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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)
NEW UNITED MOTORS MANUFACTURING, INC., Plaintiff, v. **MOTORS LIQUIDATION COMPANY,** Defendant.	Adversary Proceeding Case No's: 10-05016 and 10-05015 (REG)
TOYOTA MOTOR CORPORATION, Plaintiff, v. **MOTORS LIQUIDATION COMPANY,** **f/k/a General Motors Corp.,** Defendant.	

NUMMI'S OPPOSITION TO MOTORS LIQUIDATION COMPANY'S MOTION TO DISMISS THE NUMMI AND TOYOTA ADVERSARY COMPLAINTS

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INTRODUCTION

1. At the Court's direction, New United Motor Manufacturing, Inc. ("**NUMMI**") converted its summary Proof of Claim against Motors Liquidation Company ("**MLC**") into an eight-count, 126-paragraph, 28-page complaint (the "**Complaint**") that details the specific obligations that MLC violated.[1] Each of these counts is supported by factual assertions based upon agreements and the course of performance between MLC, NUMMI and the Toyota Motor Corporation ("**TMC**").

2. The Complaint exceeds Rule 8's minimal requirement for "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). It provides a detailed statement showing that NUMMI is entitled to relief. Each of the eight counts is based upon factual assertions which, at this preliminary stage of the case, must be taken as true and with all inferences drawn in NUMMI's favor.

3. MLC moved to dismiss the Complaint under Rule 12(b)(6). Fed. R. Civ. P. 12(b)(6) (MLC's Motion to Dismiss the NUMMI and Toyota Adversary Complaints (the "**Motion to Dismiss**" or "**Motion**") ¶ 1.) In its Motion, MLC had the burden to show that Complaint fails to "state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Conceding, as it must, that "a Court must accept all factual allegations as true and draw all reasonable inferences in favor of the plaintiff," MLC nonetheless seeks dismissal of NUMMI's Complaint based on disputed facts, inferences drawn in favor of MLC and strained interpretations of contract snippets. (Motion ¶ 40 (citations omitted).) None of these grounds show that NUMMI failed to state a claim for which relief can be granted. MLC failed to meet its burden and, as such, its Motion should be denied.

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[1] NUMMI uses the term "MLC" even though it participated in the NUMMI joint venture as General Motors Corporation.

PROCEDURAL BACKGROUND

4. NUMMI filed its timely Proof of Claim on November 24, 2009, asserting breach of contract claims based on the contracts explained below, as well as claims for breach of fiduciary duty, misrepresentation and indemnification. On April 1, 2010, MLC filed its objection to the NUMMI claim. NUMMI responded to MLC's objection on May 24, 2010 and MLC filed its reply to NUMMI's response on November 4, 2010.

5. On November 9, 2010, the Court held a hearing regarding MLC's objection to NUMMI's Proof of Claim. The Court asked NUMMI (and TMC) to submit their claims through adversary complaints. On November 24, 2010, NUMMI and TMC filed detailed adversary proceeding complaints.[2] Undeterred, MLC moved to dismiss both complaints on December 23, 2010, raising the same surface-level arguments it asserted in its April 2010 motion.

KEY FACTUAL BACKGROUND

6. NUMMI's Complaint provides more than adequate factual allegations to satisfy Rule 8's pleading requirement. The Complaint paints a detailed picture of MLC's commitments to NUMMI, MLC's breaches of these commitments and the injury NUMMI suffered as a direct result of MLC's actions. MLC's commitments date back to NUMMI's creation in 1983 and continued and expanded through the decades.[3]

7. In 1983, MLC and TMC signed a Memorandum of Understanding that became the foundational agreement for NUMMI (the "**1983 MOU**"). (Compl. ¶ 17, Ex. A.) The 1983 MOU covered all aspects of the NUMMI joint venture, including its formation, manufacturing goals, marketing plans and termination.

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[2] The schedule for filing the complaints and for MLC's Motion was established by the parties' Joint Stipulation and Scheduling Order (Docket No. 7913).

[3] To aid the Court in its assessment of the sufficiency of the Complaint, NUMMI provides this synopsis of key facts. It is not meant to replace the Complaint's highly detailed factual assertions.

8. In the 1983 MOU, MLC and TMC agreed to keep NUMMI viable until termination, and at termination MLC and TMC would equally enjoy any remaining surplus or equally be responsible for any deficit. (Comp. Ex. A at 3, 4, 5, 10.)

9. With the 1983 MOU in place, NUMMI incorporated in 1984. The Shareholders' Agreement affirmed the commitments MLC made in the 1983 MOU. (Compl. Ex. B.) Unless the Shareholders' Agreement specifically conflicted with the 1983 MOU, the Shareholders' Agreement did not remove MLC's obligations under the 1983 MOU.

10. MLC, TMC and NUMMI implemented a production plan, beginning with the 1984 Vehicle Supply Agreement (the "**VSA**"), which provides "***[MLC] shall purchase [NUMMI-produced vehicles] on a continuous and stable basis.***"[4] (Compl. ¶ 34, Ex. F at § 4.1(b).) More specifically, the VSA set a target that NUMMI's production would exceed 200,000 vehicles per year. (Compl. ¶ 34, Ex. F at § 4.1(b).) This commitment was necessary to support the immense capital investments that would be necessary for NUMMI to develop production lines to build new generations of vehicles for MLC and TMC. (Compl. ¶ 45.)

11. Through the decades, MLC upheld its contractual commitments to keep NUMMI viable. In 1989, when NUMMI incurred losses beyond its shareholders' equity, MLC and TMC each contributed an additional $30 million. (Compl. ¶ 49, Ex. J.) In 1992, NUMMI again needed additional capital and MLC and TMC provided another $25 million each. (Compl. ¶ 49, Ex. K.) MLC did not act as a mere NUMMI shareholder. It understood its contractual obligations to the joint venture and acted accordingly.

12. In a meeting in December 2005, MLC promised that if NUMMI developed the Pontiac Vibe (the "**Vibe**"), MLC would purchase enough of them to keep NUMMI viable through 2012. (Compl. ¶ 40.) The parties memorialized their respective obligations in a

[4] Emphasis reflected in quotations is added unless otherwise noted.

Memorandum of Understanding in 2006 (the "**2006 MOU**"). The parties agreed that a key purpose of the Vibe production for 2008 through 2012 was "***to help ensure that all Parties remain viable.***" (Compl. ¶ 41, Ex. I.) The parties emphasized their commitment to NUMMI's continued viability throughout the 2006 MOU. (Compl ¶ 41, Ex. I at §§ 1(2), 1(3), 7.)

13. Based on the commitments in the 2006 MOU, NUMMI invested significant resources to develop new equipment, machinery and tooling to produce the Vibe, purchase raw materials, installed a new production line for the Vibe and trained employees. (Compl. ¶ 45.)

14. MLC understood its obligations under the 2006 MOU and performed them into 2009. (Compl. ¶ 50.) Moreover, MLC recognized its duty to purchase Vibes and keep NUMMI viable. When NUMMI informed MLC and TMC in early 2008 that the Vibe was losing money for NUMMI, MLC agreed to help close the gap by increasing the "transfer price" it paid for each Vibe by $1,000—a $65 million increase annually—that was consistent with its obligations to keep NUMMI viable. (Compl. ¶ 50.)

15. In the spring of 2009, MLC decided to discontinue the Pontiac brand. (Compl. ¶ 54.) Nonetheless, MLC acknowledged its continuing obligations to NUMMI, confirmed that it was still committed to NUMMI's viability and production stability, and stated that it would explore alternatives to the Vibe for NUMMI to produce. (Compl. ¶ 54.) NUMMI engaged in good faith discussions with MLC about re-badging the Vibe to another MLC brand. (Compl. ¶ 56.)

16. On June 26, 2009, however, MLC changed course and announced that it would withdraw from NUMMI. (Compl. ¶ 60.) With MLC's withdrawal, NUMMI was no longer a viable joint venture. Its function as a venue for MLC and TMC to exchange expertise ended and, without MLC, its collaborative production and allocation procedures were destroyed. (Compl. ¶

63.) After MLC's withdrawal, NUMMI began to wind down. Because of MLC's abandonment of its commitment to purchase the Vibe through 2012, approximately $185 million of NUMMI's capital expenditures for the Vibe have not been recouped. (Compl. ¶¶ 62, 83, 89, 95, 101, 107, 113, 120, 126.) Additionally, MLC is contractually responsible for over $180 million of NUMMI's wind down deficit. (Compl. ¶ 66.)

LEGAL STANDARD

17. To state a viable claim, Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. Rule Civ. P. 8(a)(2). The purpose of this rule is to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks and citations omitted).

18. To satisfy this pleading standard, a complaint must simply "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) *on remand* 574 F.3d 820 (2d Cir. 2009) (quoting *Twombly*, 550 U.S. at 570). This is not an intense standard of pleading: "The plausibility standard is not akin to a 'probability requirement' . . . ." *Iqbal*, 129 S. Ct. at 1949.

19. In analyzing the sufficiency of a complaint a court must "accept as true all of the factual allegations set out in plaintiff's complaint, draw inferences from those allegations in the light most favorable to plaintiff, and construe the complaint liberally."[5] *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 127 (2d Cir. 2009) (internal quotation marks and citation omitted). Because all factual allegations must be accepted as true, factual disputes between parties cannot

[5] Even when a complaint falls short of these standards, a court should freely give leave to amend. "Thus, in a bankruptcy case, amendment to a claim is freely allowed where the purpose is to . . . describe the claim with greater particularity, or to plead a new theory of recovery on the facts set forth in the original claim." *In re Integrated Resources, Inc.*, 157 B.R. 66, 70 (S.D.N.Y. 1993).

be resolved on a motion to dismiss. *See Bernstein v. Seeman*, 601 F. Supp. 2d 555, 556 (S.D.N.Y. 2009).

20. Conflicting contractual interpretations also cannot be resolved on a motion to dismiss. Not only must a court accept NUMMI's factual assertions as true, but "where there are alternative, reasonable interpretations of a contract term rendering it ambiguous, the issue should be submitted to the trier of fact and is not suitable for disposition on a motion to dismiss."[6] *Psenicska v. Twentieth Century Fox Film Corp.*, Nos. 07 Civ. 10972(LAP), 08 Civ. 1571(LAP), 08 Civ. 1828(LAP), 2008 WL 4185752, at *4 (S.D.N.Y. Sep. 3, 2008); *see also 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 . . . ."); *Twentieth Century Fox Film Corp. v. Marvel Enterprises, Inc.*, 155 F. Supp. 2d 1, 14-16 (S.D.N.Y. 2001) (denying a motion to dismiss where the contractual provision at issue, read in the context of the entire agreement was susceptible to more than one reasonable interpretation). MLC has raised issues of contract interpretation and other highly factual issues that do nothing more than create potential ambiguity. Ambiguous contracts cannot be interpreted on a motion to dismiss. So even if the court believes that both NUMMI's and MLC's contractual interpretations are plausible, the Motion must be dismissed.

ARGUMENT

21. NUMMI's Complaint provides more than adequate factual detail to satisfy Rule 8's requirement for a "short and plain statement of the claim showing that the pleader is entitled to relief." Each of the eight counts "contain[s] sufficient factual matter, accepted as true, to

[6] Although the agreements at issue here unambiguously support NUMMI's Complaint, to the extent MLC's factual arguments create an ambiguity, such an ambiguity cannot be resolved in the context of a motion to dismiss.

'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570).

22. In contrast, MLC's Motion does not show that the Complaint is factually deficient. In its attempt to defeat NUMMI's claims, MLC ignores NUMMI's allegations and attempts to substitute a new set of facts (even though NUMMI has not received formal discovery). Further, MLC asks the Court to ignore or misconstrue the language in the relevant contracts and draw inferences in its favor. MLC's factual assertions only raise the potential for contract ambiguity and disputes over ambiguous contracts cannot be resolved on a motion to dismiss. MLC's legal and factual misdirection are not grounds to dismiss the Complaint.

I. MLC'S STATEMENT OF FACTS CANNOT SERVE AS A BASIS FOR A MOTION TO DISMISS AND SHOULD BE DISREGARDED

23. MLC ignores the basic rules governing a motion to dismiss. A motion to dismiss tests the sufficiency of the factual allegations made in a compliant. Yet MLC's motion relies upon twelve pages of its version of the "facts." (*See* Motion ¶¶ 6-32.) This "statement of facts" is improper and must be rejected as part of a motion to dismiss.

24. First, in ruling on a motion to dismiss, a Court must "accept as true all of the factual allegations set out in plaintiff's complaint, draw inferences from those allegations in the light most favorable to plaintiff and construe the complaint liberally." *Gregory v. Daly,* 243 F.3d 687, 691 (2d Cir. 2001). The facts must be taken as they are alleged in the Complaint and inferences must be made in NUMMI's favor, not MLC's.

25. Second, MLC's twelve pages of "facts" are heavily reliant upon "evidence" not in the Complaint. For example, MLC's repeatedly relies upon an affidavit by its former Chief Executive Officer that was not mentioned or relied upon in the Complaint. (*See* Motion ¶¶ 23-

27.) MLC also cites to online Wall Street Journal, CNN and Bloomberg articles that were not referenced or relied upon in the Complaint. (*See* Motion at 11-13 n. 6, 7, 8.)

26. In determining whether a complaint states a claim for relief, a court 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 L.L.C.,* 622 F.3d 104, 111 (2d Cir. 2010). MLC cannot base its motion on evidence not referenced or relied upon in the Complaint:

> Consideration of extraneous material in judging the sufficiency of a complaint is at odds with the liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2), which requires only that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief."

Chambers v. Time Warner, Inc., 282 F.3d 147, 154 (2d Cir. 2002) (citing to Fed. R. Civ. P. 8(a)(2) and 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1366 (2d ed. 1990 & Supp. 2001)).

27. The only appropriate remedy for MLC's reliance upon extrinsic evidence is to deny the Motion. Although Rule 12(b) allows a court to treat a motion to dismiss that relies upon extrinsic evidence as a summary judgment motion brought under Rule 56, which is limited to motions made ***after*** discovery: "Conversion to summary judgment would also be inappropriate because discovery has not yet occurred." *Pearce v. Manhattan Ensemble Theater, Inc.*, 528 F. Supp. 2d 175, 179 fn. 3 (S.D.N.Y 2007) (citing to *Gurary v. Winehouse*, 190 F.3d 37, 43 (2d Cir. 1999) ("[P]arties are entitled to a reasonable opportunity to present material pertinent to a summary judgment motion."). Here, MLC ***has refused*** to engage in discovery. In other words, MLC seeks dismissal of the Complaint based upon MLC's allegations, without giving NUMMI the opportunity to take discovery on those allegations.

28. By relying on extrinsic evidence and its own version of "facts," MLC's Motion to Dismiss must be denied. It does not comport with the rules for a motion to dismiss and cannot be converted to a motion for summary judgment because discovery has not taken place.

II. MLC IS JUDICIALLY ESTOPPED FROM CLAIMING THAT IT DID NOT BREACH THE VSA AND 2006 MOU

29. MLC should be judicially estopped from arguing that it did not breach the VSA or the 2006 MOU because of the conflicting positions it has taken in its bankruptcy proceedings. The doctrine of "[j]udicial estoppel prevents a party from asserting a factual position in a legal proceeding that is contrary to a position previously taken by him in a prior legal proceeding." *Bates v. Long Island R.R. Co.,* 997 F.2d 1028, 1037-38 (2d Cir. 1993); *Simon v. Safelite Glass Corp.*, 128 F.3d 68, 71 (2d Cir. 1997) (citing to *Bates v. Long Island R.R. Co.,* 997 F.2d 1028, 1037-38 (2d Cir. 1993)). That is exactly what MLC seeks to do here.

30. Judicial estoppel is appropriate where: "(1) the party against whom the estoppel is asserted took an inconsistent position in a prior proceeding, and (2) that position was adopted by the first tribunal." *Garcia v. Greco*, 05 CIV 9587 SCR JFK, 2010 WL 446446, at *6 (S.D.N.Y. Feb. 9, 2010) (citing to *Perlleshi v. County of Westchester,* No. 98 Civ. 6927, 2000 WL 554294, at *5 (S.D.N.Y. Apr. 24, 2000)). Here, MLC argues that it had ***no obligations*** under either the VSA or 2006 MOU. (*See* Motion ¶¶ 22, 47.) But in earlier proceedings in its bankruptcy case, MLC acknowledged that it had obligations under the VSA and 2006 MOU, and that position was accepted by this Court.

31. In the Eleventh Omnibus Motion Pursuant to 11 U.S.C. § 365 to Reject Certain Executory Contracts ("Eleventh Rejection Motion"), MLC asserted that the VSA and 2006 MOU were executory contracts and sought to reject them. (TMC 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 performance of the other." *In re Penn Traffic Co.*, 524 F.3d 373, 379 (2d Cir. 2008) (citing Vern Countryman, *Executory Contracts in Bankruptcy: Part I,* 57 Minn. L. Rev. 439, 460 (1973); 3 Collier on Bankruptcy ¶ 365.02[1] (15th ed. rev. 2007)); *see also In re Lehman Bros. Holdings Inc.*, 422 B.R. 407, 416 (Bankr. S.D.N.Y. 2010); *In re Calpine Corp.*, 05-60200 (BRL), 2008 WL 3154763, at *3 (Bankr. S.D.N.Y. Aug. 4, 2008); *In re Acevedo*, 07-11702 (AJG), 2010 WL 3633040, at *3 (Bankr. S.D.N.Y. Sept. 10, 2010). In asserting that the VSA and the 2006 MOU were executory contracts, MLC took the position that its failure to complete performance would constitute a material breach of the contracts.

32. The Court must have relied upon MLC's assertion that the VSA and 2006 MOU were executory contracts because MLC's Eleventh Rejection Motion was granted and the VSA and 2006 MOU were rejected.

33. Because MLC took a previously inconsistent position about its obligations under the VSA and 2006 MOU, and this Court adopted that position in allowing MLC to reject those contracts, MLC is judicially estopped from now claiming that it did not breach any obligations to NUMMI under those contracts.

III. NUMMI HAS STATED VALID BREACH OF CONTRACT CLAIMS AGAINST MLC.

34. A breach of contract cause of action must show: (1) the existence of a contractual duty; (2) NUMMI's performance; (3) MLC's breach; and (4) damages caused by such breach. *See Kirbyson v. Tesoro Refining and Marketing Co.*, No. 09-3990, 2010 WL 761054, at *8 (N.D. Cal. Mar. 2, 2010) (applying California law and denying motion to dismiss; stating that detailed allegations on each element are not required as long as the defendant has "notice of the nature of

the claim").[7] NUMMI's Complaint meets these basic pleading requirements by providing factual allegations that support the existence of a contract, NUMMI's performance under the contract, MLC's breach of its contractual commitments and damages to NUMMI caused by MLC's breaches.

A. Count One: NUMMI Has Stated A Valid Claim For Breach Of Contract Under The 1983 MOU And Section 3.1(b) Of The Shareholders' Agreement.

35. The 1983 MOU was a contract between MLC and TMC in exchange for consideration. (Compl. ¶ 17, Ex. A.) The 1983 MOU covered all aspects of the joint venture, including its formation, its manufacturing goals, its marketing plans and its termination. In the 1983 MOU, both TMC and MLC pledged their support to NUMMI and promised to:

- "increas[e] its production to the maximum extent possible[;]"
- price its vehicles "to provide a reasonable profit" to NUMMI;
- "take necessary measures" if NUMMI was "endanger[ed];" and
- provide guarantees to NUMMI's lenders as needed.

(Compl. ¶ 17, Ex. A. at 3, 4, 7, 10.)

36. The Shareholders' Agreement was executed by TMC and MLC in 1984 and is a valid contract. Under the Shareholders' Agreement, MLC and TMC each had a 50% ownership stake and each promised to keep NUMMI viable by "assist[ing] [NUMMI] in increasing its production to the maximum extent possible." (Compl. Ex. B at § 3.1(b).)

37. NUMMI alleges that it performed its obligations under its contracts with MLC by, among other things, maintaining agreed-upon production levels at its facility and delivering the vehicles that MLC ordered in a timely manner. (Compl. ¶ 80.)

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[7] The agreements are governed by California law. (*See* e.g. VSA (Compl. Ex. F at § 7.6) and Shareholders' Agreement (Compl. Ex. B at § 10.6).)

38. MLC's decision to withdraw from the NUMMI venture breached its contractual duty to assist NUMMI in maximizing its production under both the 1983 MOU and the Shareholders' Agreement. MLC's breach of its obligations to assist NUMMI in maximizing its production has caused damages to NUMMI because it forced NUMMI to wind down. (Compl ¶ 82.) After MLC withdrew from NUMMI, the purpose of the joint venture was defeated. (*Id.*) In reliance on MLC's commitment in the 1983 MOU and the Shareholders' Agreement to assist in maximizing production, NUMMI expended hundreds of millions of dollars in capital expenditures for Pontiac Vibe production. (*Id.*) Had MLC fulfilled its contractual obligations, NUMMI would have recovered these costs. (*Id.*)

39. MLC offers two reasons why Count One should be dismissed, neither of which speaks to whether the claim is legally viable: (1) "the terms of the Shareholders' Agreement have expressly superseded any requirement of the 1983 MOU for MLC to keep NUMMI viable." (Motion ¶ 50); and (2) NUMMI cannot rely on the 1983 MOU as a third-party beneficiary. (Motion ¶ 51.)

1. The Entire 1983 MOU Was Not Superseded by the Shareholders' Agreement.

40. MLC erroneously asserts that "the terms of the Shareholders' Agreement have expressly superseded any requirement of the 1983 MOU for MLC to keep NUMMI viable." (Motion ¶ 50.) This argument is inapplicable to Count One, which is specifically based upon the 1983 MOU ***and*** the Shareholders' Agreement. So even if the Shareholders' Agreement superseded the 1983 MOU, this count is still factually supported by the allegations of a breach of the Shareholders' Agreement.

41. Furthermore, the Shareholders' Agreement only supersedes the 1983 MOU "to the extent that provisions . . . are inconsistent." (Compl. Ex. B at § 10.7.) MLC makes no effort

to show how the Shareholders' Agreement is inconsistent with the 1983 MOU's promise to "assist [NUMMI] in increasing its production to the maximum extent possible . . . ." (Compl. Ex. A at § 3.1(b).)

2. NUMMI Is A Third Party Beneficiary of the 1983 MOU.

42. MLC relies upon a factual dispute to assert that NUMMI cannot benefit from 1983 MOU. It is true that a third party beneficiary cannot be "incidentally named in the contract." *E. Aviation Group, Inc. v. Airborne Express, Inc.*, 8 Cal. Rptr. 2d 355, 357 (Cal. Ct. App. 1992) (citation omitted). But, of course, that is not the situation here. As repeatedly alleged in the Complaint, the express intent of the 1983 MOU was "to establish" NUMMI. (Compl. Ex. A at 1.) The 1983 MOU was not just the "basis for the[] NUMMI joint venture[,]" but also memorialized the TMC's and MLC's "intent . . . to provide such assistance . . . as is considered appropriate to the enhancement of [NUMMI's] success." (*See* Compl. ¶ 17, Ex A. at 1.) "A third party may qualify as a contract beneficiary where the contracting parties ***must have intended*** to benefit that individual," even where that individual is not "identified by name." *See Brinton v. Bankers Pension Servs., Inc.*, 90 Cal. Rptr. 2d 469, 474 (Cal. Ct. App. 1999). Here, by pledging to develop and support NUMMI's business, MLC and TMC "must have intended to benefit" NUMMI.

43. This case is similar to *Gourmet Lane, Inc. v. Keller*, 35 Cal. Rptr. 398 (Cal. Ct. App. 1963), where the court allowed an incorporated association to enforce a pre-incorporation agreement among its members. *Id.* at 399-400. The incorporated association sued one of its members for failing to bear a share of certain costs, as the member had agreed to do in the agreement that formed the association. *Id.* at 400. The California Court of Appeal affirmed a ruling that the corporation could recover as a third-party beneficiary: it was an intended beneficiary whom the other members intended to benefit by obtaining the promise of payment

from the defendant member. *Id.* The same result is appropriate here. NUMMI is the intended beneficiary of the 1983 MOU that requires MLC to share with TMC any deficit existing at NUMMI's termination.

44. In sum, NUMMI has satisfied Rule 8's minimal requirement for "a short and plain statement of the claim showing that [it is] . . . entitled to relief." Fed. R. Civ. P. 8(a)(2). MLC has failed to demonstrate that Count One of the Complaint does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949. For this reason, the Motion should be denied.

B. Count Two: NUMMI Has Stated A Valid Claim For Breach Of Contract Under Section 1(2) Of The 2006 MOU.

45. The 2006 MOU was a validly executed contract in which MLC promised to keep NUMMI viable by "mak[ing] best effort to maximize the production volume during the model life in consideration of maintaining the stability of operations at NUMMI." (Compl. Ex. I at § 1(2).) Specifically, the 2006 MOU obligated MLC to use its best efforts to maximize the production of Vibes during the Vibes' model life. (Compl. ¶¶ 40-45, 85-89, Ex. I at § 1(2).) Indeed, MLC acknowledges that this obligation and the 2008-2012 Vibe model life "relate[] to the production and pricing of Pontiac Vibes and Toyota Corollas ***to be manufactured at NUMMI*** from January 2008 through December 2012." (Motion ¶ 20.)

46. Contracts with "best efforts" clauses like section 1(2) of the 2006 MOU are enforceable. *See Midland Pacific Bldg. Corp. v. King*, 68 Cal. Rptr. 3d 499, 507 (Cal. Ct. App. 2007); *Burgermeister Brewing Corp. v. Bowman*, 38 Cal. Rptr. 597, 601 (Cal. Ct. App. 1964) (enforcing a best efforts clause in a contract that had been in effect for nearly two decades and rejecting defendant's argument that the best efforts clause lacked mutuality).

47. NUMMI performed its obligations under its contracts with MLC by, among other things, maintaining agreed-upon production levels at its facility and delivering the vehicles that MLC ordered in a timely manner. (Compl. ¶ 86.) MLC does not dispute that NUMMI performed its obligations under the 2006 MOU.

48. Nevertheless, MLC failed to perform under the 2006 MOU. (Compl. ¶¶ 52-67, 84-89.) MLC's breach of its obligation to assist NUMMI in maximizing its production volume during the model life of the Vibe has caused damages to NUMMI because it led to NUMMI's wind down. (Compl. ¶ 88.) After MLC withdrew from NUMMI, the purpose of the joint venture was defeated. (*Id.*) In reliance on MLC's commitment in the 2006 MOU to assist in maximizing production volume during the model life of the Vibe, NUMMI expended hundreds of millions of dollars in capital expenditures for Pontiac Vibe production. (*Id.*) Had MLC fulfilled its contractual obligations, NUMMI would have recovered these costs. (*Id.*)

49. To the extent MLC attempts to argue that NUMMI cannot state a claim based on the 2006 MOU's viability provisions, NUMMI is entitled to rely on the parties' course of performance to support its claims. Under California contract law, a written agreement "may be explained or supplemented by course of dealing, course of performance or usage of trade." Cal. Com. Code § 2202; Cal. Civ. Proc. Code § 1856(c) (same). "Under section 2202 of California's Commercial Code, terms of a contract involving the sale of goods may be explained or supplemented . . . by course of performance." *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 857 (9th Cir. 1995) *cert. denied* 516 U.S. 861 (1995) (internal quotation marks omitted). "Furthermore, a construction given the contract by the acts and conduct of the parties with knowledge of its 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." *Woodbine v. Van Horn*, 173 P.2d 17,

22 (Cal. 1946). At this early stage of pleading, all reasonable inferences about the parties' course of performance must be drawn in NUMMI's favor.

50. As alleged in the Complaint, the parties' course of performance shows that MLC recognized its contractual duty to support NUMMI and keep it viable. For example, at times when NUMMI suffered losses, MLC infused millions of dollars of additional capital into NUMMI through amendments to its Subscription Agreement with TMC to keep NUMMI afloat. (Compl. ¶ 49, Exs. J, K.) Then, when NUMMI was losing money on the Vibe in 2008, MLC increased the price it paid for each Vibe by $1,000 to reduce the financial burden on NUMMI. (Compl. ¶ 50.) This was not the conduct of a party confident that it had satisfied its "limited obligations" to a "distinct legal entity." (Motion ¶¶ 13, 16.) Instead, MLC showed that it intended to continue the NUMMI business as a viable joint venture. NUMMI has more than adequately pleaded that the terms of the 2006 MOU (and the parties' other agreements) required MLC to use best efforts to keep NUMMI viable.

51. In Count Two, NUMMI has satisfied Rule 8's minimal requirement for "a short and plain statement of the claim showing that [it is] . . . entitled to relief." Fed. R. Civ. P. 8(a)(2). MLC has failed to demonstrate that Count Two of the Complaint does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949. For this reason, the Motion should be denied.

C. <u>Count Three: NUMMI Has Stated A Valid Claim For Breach Of Contract Under Section 7 Of The 2006 MOU.</u>

52. Similar to Count Two, the Motion to Dismiss fails to address the allegations in Count Three: that MLC promised to "to ensure that NUMMI will remain viabile . . . ." (Compl. Ex. I at § 7.) MLC had a duty to ensure that NUMMI remained viable, MLC breached that duty, which caused $185 million in damages to NUMMI. (*See* Compl. ¶¶ 40-45, 60-66, 90-95.) For

the same reasons stated above—including NUMMI's reliance of detailed allegations regarding the parties' course of performance—Count Three survives MLC's Motion to Dismiss.

D. Count Four: NUMMI Has Stated A Valid Claim For Breach Of Contract Under Section 4.1 Of The VSA.

53. The Vehicle Supply Agreement ("VSA") was executed between NUMMI, MLC and TMC in 1984 and was implemented without issue until 2009. (Compl. ¶ 34, Ex. F.) The Complaint alleges that, in the VSA, MLC had a duty to purchase vehicles on a continuous and stable basis from NUMMI. (Compl. ¶¶ 34-38, 96-101; Compl. Ex. F at § 4.1.)

54. The VSA, as supplemented and continued by the 2006 MOU, was an enforceable, requirements contract. A "requirements contract" simply "measures the quantity [to be produced by] the seller" by "the requirements of the buyer." *See* Cal. Com. Code § 2306(1). No fixed amount is needed. *Id.* Thus, while MLC stated its estimate of "at least 65,000" Vibes from 2008 through 2012 in the 2006 MOU, MLC was obligated to purchase NUMMI's vehicles in quantities not "unreasonably disproportionate to [that] estimate" for that time period. Cal. Com. Code § 2306(1); *Shea-Kaiser-Lockhead-Healy v. Dept. of Water & Power of City of Los Angeles*, 140 Cal. Rptr. 884, 888-90 (Cal. Ct. App. 1977) (enforcing a requirements contract containing a minimum estimate).[8]

55. NUMMI performed its obligations under its contracts with MLC by, among other things, maintaining agreed-upon production levels at its facility and delivering the vehicles that MLC ordered in a timely manner. (Compl. ¶ 98.)

56. MLC breached its contractual obligations to NUMMI because it failed to purchase vehicles from NUMMI on a "continuous and stable basis." (Compl. Ex. F at § 4.1.)

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[8] In the absence of an estimate, this section requires the buyer to purchase a quantity not "unreasonably disproportionate to . . . any normal or otherwise comparable prior output or requirements." Cal. Com. Code § 2306(1).

MLC's refusal to continue the agreement entitles NUMMI to damages based on the capital expenditures discussed above. *See, e.g.*, *Tri-State Generation and Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 874 F.2d 1346 (10th Cir. 1989) (ruling that a buyer could not discontinue a requirements contract where the seller had incurred debt obligations to build facilities to meet the buyer's needs); *Texas Indus. v. Brown*, 218 F.2d 510, 511-12 (5th Cir. 1955) (holding that a buyer could not abandon a requirements contract where the seller had built a new plant to service the contract); *In re Big V Holding Corp.*, 267 B.R. 71, 110 (Bankr. D. Del. 2001) (requiring a withdrawing member of a cooperative based on a requirements contract to "live up to its obligations . . . and if not, to compensate remaining members who bear the economic burden associated with a withdrawing member").

57. MLC asserts two arguments in its attempt to dismiss NUMMI's VSA claim. First, MLC asserts that under the VSA, it "***has no purchase obligations or requirements with respect to NUMMI.***" (Motion ¶ 43.) Second, MLC argues that its performance was excused under the VSA's "Force Majeure" clause. Neither of these assertions supports a motion to dismiss. (Motion ¶¶ 45-46.)

1. The VSA Requires MLC to Purchase Vibes on a Continuous and Stable Basis.

58. MLC's first argument fails because the plain language of the VSA requires MLC "to purchase [Vibes] on a continuous and stable basis." (Compl. Ex. F at § 4.1(b).) In acknowledging that it had "purchasing obligations," MLC attempts to excuse these obligations by asserting "the parties expressly agreed that market demand for the products would govern MLC's ***purchasing obligations*** with respect to all products." (Motion ¶ 43.) Although not expressly stated in its Motion, MLC seems to argue that "market demand" forced MLC to

abdicate its purchasing obligations. That factual argument directly contradicts NUMMI's undisputed factual allegations about Vibe sales.[9] (Compl. ¶ 42.)

59. In 2006, MLC committed to purchase "at least 65,000" Vibes from 2008 through 2012, including its desire for 72,000 Vibes in 2008. (Compl. ¶ 42.) And NUMMI alleged and MLC admits that in its last full year of production, 2008, MLC sold tens of thousands of Vibes. (Compl. ¶¶ 42, 50; Motion ¶ 25.) Further undermining its argument that there was no demand for the Vibe after its discontinuation, it is undisputed that MLC suggested "shifting the Pontiac Vibe to an alternative brand" once the Pontiac brand ended. (Motion ¶ 30.)

60. There are two explanations why MLC would want to shift production of the Vibe to another GM brand: (1) there was market demand for the Vibe; and/or (2) MLC knew that it was obligated to continue purchasing vehicles on a continuous and stable basis. Taking these (undisputed) facts about market demand as true and drawing inferences from them in the light most favorable to NUMMI, "market demand" cannot excuse MLC's purchasing obligations. *See Rescuecom Corp.*, 562 F.3d at 127.

61. Furthermore, "market conditions" cannot be read to eviscerate MLC's purchasing obligations. That interpretation would render the "continuous and stable" provision meaningless. 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*, 118 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

[9] As detailed below, MLC's interpretation of the VSA to require "no purchasing obligations" is unreasonable. But to the extent the Court finds MLC's interpretation of the VSA creates an ambiguity, that ambiguity cannot be resolved on a motion to dismiss. *Psenicska v. Twentieth Century Fox Film Corp.*, Nos. 07 Civ. 10972(LAP), 08 Civ. 1571(LAP), 08 Civ. 1828(LAP), 2008 WL 4185752, at *4 (S.D.N.Y. Sep. 3, 2008) ("Where there are alternative, reasonable interpretations of a contract term rendering it ambiguous, the issue should be submitted to the trier of fact and is not suitable for disposition on a motion to dismiss.").

68, 72 (Cal. 2005). And "'[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)). MLC's interpretation that the VSA imposes "***no purchasing obligations***" would render the remainder of the VSA surplusage and so must be rejected. (Motion ¶ 43.) And, taken in context of the entire Section 4, the "market conditions" provision referred to in section 4.1(b) simply reflected the parties' decision to create "flexibility" for their business. (Compl. Ex. F at § 4.1(c).)

62. Similarly, Section 4.2 of the VSA does not eviscerate MLC's acknowledged purchasing obligations. While it is true that Section 4.2 states that there was no obligation to purchase any vehicles until the parties entered into an individual sales contract, ***Section 4.2 does not allow MLC to choose not to enter into individual sales contracts during the Vibe 2008-2012 production period***. (Compl. Exs. G, H.) As alleged in the Complaint, under the Manual Of Allocation and the Purchase Procedures Manual—which expressly state that they implement the VSA—MLC and NUMMI continually updated production levels based on annual and quarterly projections and formed individual sales contracts each week. (Compl. Exs. G, H.) The VSA refers to the establishment of these procedures in section 3.4 (providing for the creation of "a purchase procedures manual"), section 4.1 (discussing "supply and purchase arrangements") and section 4.7 (referring to the parties' "separately agreed upon" payment procedure). (Compl. Ex. F.)

63. In contrast to this sensible and enforceable operation, under MLC's interpretation, the VSA was an illusory contract that contained no obligations whatsoever. That interpretation

violates basic principles of contract law. *See Bleecher v. Conte*, 213 Cal. Rptr. 852, 854-55 (Cal. 1981) (stating the rule that a contract is unenforceable where the agreement lacks mutuality of obligation but finding that a party's promise to "proceed with diligence" was enforceable); *see also* Cal. Civ. Code § 1643 ("A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."); Cal. Civ. Code § 3541 ("An interpretation which gives effect is preferred to one which makes void.").

64. NUMMI contends that the VSA required MLC and NUMMI to form individual sales contracts on a continuous basis. (Compl. ¶ 35.) MLC's position that it had "no obligation to purchase" NUMMI's vehicles contradicts NUMMI's well-pleaded allegations, the provisions in the VSA on which NUMMI relies and the history of the joint venture. (Motion ¶ 44.) MLC's reliance on factual and interpretative disputes shows that its Motion cannot be granted.

2. <u>MLC's Performance Was Not Excused Under the VSA's Force Majeure Clause.</u>

65. MLC's second argument, that its performance was excused under the VSA's "Force Majeure" clause, is flawed and, in any event, merely presents a factual dispute. It claims that because there was a "discontinuation of the manufacture of the Products ordered[,]" it was no longer required to buy Vibes. (Motion ¶ 45.) But NUMMI's production was only discontinued because MLC stopped its orders. MLC's decision to discontinue the Vibe cannot be a force majeure event for MLC because, under the VSA, "the performance of any party hereunder shall be excused if and to the extent ***caused by occurrences beyond such party's control*** . . ." (Compl. Ex. F at § 6.1.)

66. As discussed above, NUMMI pleaded and MLC acknowledged that demand for the Vibe continued. (Compl. ¶ 42.) MLC also repeatedly admits that the discontinuation of the

Vibe was ***its decision***. (Motion ¶¶ 23, 30.) As the decision was made by MLC, it cannot rely upon the Force Majeure clause to excuse its purchasing obligations. *See Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1110 (C.D. Cal. 2001) (denying motion to dismiss under a force majeure clause because a plant shutdown had to be "beyond the reasonable control of either party"). Courts have consistently rejected parties' attempts to convert market conditions or decisions within their own control into an excuse under a force majeure clause. *See B.F. Goodrich Co. v. Vinyltech Corp.*, 711 F. Supp. 1513, 1518-19 (D. Ariz. 1989) (holding the force majeure clause at issue did not extend "to severe price fluctuations and/or changes in market conditions"); *United States v. Panhandle Eastern Corp.*, 693 F. Supp. 88, 96 (D. Del. 1988) (noting that "American courts have routinely refused to excuse performance [due to market fluctuation], even where the force majeure clause . . . presents potential ambiguities"). To allow MLC to manufacture its own force majeure would be to allow MLC to manufacture its own "out" under the contract.

67. Similarly, MLC's lengthy discussion of its interactions with the federal government to "fundamentally transform MLC" is improper and irrelevant. (*See supra*, Section I; Motion ¶¶ 23-28.) A motion to dismiss analyzes whether the Complaint states adequate facts to support a cause of action. MLC's rendition of what took place, including what has "been described at length in the June 1, 2009 Affidavit of Frederick A. Henderson . . . and in countless other pleadings" has no place in this analysis. (Motion ¶ 23.) At the very least, there is a factual dispute whether MLC acted in response to a force majeure, which precludes MLC's Motion from succeeding. *See Bernstein*, 601 F. Supp. 2d at 556.

68. In Count Four, NUMMI has satisfied Rule 8's minimal requirement for "a short and plain statement of the claim showing that [it is] . . . entitled to relief." Fed. R. Civ. P.

8(a)(2). MLC has failed to demonstrate that Count Four of the Complaint does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949. For this reason, the Motion should be denied.

E. **Count Five: NUMMI Has Stated A Valid Claim For Breach Of Contract Under Section 1(3) Of The 2006 MOU.**

69. As discussed above, in Count Two, the 2006 MOU is a valid contract. NUMMI asserts that MLC promised to purchase enough Vibes through 2012 to keep NUMMI viable, that MLC breached that promise and that breach caused damages to NUMMI. (Compl. ¶¶ 40-45, 60-66, 102-107.) As with its argument to dismiss Count Four concerning the VSA, MLC's argument against Count Five would render provisions of the 2006 MOU meaningless.

70. The 2006 MOU viability clauses were pegged to a concrete production target—*i.e.*, the intent for MLC to purchase "at least 65,000" Vibes every year through 2012—that guided the parties' expectations and is consistent with MLC's intent to support NUMMI. *See Shea-Kaiser-Lockhead-Healy*, 140 Cal. Rptr. at 888-90 (holding that a quantity estimate in a requirements contract was enforceable).

71. MLC's interpretation of the 2006 MOU focuses only on the portion of section 1(3) of the 2006 MOU that states "MLC will have a right to, but not an obligation to, purchase the products." (Motion ¶ 47.) MLC argues that this provision means there was no obligation to use its best efforts to help keep NUMMI viable. When read in context, though, it is clear that the clause of section 1(3) which MLC emphasizes was not an escape hatch for MLC (or TMC). Instead, it recognized that MLC and TMC could alter their purchase commitments to NUMMI if market conditions changed. As discussed above, whether market conditions changed is a fact in dispute and cannot be resolved on a motion to dismiss.

72. Further, this clause cannot be read to nullify the overarching commitment to find solutions for NUMMI regardless of the economic climate. MLC cannot use one passage from one section of the 2006 MOU to expunge the viability provisions found elsewhere in the 2006 MOU, especially not on a motion to dismiss. At most, MLC's Motion shows that the 2006 MOU is subject to different interpretations, and at this stage, NUMMI's interpretation must be used.

73. In Count Five, NUMMI has satisfied Rule 8's minimal requirement for "a short and plain statement of the claim showing that [it is] . . . entitled to relief." Fed. R. Civ. P. 8(a)(2). MLC has failed to demonstrate that Count Two of the Complaint does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949. For this reason, the Motion should be denied.

F. Count Six: NUMMI Has Stated A Valid Claim For Breach Of Contract Under The 1983 MOU's "Deficit" Provision.

74. The 1983 MOU was a validly executed contract between MLC and TMC. In the 1983 MOU, MLC and TMC agreed that "[a]ny surplus or ***deficit*** of the JV as at termination of the JV will be shared equally by [TMC] and [MLC], in line with [TMC's] and [MLC's] ownership." (Compl. Ex. A at 10.) Deficit is not defined in the agreement and as a result, it is reasonable to infer a common meaning of the term. Cal. Civ. Code § 1644 ("The words of a contract are to be understood in their ordinary and popular sense . . . ."); *Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 319 F. Supp. 2d 1040, 1057 (C.D. Cal. 2003) (citing Cal. Civ. Code § 1644 and using a dictionary to define a contract term). Deficit means "an excess of debit over credit items" or "a loss in business operations." Webster's Third New International Dictionary (Unabridged) 592 (1993); *see also* Black's Law Dictionary 433 (9th ed. 2009) (defining deficit as "[a]n excess of expenditures or liabilities over revenues or assets"). MLC agreed to share equally (with TMC) NUMMI's excess liabilities. TMC has implicitly recognized its obligation

to share in NUMMI's deficit and is taking steps to contribute to NUMMI's wind down, including by providing financial support. (Compl. ¶ 67.)

75. NUMMI performed any obligations it had under the 1983 MOU by maintaining agreed-upon production levels at its facility and delivering the vehicles that MLC ordered in a timely manner. NUMMI ceased producing vehicles for MLC only because MLC breached its agreements with NUMMI and TMC and ended the joint venture.

76. MLC's breach of its agreement to be responsible for NUMMI's deficit during its wind down has caused damages to NUMMI in the amount of MLC's share of NUMMI's deficit during wind down.

77. Though it withdrew its board members, MLC remained obligated under the 1983 MOU and is therefore required to share in whatever excess liabilities remain during NUMMI's wind down, including assisting NUMMI in meeting deficits in payments to NUMMI's employees and creditors.

78. MLC misreads the controlling agreements to argue that Count Six fails. MLC argues that (i) the Shareholders' Agreement "supersedes all prior agreements," but only to the extent they contain provisions that "are inconsistent with the [Shareholders' Agreement]" (Motion ¶ 49), and (ii) it has no obligation to assist with NUMMI's wind down because NUMMI was incorporated and became "responsible for the payment of its own expenses" under section 4.3 of the Shareholders' Agreement. (*Id.* ¶ 50.) Thus, MLC contends that the 1984 Shareholders' Agreement extinguished the "deficit" provision in the 1983 MOU because it is inconsistent with the "expenses" provision of the Shareholders' Agreement. (*Id.*) But the use of different terms in the agreements shows that the Shareholders' Agreement's "expenses" is different from the 1983 MOU's "deficit," and thus not inconsistent.

79. "Expenses" are "an item of outlay incurred in the operation of a business enterprise allocable to and chargeable against revenue for a specific period." Webster's Third New International Dictionary (Unabridged) 800 (1993). By contrast, deficit measures the overall financial position of a business. *See* Webster's Third New International Dictionary (Unabridged) 592 (1993). MLC equates these terms without explanation.[10]

80. NUMMI specifically alleges that the parties implicitly recognized the distinction between deficit and expenses. Section 4.3 of the Shareholders' Agreement provides that:

> ***Except as otherwise provided in any agreement or instrument to which the parties signatory hereto are parties***, [NUMMI] shall be responsible for the payment of all of its own expenses.

(Compl. Ex. B at § 4.3.) "In other words, although NUMMI was generally responsible for its expenses, upon termination of the joint venture, TMC and MLC remained responsible for any remaining deficit because this commitment was 'otherwise provided' for in the 1983 MOU." (Compl. ¶ 20.) The Shareholders' Agreement carved out the "deficit" provision in the 1983 MOU. MLC's argument does not address this aspect of NUMMI's claim. Thus, at the most, MLC has raised an ambiguity in the 1983 MOU and the Shareholders' Agreement. NUMMI's contractual interpretation cannot be discarded on a motion to dismiss.[11] *Psenicska*, 2008 WL 4185752 at *4 ("Where there are alternative, reasonable interpretations of a contract term rendering it ambiguous, the issue should be submitted to the trier of fact and is not suitable for disposition on a motion to dismiss.").

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[10] MLC states that "to require MLC to cover NUMMI's outstanding ***expenses at its termination*** under the terms of the 1983 MOU would be completely inconsistent with NUMMI being responsible for its own expenses . . . ." (Motion ¶ 50.)

[11] The parties' course of performance also contradicts MLC's position. When NUMMI faced deficits in the past, MLC recognized its duty to provide NUMMI with additional funding. In 1989, MLC and TMC amended their Subscription Agreement and each made an additional $30 million capital contribution to NUMMI. (Compl. ¶ 49, Ex. J.) They did this again in 1992, this time providing $25 million each. (Compl. 49, Ex. K.) MLC's obligation to support NUMMI in those instances stems from the same fundamental obligation that requires it to contribute to NUMMI's wind down now: it was a joint venturer in NUMMI and a beneficiary of NUMMI's production and know-how for over 25 years; MLC has only recently decided to conveniently ignore this history.

81. MLC's argument that NUMMI cannot rely upon the 1983 MOU as a third party beneficiary also fails. Not only is it wrong that NUMMI did not benefit from its founding contract, but it is also disingenuous for MLC to argue that MLC and TMC did not intend for NUMMI to benefit from a promise to cover NUMMI's deficits.

82. In sum, the 1983 MOU and the Shareholders' Agreement support NUMMI's claim that MLC is liable for a part of NUMMI's "deficit" upon dissolution. MLC's attacks on NUMMI's interpretations of these agreements are unfounded and cannot support its Motion to Dismiss. In Count Six, NUMMI has satisfied Rule 8's minimal requirement for "a short and plain statement of the claim showing that [it is] . . . entitled to relief." Fed. R. Civ. P. 8(a)(2). MLC has failed to demonstrate that Count Six of the Complaint does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949. For this reason, the Motion should be denied.

G. Count Seven: NUMMI Has Stated A Valid Claim Breach Of The Covenant Of Good Faith And Fair Dealing.

83. NUMMI has adequately stated a claim against MLC for breaching the covenant of good faith and fair dealing, which exists "in every contract [so] that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." *Comunale v. Traders & General Ins. Co.*, 328 P.2d 198, 200 (Cal. 1958). The implied covenant imposes upon each party the "duty to do everything that the contract presupposes that he will do to accomplish its purpose." *Harm v. Frasher*, 5 Cal. Rptr. 367, 374 (Cal. Ct. App. 1960). Here, the covenant of good faith supports a separate breach of contract claim because MLC did not "do everything . . . to accomplish [the] purpose" of the 2006 MOU and the VSA. *See Storek & Storek, Inc. v. Citicorp Real Estate, Inc.*, 122 Cal. Rptr. 2d 267, 283 n. 15 (Cal. Ct. App. 2002) (explaining that a breach of the covenant of good faith and fair dealing can give rise to a separate

contract claim). Specifically, NUMMI alleges that when MLC cancelled the Vibe, it did not act in good faith to find a vehicle for NUMMI to produce as an alternative to the Vibe.[12] (Compl. ¶¶ 54-60, 114-120.) This failure to act in good faith caused damages to NUMMI. (*Id.*)

84. MLC attempts to dismiss this claim in two ways. First, MLC disputes that it was required to work with NUMMI and TMC to find solutions to support NUMMI. MLC argues that it had no obligation to purchase Vibes under the VSA and the 2006 MOU and could not have breached the implied covenant of good faith and fair dealing. (Motion ¶ 53.) Like MLC's other positions, this argument is based on a fundamental misreading of the VSA and the 2006 MOU. As set forth in the Complaint, the duty to negotiate in good faith to find an alternative to the Vibe does "not contradict the express terms of [the] contract[s]," as MLC contends. Instead, the obligation is part and parcel of the VSA and the 2006 MOU, which required all parties to work together to support NUMMI. (Motion ¶ 52; Compl. ¶¶ 54-56.)

85. Second, MLC disputes NUMMI's well-pleaded factual allegations. NUMMI alleges—and believes that discovery will show—that, after deciding to cancel the Pontiac brand in April of 2009, MLC repeatedly confirmed that it was still committed to NUMMI, but then abruptly changed course and proposed that NUMMI produce a MLC-badged Tacoma truck as a way to extract additional value from NUMMI and TMC at an unreasonably low price. (Compl. ¶¶ 57-59.) This conduct supports NUMMI's claim for damages for both its capital expenditures related to the Vibe (which could have been put to use producing a replacement vehicle from MLC) and for MLC's share of NUMMI's deficit at termination (which is the result the MLC's failure to find a solution to keep NUMMI afloat). (Compl. ¶¶ 119-20.)

[12] "[T]he implied covenant of good faith and fair dealing has both a subjective and an objective component-subjective good faith and objective fair dealing. A party violates the covenant if it subjectively lacks belief in the validity of its act or if its conduct is objectively unreasonable. The covenant of good faith can be breached for objectively unreasonable conduct, regardless of the actor's motive." *Storek & Storek, Inc.*, 122 Cal. Rptr. 2d at 282 n. 13 (citations and quotations omitted). NUMMI alleges that the parties could have reached a beneficial agreement on a substitute for the Vibe. (Compl. ¶ 56.)

86. In response, MLC contends that it did make a "good faith effort to provide, on commercially reasonable terms, a replacement vehicle to be manufactured at NUMMI." (Motion ¶¶ 30, 53.) While MLC is entitled to defend itself from NUMMI's claim, at this stage, NUMMI's allegations must be "accept[ed] as true . . . in the light most favorable to [NUMMI]." *Rescuecom Corp.*, 562 F.3d at 127. MLC's version of events simply creates a factual dispute, which cannot be decided on a motion to dismiss. NUMMI's good faith and fair dealing claim cannot be dismissed.

87. In Count Seven, NUMMI has satisfied Rule 8's minimal requirement for "a short and plain statement of the claim showing that [it is] . . . entitled to relief." Fed. R. Civ. P. 8(a)(2). MLC has failed to demonstrate that Count Seven of the Complaint does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949. For this reason, the Motion should be denied.

H. <u>Count Eight: NUMMI Has Stated A Valid Promissory Estoppel Claim.</u>

88. In addition to its contract claims, NUMMI has pled a promissory estoppel claim. To state a promissory estoppel claim, the plaintiff must allege: (1) that the defendant made a promise to the plaintiff; (2) that the plaintiff relied on that promise; (3) that the plaintiff's reliance was reasonable and foreseeable; and (4) that the plaintiff was harmed by its reliance on the defendant's promise. *See Van Hook v. S. Cal. Waiters Alliance, Local 17*, 323 P.2d 212, 220 (Cal. Ct. App. 1958). NUMMI has satisfied each of these elements.

89. First, NUMMI alleges several clear and unambiguous promises that MLC made regarding the 2006-2012 Vibe production cycle. At a three-party meeting in December of 2005 (prior to the 2006 MOU), MLC promised to maintain high enough production levels to keep NUMMI viable through 2012. Specifically, MLC represented that it would purchase approximately 325,000 Vibes from 2008 to 2012. (Compl. ¶ 40.) MLC made similar promises

when the parties discussed production projections. For example, in 2006 when MLC asked for pricing adjustments, MLC promised to maintain a sales level of at least 47,000 vehicles per year for 2007 and 2008. (Compl. ¶ 50.)

90. Second, NUMMI alleges that it reasonably relied on MLC's promises. Based on MLC's promises to purchase Vibes through 2012, NUMMI invested hundreds of millions of dollars re-purposing and expanding its facilities and developing new production capabilities. (Compl. ¶ 45.) MLC cannot claim that these expenditures were not reasonable or foreseeable because Vibe production depended on them and NUMMI had always recouped its capital expenditures for new models in the past.

91. For the third and fourth promissory estoppel elements, NUMMI alleges that it has been harmed as a result of MLC's failure to honor its promises. (Compl. ¶¶ 45, 60-66, 121-126.) Thus, NUMMI is entitled to recovery because "[t]he contract measure of damages applies to claims based upon promissory estoppel." *Cooper v. State Farm Mut. Auto. Ins. Co.*, 99 Cal. Rptr. 3d 870, 888 (Cal. Ct. App. 2009). With Vibe production halted, over $185 million of NUMMI's capital outlays have not been recouped and MLC has refused to make up the difference. (Compl. ¶ 126.)

92. MLC challenges NUMMI's promissory estoppel claim in its standard fashion. It begins by arguing that NUMMI's promissory estoppel claim contradicts the provision of the VSA stating that MLC "had no obligation" to purchase NUMMI's vehicles. (Motion ¶¶ 56-57.) Again, this argument is based on a selective quotation of the VSA, as well as an incomplete appraisal of NUMMI's allegations. MLC's alleged promises are consistent with the many contractual provisions on which NUMMI relies. For example, the promise to purchase 47,000 Vibes in 2007 and 2008 does not contradict the duty in the VSA to purchase vehicles "on a

continuous and stable basis"; the promise was made in recognition of that duty. NUMMI's promissory estoppel claim is not inconsistent with any of the controlling agreements.[13]

93. Further, MLC improperly disputes NUMMI's factual allegations, claiming that "it is implausible that MLC's withdrawal was the proximate cause of NUMMI's damages." (Motion ¶ 58.) It is well-settled that "issues of proximate cause are often fact-laden, requiring a fully developed factual record, and not a bare-bones motion to dismiss." *Bank Midwest, N.A. v. Hypo Real Estate Capital Corp.*, No. 10 Civ. 232 (WHP), 2010 WL 4449366, at *4 (S.D.N.Y. Oct. 13, 2010) (internal quotation marks and citation omitted). As with NUMMI's breach of contract claims, MLC cannot dismiss NUMMI's promissory estoppel claim either by raising contractual ambiguities in the VSA and 2006 MOU or by disputing NUMMI's factual contentions.

94. In Count Eight, NUMMI has satisfied Rule 8's minimal requirement for "a short and plain statement of the claim showing that [it is] . . . entitled to relief." Fed. R. Civ. P. 8(a)(2). MLC has failed to demonstrate that Count Eight of the Complaint does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949. For this reason, the Motion should be denied.

CONCLUSION

95. NUMMI's eight-count, 126-paragraph Complaint more than satisfies Rule 8's pleading requirement. None of the arguments that MLC raises demonstrates that NUMMI's claim is speculative. MLC's arguments are strained readings of the contracts, which do nothing more than to create factual issues. For this reason and the reasons stated herein, NUMMI request

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[13] NUMMI understands that its promissory estoppel claim may become redundant if it prevails on its contract claims. NUMMI expressly pleads promissory estoppel as an alternative theory of liability because MLC claims that none of its contracts with NUMMI are enforceable or entitle NUMMI to relief. *See Randolph Equities, LLC v. Carbon Capital, Inc.*, No. Civ. 10889, 2007 WL 914234, at *6 (S.D.N.Y. Mar. 26, 2007) (allowing promissory estoppel and contract claims to proceed simultaneously).

that the Court deny MLC's motion and allow the adversary proceeding to move forward to discovery and trial.

New York, New York.
Dated: January 18, 2011

Respectfully Submitted,

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