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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.**	
NEW UNITED MOTORS MANUFACTURING, INC., Plaintiff, v. **MOTORS LIQUIDATION COMPANY,** Defendant.	**Chapter 11** **Case No.: 09-500026 (REG)** **(Jointly Administered)** **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.	

MOTORS LIQUIDATION COMPANY'S REPLY IN FURTHER SUPPORT OF ITS MOTION TO DISMISS THE ADVERSARY COMPLAINTS

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Motors Liquidation Company ("**MLC**") submits this memorandum of law in further support of its motion to dismiss the Adversary Complaints filed by plaintiffs New United Motor Manufacturing, Inc. ("**NUMMI,**" and its complaint, the "**NUMMI Complaint**") and Toyota Motor Corporation ("**Toyota,**" and its complaint, the "**Toyota Complaint**") (the NUMMI Complaint and the Toyota Complaint, the "**Adversary Complaints,**" and NUMMI and Toyota, the "**Plaintiffs**"), pursuant to Federal Rules of Civil Procedure 8 and 12(b)(6), as incorporated by Federal Rules of Bankruptcy Procedure 7008 and 7012, for failure to state a claim upon which relief can be granted.[1]

PRELIMINARY STATEMENT

1. Faced with unambiguous language stating that MLC had no obligation to purchase vehicles absent individual sales contracts, Plaintiffs attempt to circumvent the governing contracts by asserting that NUMMI was "unlike MLC's other tier-one suppliers" and that NUMMI and Toyota's claims are "unique." These assertions, however, have no bearing on the parties' rights and obligations under the plain language of the governing agreements. What is relevant here are the unambiguous terms of the obligations, if any, under the contracts that governed the parties' relationship. Because MLC has not breached any of those agreements, the Adversary Complaints should be dismissed for failure to state a claim upon which relief may be granted.

2. Plaintiffs' oppositions ("**Oppositions**" or "**Opp.**" and respectively the "**NUMMI Opp.**" and the "**Toyota Opp.**") highlight the deficiencies contained within the Adversary Complaints. First, NUMMI -- citing a contract (the 1983 MOU) that pre-

[1] Capitalized terms used but not defined herein shall have the meaning ascribed to them in MLC's December 23, 2010 Motion to Dismiss the NUMMI and Toyota Adversary Complaints (the "**Motion to Dismiss**" or "**Mot. to Dismiss**").

dates NUMMI's very inception and to which NUMMI is not a party -- contends that MLC was obligated to keep NUMMI viable and to share in costs relating to NUMMI's wind down. These claims must fail not only because NUMMI lacks standing to bring them, as it was not a party to the 1983 MOU, but also because the language of the agreement under which NUMMI seeks to recover was **expressly superseded** by a subsequent contract to which NUMMI **is** a party, and which precludes the relief sought in the Adversary Complaints. NUMMI and Toyota next attempt to argue that MLC breached two other contracts (the VSA and the 2006 MOU) that purportedly required MLC to purchase vehicles from NUMMI on a "continuous and stable basis." But Plaintiffs ignore the unambiguous language of the agreements, which expressly provide that "[NUMMI] has no obligation to supply and **[MLC] has no obligation to purchase** any Products until the parties enter such a contract." Mot. to Dismiss Ex. D § 4.2 (emphasis added). As Plaintiffs have not (and cannot) allege the existence of any such contracts, these claims must fail.

3. NUMMI and Toyota also assert claims against MLC for breach of the duty of good faith and fair dealing based on MLC's alleged failure to reach an agreement with NUMMI and Toyota on a replacement vehicle for the Pontiac Vibe. These claims are entirely lacking in merit, as MLC was not required to purchase any Pontiac Vibes from NUMMI through 2012 under the express terms of the relevant agreements, let alone agree to a replacement vehicle for the Vibe or purchase any such replacement vehicles. Moreover, Plaintiffs fail to identify any unreasonable actions taken by MLC, which must be alleged to state a claim. Finally, Plaintiffs assert a claim for promissory estoppel, arguing that MLC promised to purchase Pontiac Vibes from

NUMMI through 2012. Here, Plaintiffs impermissibly seek to substitute generalized business discussions that occurred during in-person meetings for the express language of contracts that do not obligate MLC to purchase any vehicles at all from NUMMI. As these claims are barred by the express language of the relevant contracts, they must fail.

4. Accordingly, the Adversary Complaints each should be dismissed with prejudice for failure to state a claim upon which relief may be granted.

ARGUMENT

A. NUMMI AND TOYOTA HAVE FAILED TO STATE A CLAIM FOR BREACH OF CONTRACT

5. It is a well-settled rule of law that where the terms of a contract are clear, the court is bound to enforce its terms as they are written. *See In re Netia Holdings S.A.*, 278 B.R. 344, 355 (Bankr. S.D.N.Y. 2002) (Gerber, J.) (". . . this Court does not believe that it has a license to disregard the language of a contract when it is clear and unambiguous"); *Fireman's Fund Ins. Co. v. Workers' Comp. Appeals Bd.*, 116 Cal. Rptr. 3d 658, 669 (Ct. App. 2010) (enforcing unambiguous contract as written because "there is no need to go outside its provisions"). In the present case, NUMMI and Toyota's contention that the contracts are ambiguous is belied by the plain language of the contracts, which speaks for itself.[2] Thus, the Court need only look within the four corners of the relevant agreements to make its ruling.[3]

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[2] Because the contractual provisions are clear, MLC does not believe there is need for discovery in this case. To be clear, however, NUMMI's contentions that it "has not received formal discovery" (NUMMI Opp. ¶ 22), and that MLC "***has refused*** to engage in discovery," (*Id.* ¶ 27) (emphasis in original) are incorrect. On April 9, 2010, NUMMI served MLC with a document request and interrogatories, to which MLC responded on May 18, 2010.

[3] With respect to documents cited in MLC's Motion to Dismiss setting out the background of the GM bankruptcy, this Court may take judicial notice of matters of public record, *see* Fed. R. Evid. 201(b),

1. NUMMI Has Failed To State A Claim For Breach Of Contract In Connection With The 1983 MOU Or The Shareholders' Agreement

6. NUMMI, in both its Complaint and Opposition, claims that MLC is obligated under the non-binding 1983 MOU to "keep NUMMI viable" and to share in any "deficit" at termination of the NUMMI joint venture. NUMMI Compl. ¶¶ 7, 18, 41, 43, 47a, 47c; NUMMI Opp. ¶¶ 8, 16, 43, 74-82, 85. However, as thoroughly detailed in the Motion to Dismiss,[4] NUMMI was not a party to the 1983 MOU, which was entered into by MLC and Toyota prior to NUMMI's incorporation. And, in any event, the Shareholders' Agreement—to which NUMMI **is** a party—expressly superseded any language that might obligate MLC to keep NUMMI viable or to share in any "deficit" at NUMMI's termination.

a. NUMMI Is Not A Third Party Beneficiary Of The 1983 MOU

7. It is undisputed that the 1983 MOU was entered into by MLC and Toyota **prior** to NUMMI's incorporation. According to its terms, the purpose of the 1983 MOU was to establish MLC and Toyota's initial understanding and basic parameters of how the joint venture would operate. NUMMI Opp. ¶ 7-9, 35; NUMMI Compl. ¶ 17; *see* Motion to Dismiss Ex. A at 1 ("The purpose of this Memorandum is to summarize the current understanding of Toyota and [MLC] regarding the basic parameters of this **limited manufacturing arrangement**.") (emphasis added). Because NUMMI was not a party to the 1983 MOU, it now argues in opposition that it was a third

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without converting the motion into a motion for summary judgment. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986).

[4] *See* Mot. to Dismiss ¶¶ 12, 49.

party beneficiary of the 1983 MOU. NUMMI Compl. ¶ 79, 110, 116; NUMMI Opp. ¶ 42-43. This assertion is incorrect as a matter of law.

8. Under California law, "[a] contract, made **expressly** for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." Cal. Civ. Code § 1559 (emphasis added). Here, NUMMI has failed to allege any facts whatsoever indicating that Toyota and MLC expressly intended to benefit NUMMI by entering into the 1983 MOU. In opposition, NUMMI argues that, "by pledging to develop and support NUMMI's business, MLC and TMC 'must have intended to benefit' NUMMI." NUMMI Opp. ¶ 42 (citation omitted). In support of this proposition, NUMMI cites California authority stating that "'[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.'" NUMMI Opp. ¶ 42 (citing *Brinton v. Bankers Pension Servs., Inc.*, 90 Cal. Rptr. 2d 469, 474 (Ct. App. 1999)).

9. Reliance on *Brinton* does not save NUMMI's claim. The issue in *Brinton* was whether a general release of claims precluded a plaintiff's subsequent action against entities not specifically identified in the release. *Id.* at 471, 474-475. Moreover, the *Brinton* court held that "[a] contract must be 'interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting' and where, as here, the contract is in writing, 'the intention . . . is to be ***ascertained from the writing alone***, if possible." *Id.* at 474 (citing Cal Civ. Code § 1639). NUMMI has not alleged, and a review of the 1983 MOU does not reveal, language supporting NUMMI's argument that its provisions were meant to benefit NUMMI as a third party beneficiary.

10. *Gourmet Lane*, another case relied on by NUMMI, also fails to support NUMMI's contention that it should be considered a third party beneficiary. *Gourmet Lane Inc. v. Keller*, 35 Cal. Rptr. 398 (Ct. App. 1963). In *Gourmet Lane*, a number of concession stand owners leased space in a food court from a common lessor. *Id.* at 398. Under the terms of each lease, the concessionaires were obligated to work together to manage a common dining space. *Id.* at 398-399. To this end, the leases provided that, with regard to the common space, a decision made by a majority of the concessionaires would bind a minority of them. *Id.*[5] The concessionaires eventually formed a special corporation for this purpose, and sued a lessor who refused to contribute his share of the costs of financing the special corporation (which the special corporation had fixed by a majority vote). *Id.* at 398-400. The trial court rejected the defendant's argument that he had no contractual obligation to the special corporation and held that the special corporation was a third party beneficiary of the lease between the lessor and the defendant. *Id.* at 399-400. Here, NUMMI has failed to allege that MLC and Toyota intended to give NUMMI (or any other party) rights under the 1983 MOU agreement. NUMMI's claims under the 1983 MOU must fail.

[5] This provision stated: "Lessee promises and agrees, together with such other tenants as there may be of the other concourse shops, to maintain and operate in a sanitary and businesslike manner the said dining area at no cost or expense of any nature to lessor. Lessee shall enter into an association and cooperate with such other tenants in the operation of said dining area. This obligation is to be joint and several among all of said tenants. **A decision of the majority of said tenants with regard to the details of the operation and maintenance of said area and allocating the costs thereof shall be binding upon lessee and all of the other tenants**." (Emphasis added.)

b. The Terms Of The Shareholders' Agreement Expressly Superseded The 1983 MOU

11. Even if NUMMI **was** a third party beneficiary, however, it still could not state a claim upon which relief could be granted, because any provisions of the 1983 MOU requiring MLC to keep NUMMI viable or to share in its wind down costs were expressly superseded by the terms of the Shareholders' Agreement.

12. On February 21, 1984, MLC, Toyota and NUMMI entered into the Shareholders' Agreement, which relates to the management and governance of NUMMI, and which expressly superseded the 1983 MOU to the extent that the provisions of the two agreements were inconsistent with one another. As Section 10.7 of the Shareholders' Agreement clearly states:

> 10.7 Entire Agreement, Etc.: This Agreement constitutes the entire agreement of the parties hereto with respect to the subject matter hereof. **To the extent that provisions in any of the Prior Agreements (as that term is hereafter defined) are inconsistent with any provision of this Agreement, this Agreement supersedes all prior agreements and understandings**, oral and written, among the parties hereto with respect to the subject matter hereof, **including without limitation the Memorandum of Understanding (the "Memorandum"), dated February 17, 1983**, as amended, between [TMC] and [MLC] and all letter agreements, minutes of meetings and similar documents dated prior to the date hereof to which [MLC], [TMC] or any of their respective representatives are parties (the Memorandum and such letter agreements, minutes and similar documents being referred to herein as the "Prior Agreements").

Mot. to Dismiss Ex. B § 10.7 (emphasis added).

13. The Shareholders' Agreement further provides that NUMMI has a "separate and distinct existence from each of its Shareholders," Mot. to Dismiss Ex. B at

1, and that except for each of the Shareholders' initial contributions made pursuant to a separate Subscription Agreement, NUMMI would fund its own working capital requirements and "**be responsible for the payment of all of its own expenses**." Mot. to Dismiss Ex. B at §§ 4.2; 4.3 (emphasis added). Requiring MLC to keep NUMMI viable or to cover its outstanding expenses at its termination, or "deficit," under the terms of the 1983 MOU, would be completely inconsistent with NUMMI being responsible for its own expenses as provided in the controlling Shareholders' Agreement.

14. In its Opposition, NUMMI engages in a tortured reading of 1983 MOU and the Shareholders' Agreement in an attempt to hold MLC liable for NUMMI's wind down costs. *See* NUMMI Opp. ¶¶ 74-80. According to NUMMI, the use of the term "deficit" in the 1983 MOU, as opposed to "expenses," in the Shareholders' Agreement, creates ambiguity. *Id.* This interpretation of the relevant contracts would require the Court to conclude that, notwithstanding the fact that the Shareholders' Agreement provides that NUMMI will be responsible for its expenses, any expenses remaining at termination -- or "deficit" -- still would be covered by NUMMI's shareholders. Such a reading strains credulity.

15. Thus, NUMMI has failed to plead a claim that MLC has breached either the 1983 MOU or the Shareholders' Agreement.

2. NUMMI And Toyota Have Failed To State A Claim For Breach Of Contract Under The VSA

16. Despite NUMMI and Toyota's repeated claims that MLC was obligated under the VSA to purchase Pontiac Vibes "on a continuous and stable basis" and that MLC breached the VSA "by failing to accommodate NUMMI's manufacture of

the Vibes on a volume basis," NUMMI Compl. ¶¶ 7b, 34-35, 47b, 72, 97, 99-100; Toyota Compl. ¶¶ 30, 33, 62-64, 75, the clear language of the VSA shows that MLC was not required to purchase **any** vehicles from NUMMI absent individual, written sales contracts. Indeed, the parties regularly entered into such contracts, which were delivered on a weekly basis. Because NUMMI and Toyota have not (and cannot) allege the existence of any remaining contracts, their claims that MLC breached the VSA must be dismissed for failure to state a claim upon which relief may be granted. But, as shown below (and as set forth in greater detail in the Motion to Dismiss at ¶¶ 17-19, 42-46), even if the VSA did require MLC to purchase Pontiac Vibes, MLC's non-performance was excused by the VSA's force majeure clause.

17. As further detailed in the Motion to Dismiss, Section 4.1 of the VSA (entitled "General Understanding") sets forth the principles that applied to purchase and sale agreements between NUMMI and MLC. As both NUMMI and Toyota admit, the VSA was drafted to give MLC flexibility in determining how many Pontiac Vibes to purchase. NUMMI Opp. ¶ 61; Toyota Opp. at 12.

18. In keeping with this flexibility, the VSA provides:

> 4.2 Individual Sales Contracts: (a) Within the general principles set forth in Section 4.1 hereof, **each purchase and sale transaction between [NUMMI] and [MLC] relating to the Products shall be governed by an individual sales contract**, it being agreed within that context that **[NUMMI] has no obligation to supply and [MLC] has no obligation to purchase any Products until the parties enter such a contract**. The terms of this agreement (insofar as applicable) shall apply to each such sales contract.

Mot. to Dismiss Ex. D § 4.2 (emphasis added). This language makes clear that, although the VSA set the general terms and conditions of how NUMMI would sell vehicles to

MLC, the actual obligation to purchase vehicles was governed by "individual sales contracts." Moreover, as evidenced by NUMMI's admission that "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**," it is clear that the actual obligation to purchase vehicles from NUMMI was controlled by individual sales contracts and not aspirational targets set by the parties months before any actual purchases occurred. NUMMI Opp. ¶ 62 (emphasis added).

19. In opposition, Plaintiffs contend that under MLC's interpretation of the VSA would never require MLC to purchase any Vibes from NUMMI. But MLC does not dispute that it would be obligated to purchase any Pontiac Vibes it had committed to purchase in individual sales contracts. Plaintiffs have failed to allege the existence of any remaining or unfulfilled individual sales contract governing the purchase and sale of the Pontiac Vibe through 2012.[6] Thus, Plaintiffs have failed to establish that MLC has any remaining purchase obligations relating to the Pontiac Vibe whatsoever.

20. Moreover, even if the Court were to find that MLC was obliged to perform under the VSA, which it was not as set forth above, the VSA provides that in the event of the discontinuation of the manufacture of the Products ordered, any failure of performance is excused:

> 6.1 Force Majeure: **Any delay in or failure of the performance of any party hereunder shall be excused if**

[6] For this reason, Plaintiffs' reliance on *Shea-Kaiser-Lockheed-Healy v. Department of Water & Power*, 140 Cal. Rptr. 884 (Ct. App. 1977) is misplaced. In *Shea-Kaiser-Lockheed-Healy*, the court found that a quantity estimate in an individual requirements contract was enforceable. As discussed in paragraphs 23-24, no such individual requirements contract is at issue here.

> **and to the extent caused by occurrences beyond such party's control, including, but not limited to**, acts of God; fire or flood; war; governmental regulations, 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 any of its suppliers.

Mot. to Dismiss Ex. D § 6.1 (emphasis added). Accordingly, to the extent that the Court finds that MLC was required to purchase the Vibe from NUMMI through 2012 -- which it should not based on the plain language of the relevant agreements -- any performance by MLC would still be excused in its entirety because of the discontinuation of the manufacture of all Pontiac vehicles. *See Toyomenka Pac. Petroleum v. Hess Oil Virgin Islands Corp.*, 771 F. Supp. 63, 67 (S.D.N.Y. 1991) (failure of performance excused by force majeure clause).

21. In opposition, Plaintiffs contend that MLC's performance was not excused because the decision to discontinue the manufacture of Vibes was not caused by "occurrences beyond [MLC's] control." NUMMI Opp. ¶¶ 65-66; Toyota Opp. at 16-17. To the contrary, and as noted in the Motion to Dismiss at ¶¶ 45-46, the discontinuation of the entire Pontiac brand, which resulted in the discontinuation of manufacture of the Vibe, **was** beyond MLC's control and thus excused MLC's performance. For this reason, NUMMI's reliance on *B.F. Goodrich Co. v. Vinyltech Corp.*, 711 F. Supp. 1513 (D. Ariz. 1989) (rejecting reliance on force majeure provision when market prices fluctuated and alternate goods would have been cheaper) and *United States v. Panhandle E. Corp.*, 693 F. Supp. 88 (D. Del. 1988) (rejecting reliance on force majeure provision when performance would have been more expensive), *aff'd*, 868 F.2d 1363 (3d Cir. 1989), and

Toyota's reliance on *Butler v. Nepple*, 354 P.2d 239, 244-45 (Cal. 1960), *Ellison v. City of San Buena Ventura*, 122 Cal. Rptr. 167, 173 (Ct. App. 1975), and *Miranda v. Williams*, No. F054365, 2008 WL 4636445, at *3 (Cal. Ct. App. Oct. 21, 2008) have no bearing on the force majeure provision here, as these cases involve a party attempting to excuse its breach based on market fluctuation.[7]

3. NUMMI And Toyota Have Failed To State A Claim For Breach Of Contract In Connection With The 2006 MOU

22. Although NUMMI and Toyota argue that MLC is obligated by the 2006 MOU to purchase a certain number of Vibes through 2012, the express terms of that agreement make clear that while MLC had a right to purchase at least 65,000 Vibe vehicles from NUMMI, it was not obligated to do so. In fact, the 2006 MOU does not require MLC to purchase **any** vehicles from NUMMI:

> (3) The parties understand that, assuming that 225,000 units of the Products are scheduled to be produced in a year, the Products will be allocated between TMC and [MLC] under the following formula, where each of TMC and **[MLC] will have a right to, but not an obligation to, purchase the products from NUMMI**.

TMC Corolla	at least 160,000	(71.11%)
GMC Vibe	at least 65,000	(28.89%)

Mot. to Dismiss Ex. E at § 1(3) (emphasis added). As with the VSA, purchases of Pontiac Vibes under the 2006 MOU were governed by individual sales contracts. As

[7] With respect to GM's filing for Chapter 11 and the circumstances surrounding the Federal Government's requirement that MLC discontinue the Pontiac brand, this Court may take judicial notice of matters of public record without converting the Motion to Dismiss into a motion for summary judgment. *See* n. 3, *infra*.

Plaintiffs have not alleged the existence of any such contract, they have failed to state a claim upon which relief may be granted.

23. Plaintiffs attempt to paint the VSA and the 2006 MOU as "requirements contracts," but such blanket assertions do not alter the plain language of the contracts, which do not require MLC to purchase a single Pontiac Vibe. *See* NUMMI Opp. ¶ 54-56; Toyota Opp. at 13-15, 22. The VSA and the 2006 MOU were not requirements contracts, but rather supply contracts, under which MLC had a right, but not an obligation, to purchase Vehicles through 2012. No obligation to purchase any vehicles was created until MLC and NUMMI executed an individual sales contract for a specific quantity of vehicles.

24. For this reason, the cases relied on in Plaintiffs' Oppositions involving "all requirements" contracts have no bearing on the issues before this Court. Unlike those cases, the agreements here do not include language indicating any promise or requirement that MLC will purchase all required vehicles, much less a set number of vehicles from NUMMI, indeed, they unambiguously provide that there is no such obligation. *See Shea-Kaiser-Lockheed-Healy*, 140 Cal. Rptr. at 887 (contract specified minimum quantity of product to be provided as well as purchaser's option to request additional product "up to the [purchaser's] maximum requirements"); *Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1349 (10th Cir. 1989) (seller would deliver, and purchaser would purchase and receive "all electric power and energy which purchaser would require for the operation of its

system"). And as Plaintiffs have not alleged the existence of such a contract here, they have not alleged any breach of contract claim under the VSA or the 2006 MOU.[8]

B. NUMMI AND TOYOTA HAVE FAILED TO STATE A CLAIM FOR BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING

25. Plaintiffs have failed to allege the requisite facts to establish that MLC breached the implied covenant of good faith and fair dealing. Under California law, "the implied covenant of good faith and fair dealing cannot contradict the express terms of a contract." *Storek & Storek Inc. v. Citicorp Real Estate, Inc.*, 122 Cal. Rptr. 2d 267, 276 (Ct. App. 2002); *see also Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 826 P.2d 710, 728 ("We are aware of no reported case in which a court has held the covenant of good faith may be read to prohibit a party from doing that which is expressly permitted by an agreement. On the contrary, as a general matter, implied terms should never be read to vary express terms."). As MLC simply was not required to purchase Vibes from NUMMI under the express terms of the VSA and the 2006 MOU, MLC could not have breached the implied covenant of good faith and fair dealing in those contracts by failing to purchase Vibes from NUMMI. Thus Plaintiffs' should not be permitted to rewrite the parties' agreements in the face of express contractual provisions to the contrary.

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[8] Plaintiffs now additionally contend that MLC breached the VSA and the 2006 MOU because MLC moved to reject those contracts pursuant to an omnibus motion under 11 U.S.C. § 365 and that MLC should therefore be "judicially estopped" from asserting that those agreements are not executory contracts. *See* Toyota Compl. ¶¶ 60-61, 68-69; NUMMI Opp. ¶¶ 29-33; Toyota Opp. pp. 8-9, 19. Toyota goes so far as to assert that "MLC argued to this Court that the VSA was an executory contract." Toyota Opp. at 8. But as set forth clearly in the Motion attached to Toyota's Complaint, MLC acknowledged that certain contracts listed therein may not have been executory in nature, but were included in the rejection motion "out of the abundance of caution." Toyota Compl. Ex. J at FN 1. But MLC does not assert that it had no ***obligations*** under the VSA and the 2006 MOU; rather, MLC has no obligations to ***purchase vehicles*** from NUMMI under those agreements.

26. However, even if the governing contracts were unclear as to MLC's obligation to purchase Vibes from NUMMI, Plaintiffs still have failed to plead any objectively unreasonable conduct by MLC that would could give rise to a claim for breach of the implied covenant of good faith and fair dealing. The conclusory allegations by NUMMI that "NUMMI and MLC likely could have reached a beneficial agreement on a substitute for the Vibe that would have met MLC's needs and kept NUMMI in business," NUMMI Compl. ¶ 56, and by Toyota that "[b]y misleading TMC and NUMMI about Vibe production commitments before unilaterally changing course, MLC breached its duty of good faith and fair dealing" simply do not constitute unreasonable conduct. Nor have Plaintiffs alleged any facts suggesting that MLC subjectively lacked belief in the validity of its actions. *See Storek* at 282 n.13. Thus, Plaintiffs have failed to state a claim for breach of the implied covenant of good faith and fair dealing.

C. NUMMI AND TOYOTA HAVE FAILED TO STATE A CLAIM FOR PROMISSORY ESTOPPEL

27. Plaintiffs have failed to plead a claim for promissory estoppel. To state a claim for promissory estoppel under California law, a plaintiff must allege "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." *US Ecology, Inc. v. California*, 28 Cal. Rptr. 3d 894, 905 (Ct. App. 2005). In addition, a plaintiff must allege causation. *See id.* at 907 ("[I]t is logical and proper to require that any claimed damages be caused by a defendant's breach of the agreement . . . . causation must be required as an element that a plaintiff must prove, just as in ordinary contract actions."). However,

"[w]hen an enforceable contract does exist, the parties cannot assert a claim for promissory estoppel based on alleged promises that contradict the written contract. An untenable situation would result if notwithstanding the existence of a written, enforceable contract, a party could sue for promissory estoppel based on contradictory promises that it allegedly relied on. . . . Holding otherwise would allow a party to seek damages based on promissory estoppel any time it did not like a contract's terms, or the legal interpretations of such terms." *See NCC Sunday Inserts, Inc. v. World Color Press, Inc.*, 759 F. Supp. 1004, 1011-12 (S.D.N.Y. 1991).

28. As set forth above and in the Motion to Dismiss, the VSA and 2006 MOU expressly provided that MLC had a right, but not an obligation, to purchase products from NUMMI, and that any purchase requirements must be reduced to individual sales contracts. Notwithstanding this language, NUMMI claims to have relied on "several clear and unambiguous promises that MLC made regarding the 2006-2012 Vibe production cycle" which were made at a meeting that occurred prior to the signing of the 2006 MOU. NUMMI Opp. ¶ 89. And Toyota claims to have relied on the 2006 MOU itself as a promise by MLC to purchase "'at least 65,000' Pontiac Vibes per year between 2008 and 2012 from NUMMI." Toyota Compl. ¶ 84; *see* Toyota Opp. at 25-26. To permit Plaintiffs' promissory estoppel claim to prevail would read MLC's express right not to purchase products out of the VSA and 2006 MOU entirely. Thus, any reliance by NUMMI or Toyota on MLC purchasing vehicles through 2012 in light of express contractual language to the contrary is without merit. *See Salawy v. Ocean Towers Hous. Corp.*, No. B183174, 2006 WL 2391067, at *5 (Cal. Ct. App. Aug. 21,

2006) ("Plaintiffs could not maintain a successful action for promissory estoppel where their rights and duties were fixed by a contract. . . .").[9]

D. TOYOTA HAS FAILED TO STATE A CLAIM FOR ENVIRONMENTAL REMEDIATION OR WORKERS' COMPENSATION LIABILITY

29. Toyota's claims against MLC for "the cost of remediating the environmental damage at the Fremont Plant that was caused by MLC prior to the formation of NUMMI" (the "**Remediation Claim**") and for "the unpaid workers' compensation costs for which NUMMI is liable" (the "**Workers' Compensation Claim**"), Toyota Compl. ¶¶ 55-56; Toyota Opp. at 26-29, must fail as Toyota has failed to plead any actual damages. Additionally, because Toyota voluntarily and expressly guaranteed NUMMI's liability for the Workers' Compensation Claim, Toyota has failed to state a claim upon which relief may be granted.

1. Toyota's Remediation Claim Must Be Dismissed For Failure To Plead Injury

30. Toyota has failed to specify under what law (if any) MLC's purported obligation to remediate the environmental conditions at the Fremont Plant arises. Count V of the Toyota Complaint, entitled "Statutory Environmental Liability,"

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[9] In opposition, Toyota also appears to take the position that claims for breach of the covenant of good faith and fair dealing and for promissory estoppel cannot be resolved on a motion to dismiss. *See* Toyota Opp. p. 25 ("The determination of whether promissory estoppel exists is a question of fact that cannot be considered in a motion to dismiss.") Of course, this is not the case, and courts routinely dismiss such claims. *See, e.g., Thiel v. GMAC Mort., LLC*, No. 2:10-cv-00645-MCE-DAD, 2010 WL 3505087 (E.D. Cal. Sept. 03, 2010) (dismissing promissory estoppel claim); *Fishoff v. Coty Inc.*, 676 F. Supp. 2d 209, 219-220 (S.D.N.Y. 2009) (dismissing promissory estoppel claim); *Coty Inc. v. L'Oréal S.A.*, No. 07-cv-6206-KMW, 2008 WL 331360 (S.D.N.Y. Feb. 4, 2008) (dismissing claim that defendant breached the duty of good faith and fair dealing); *Celestial Mechanix, Inc. v. Susquehanna Radio Corp.*, No. CV 03-5834-GHK-VBKX, 2005 WL 4715213 (C.D. Cal. Apr. 28, 2005) (dismissing claim that defendant breached the duty of good faith and fair dealing).

does not allege the existence of any law or statute that requires NUMMI to engage in environmental remediation, let alone any law that would require MLC (or even Toyota) to bear such costs. Nor does Toyota allege **in its Complaint** -- as opposed to its Opposition Brief -- a single act of "dumping or disposal of hazardous substances at the plant while it was owned and operated by MLC." Toyota Opp. at 26. Finally as set forth in MLC's Motion to Dismiss, wholly conclusory statements are insufficient to state a claim under CERCLA as a matter of law. Thus, the Environmental Remediation Claim should be dismissed for failure to state a claim upon which relief may be granted. As such there is no "substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment" between Toyota and MLC. Toyota Opp. at 27 (citing *Olin Corp. v. Consol. Aluminum Corp.*, 5 F.3d 10, 17 (2d Cir. 1993)).

2. Toyota's Workers' Compensation Claim Must Be Dismissed For Failure To Plead Injury

31. The Workers' Compensation Claim must also be dismissed as Toyota has failed to plead any facts or cognizable legal theories as to how it has suffered any damages, let alone as to how MLC might be responsible for such damages. Although Toyota alleges that, "[t]o date, NUMMI has paid in excess of $200 million in workers' compensation liability," and that "[Toyota] provided a guarantee to the California Department of Industrial Relations [] to cover NUMMI's workers' compensation liability," these conclusory allegations do not state a claim for MLC's liability to Toyota for workers' compensation payments. Toyota Compl. ¶ 56. First, Toyota has not alleged any cognizable damages. The Toyota Complaint only alleges that **NUMMI** has paid over $200 million in workers' compensation and that "**NUMMI** is liable for a significant

amount of unpaid workers' compensation liability." Toyota Compl. ¶ 56, 102. Assuming that the above facts are true, Toyota has not alleged (and could not allege) that it has spent a single penny paying NUMMI's workers compensation costs.

32. Further, even if Toyota had alleged damages (which it has not), Toyota has failed to plead any theory under which MLC might be responsible for these damages. Under the Shareholders' Agreement, MLC and Toyota are responsible for their own expenses, except as provided otherwise. Mot. to Dismiss Ex. B at § 4.3. Here, Toyota admits that it has guaranteed NUMMI's workers' compensation liability. *See* Toyota Compl. ¶ 56; Toyota Opp. at 28. Thus Toyota should not now be permitted to seek indemnification from MLC for its unilateral business decision to enter into a guarantee for its own business purposes.

CONCLUSION

33. For the foregoing reasons, the Adversary Complaints should be dismissed with prejudice.

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