delivery Agreement, it should find that BMW breached the agreement by repudiating it and award MLC damages.

35. MLC and its predecessors in interest have fully satisfied their obligations under the Delivery Agreement.

36. BMW has breached the Delivery Agreement by repudiating the contract and refusing to purchase the number of transmissions required pursuant to the Delivery Agreement.

37. As a result of BMW's repudiation and breach, MLC has suffered and continues to suffer monetary damages.

38. Accordingly, MLC seeks an award of damages, including interest, arising from BMW's repudiation and breach of the Delivery Agreement.

PRAYER

WHEREFORE, Plaintiffs request the entry of a judgment: (i) declaring that MLC has fully complied with the Delivery Agreement; (ii) ordering BMW to specifically perform its obligations under the Delivery Agreement or, in the alternative, to pay damages relating to its breach and repudiation of the Delivery Agreement; and (iii) granting such other and further relief as may be just.

Dated: New York, New York
February 3, 2010

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