

3. At all relevant times, Motiv conducted business in Chicago, Illinois.

ANSWER: Motiv denies that it conducts business in Chicago, Illinois generally. Motiv admits that it entered into a business transaction with the City of Chicago for the sale of electric refuse trucks.

Jurisdiction and Venue

4. This Court has subject matter jurisdiction over this claim pursuant to Article VI, Section 9 of the Constitution of the State of Illinois. Additionally, this Court has jurisdiction over the subject matter of this action pursuant to 735 ILCS 5/2-209 because the actions that are the subject of this lawsuit took place in Chicago, Illinois.

ANSWER: Plaintiff's subject matter jurisdiction allegations of Paragraph 4 are directed at the Circuit Court of Cook County, in which this case was pending before Motiv removed it to this Court. As a result, no answer is required. Motiv admits that the United States District Court for the Northern District of Illinois, Eastern Division possess subject matter jurisdiction of this matter pursuant to 28 U.S.C. §§ 1332, 1441 and 1446.

5. This Court has personal jurisdiction over Motiv pursuant to:

- a. 735 ILCS 5/2-209(a)(1), because Motiv transacted business within the State of Illinois; and
- b. 735 ILCS 5/2-209(a)(7), because Motiv made a contract substantially connected with the State of Illinois.

ANSWER: Motiv admits the allegations of paragraph 5.

6. Venue is proper in this Court pursuant to 735 ILCS 5/2-101 because a substantial portion of the transaction giving rise to this suit occurred in Cook County, Illinois.

ANSWER: Plaintiff's venue allegations of Paragraph 6 are directed at the Circuit Court of Cook County, in which this case was pending before Motiv removed it to this Court. As a result, no answer is required. Motiv admits that the United States District Court for the Northern

District of Illinois, Eastern Division is the proper venue for this lawsuit pursuant to 28 U.S.C. § 1441(a).

Factual Background

7. In 2008, the City launched the Chicago Climate Action Plan (“CCAP”), a comprehensive and detailed strategy to help lower green-house gas emissions and address climate change. *See* Chicago Climate Action Plan, <https://www.cityofchicago.org/city/en/progs/env/climateaction.html>.

ANSWER: In response to Paragraph 7, Motiv states that the website cited in Paragraph 7 “is no longer available or cannot be found,” and efforts to access that website address are automatically redirected to <https://www.chicago.gov/city/en/progs/%20env/climateaction.html>. As a result, Motiv lacks sufficient knowledge to either admit or deny the allegations in paragraph 7.

8. The CCAP includes an Advanced Transportation Technologies Initiative (“ATTI”) to introduce both all-electric and hybrid garbage trucks into the City’s fleet, thereby reducing both reliance on diesel-driven trucks and petroleum use, improving local air quality, and helping the City achieve CCAP’s goals. *See* Chicago Climate Action Plan Advanced Transportation Technologies Initiative: Final Project Report (July 16, 2018), <https://www.osti.gov/servlets/purl/1460408>.

ANSWER: Motiv lacks sufficient information to either admit or deny the allegations in Paragraph 8. Motiv admits that Paragraph 8 seeks to paraphrase portions of the electronic data accessible at the website address referenced in Paragraph 8. Motiv further responds by stating that the website speaks for itself.

9. The City secured grant money from the United States Department of Energy to partially fund its acquisition of hybrid and electric fleet vehicles, including electric refuse trucks (“ERTs”), in order to advance its goals under the CCAP ATTI.

ANSWER: Motiv admits that the City of Chicago secured money from the United States Department of Energy in connection with the transaction that is the focus of this lawsuit. Motiv lacks sufficient information to either admit or deny the remaining allegations of Paragraph 9.

Motiv is Awarded a City Contract for Electric-Powered Vehicles.

10. Originally launched in 2009, Motiv specializes in the sale of electric-powered commercial vehicles, including ERTs. On its website, www.motivps.com, Motiv holds itself out as having knowledge and skill in the design, assembly, sales and support of electric-powered commercial vehicles, including ERTs. *See* Motiv Power Systems, Inc., <https://www.motivps.com> (last visited Jan. 8, 2019).

ANSWER: Motiv admits that it specializes in the sale of electric-powered chassis for commercial vehicles. Motive further admits that its website, www.motivps.com, reflects Motiv’s knowledge and skill in the design, assembly, sales and support of electric-powered commercial vehicle chassis. Motiv further admits that Plaintiff has properly cited Motiv’s website address. Motiv denies all other allegations in Paragraph 10 whether express or implied.

11. Additionally, Motiv states that:

- a. its electric power systems dramatically reduce operating and maintenance requirements. *See* Join us at ACT Expo 2018 for an Epic Experience, <https://www.motivps.com/motivps/newsletter/join-us-at-act-expo-2018-for-an-epic-experience/>; and
- b. its “sodium nickel batteries deliver the same range and performance from -40°F to 120°F.” *See* December 2017 Newsletter, <https://www.motivps.com/motivps/newsletter/december-2017-newsletter-celebrating-san-bernardinos-first-all-electric-school-buses/>.

ANSWER: Motive admits that Paragraph 11.a selectively, and out of context, quotes the Motiv website address referenced in Paragraph 11.a. Motiv denies that Paragraph 11.b accurately quotes the referenced website as the website cited in Paragraph 11.b is not accurate.

12. On October 10, 2012, the City awarded Motiv a contract for the sale, service, and maintenance of electric-powered commercial vehicles, including ERTs, Contract Number 26567 (“Contract”), a copy of which is attached as **Exhibit A**.

ANSWER: Motiv denies the allegations in Paragraph 12. In further response to Paragraph 12, Motiv states that the City awarded Motiv a contract for the sale, service, and

maintenance of electric-powered refuse trucks on October 15, 2012 and that Exhibit A of the City's complaint appears to be a true and accurate copy of the Contract.

13. At all relevant times, the Contract constituted a valid and enforceable contract between Motiv and the City.

ANSWER: Motiv admits the allegations in Paragraph 13.

14. Pursuant to the Contract, the City's Department of Fleet and Facility Management ("2FM") could submit purchase orders for electric vehicles "necessary to meet their current needs." Ex. A, Contract, § 4.5.

ANSWER: In response to Paragraph 14, Motiv states that the allegations attempt to characterize and/or otherwise quote certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

15. The Contract only obligated the City to pay for the vehicles that were ordered by 2FM, delivered and accepted. *Id.*

ANSWER: In response to Paragraph 15, Motiv states that the allegations attempt to characterize certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

16. Under the Contract, the City was not obligated to pay for any vehicles that do not comply with the terms and conditions of the Specifications. *Id.* at § 4.17.

ANSWER: In response to Paragraph 16, Motiv states that the allegations attempt to characterize certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

17. On November 4, 2013, the City submitted a purchase order for one ERT for use by 2FM in its year-round refuse collection operations.

ANSWER: Motiv denies the allegations in Paragraph 17.

Motiv was Required to Furnish and Deliver the ERT Purchased by the City.

18. The Contract provides:

It is understood and agreed that TIME IS OF THE ESSENCE OF CONTRACT, and [Motiv] agrees to begin actual work covered by this contract in conformity with the provisions set forth herein and to prosecute the same with all due diligence, so as to complete the entire work under this contract within the calendar days stipulated after the date for commencement of work as specified in the written notification to [Motiv] from the Commissioner, using double shift and holiday work when necessary.

Id. at § 3.25 (emphasis in original).

ANSWER: In response to Paragraph 18, Motiv states that the allegations attempt to quote certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

19. If Motiv fails to satisfactorily complete the work under the Contract within the time specified in the Contract, the Chief Procurement Officer may declare the Contract in default. *Id.* at §§ 3.25, 3.63.

ANSWER: In response to Paragraph 19, Motiv states that the allegations attempt to characterize certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

20. The Contract requires Motiv to furnish and deliver any vehicle purchased by the City “complete with all attachments and ready for use” within 270 days of the purchase order. *Id.* at § 4.19.

ANSWER: In response to Paragraph 20, Motiv states that the allegations attempt to characterize and/or quote certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

21. Under the Contract, Motiv “must furnish and deliver the new current model Electric Trucks as specified [to 2FM], in accordance with all the terms and conditions of this specification.” *Id.* at § 6.1.

ANSWER: In response to Paragraph 21, Motiv states that the allegations attempt to characterize and/or quote certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

22. Section 6 of the Contract provides several specifications common to all electric vehicles that can be purchased under the Contract. Section 6 of the Contract also provides specifications for several different types of electric vehicles, including ERTs.

ANSWER: In response to Paragraph 22, Motiv states that the allegations attempt to characterize certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

23. Motiv was required to furnish and deliver an ERT meeting the specifications of the Contract, including, but not limited to, an ERT that:

- a. conforms to the best practices known to the trade in strength, quality of material and workmanship, id. at § 6.6;
- b. is “designed to function reliably and efficiently in sustained operation, under conditions which are typical for the intended application,” id. at § 6.10;
- c. is “designed and constructed for reliable year-round use in a range of weather conditions encountered in Chicago, including temperature extremes and precipitation events, and for use on city streets and roads for daily shifts of up to ten hours,” id. at § 6.36.6;
- d. has a “warming capacity where necessary to provide for use of the drive system, energy storage system, charging system and accessories system continuously (subject to the range limitations of the energy storage system) in the range of weather conditions encountered in Chicago, including start-up from overnight winter parking,” id. at § 6.43.2; and
- e. has hydraulic and electrical systems “capable of proper operation within an ambient temperature range of -30°F to +120°F,” id. at § 6.106.12.

ANSWER: In response to Paragraph 23, Motiv states that the allegations attempt to characterize and/or quote certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

24. The Contract provides further that:

If defects or omissions are discovered during the inspection, the City may:

1. Refuse acceptance of any/all units.
2. Arrange with [Motiv] to make corrections.
3. Require [Motiv] to remove any/all units from the City's premises at its own cost to make the necessary corrections.

Any/all labor and materials which may be required to correct non-compliant aspects of all items must be provided by [Motiv] in a prompt manner, at no cost to the City. The "promptness" of corrective actions will be established by the City based upon the quantity and scope of the corrections required.

Id. at § 4.20.

ANSWER: In response to Paragraph 24, Motiv states that the allegations attempt to quote certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

25. The Contract further requires that Motiv "be responsible for the contracted quality and standards of all materials, components or completed work furnished under this contract up to the time of final acceptance by the City." *Id.* at § 3.34.

ANSWER: In response to Paragraph 25, Motiv states that the allegations attempt to characterize and quote certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

Motiv was Required to Warrant and Repair the ERT.

26. The Contract requires Motiv to warrant the ERT and all mounted and furnished equipment against defective design, material or workmanship for the greater time period of:

- a. the full extent of the respective Original Equipment Manufacturer's standard published warranty;
- b. two years/36,000 miles parts and labor for the complete base unit;
- c. three years/36,000 miles parts and labor for the drivetrain;

- d. five years/100,000 miles parts and labor for chassis rust-through;
- e. two years/36,000 miles parts and labor for the body;
- f. five years parts and labor for LED lighting;
- g. one year parts and labor Non-OEM accessories; and one year parts and labor for other items.

Id. at §§ 6.8, 8.5.

ANSWER: In response to Paragraph 26, Motiv states that the allegations attempt to characterize certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

27. In addition, Motiv agreed that:

[f]or repair parts and services, [Motiv] must warrant for a period of 90 days from the date of final acceptance (i.e. the date the unit is returned to the City) all parts and services, that it will, at its own expense and without any cost to [the City], replace all defective parts and make any repairs that may be required or made necessary by reason of defective design, material or workmanship, or by reason of non-compliance with these specifications.

Id. at § 6.8.

ANSWER: In response to Paragraph 27, Motiv states that the allegations attempt to quote certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

28. Motiv further agreed that such “[w]arranties will not commence until the vehicle is accepted by [2FM] and placed into service.” *Id.*

ANSWER: In response to Paragraph 28, Motiv states that the allegations attempt to quote certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

29. Motiv further agreed that it “must furnish a warranty for the items and services provided under this Contract in accordance with the standard warranty regularly supplied . . . In the event that any such repair fails to endure this minimum period, the City may elect to repair the unit in-house on an emergency basis, and/or the Contractor will replace the subject part(s) and/or furnish the necessary labor to make good the subject repair at no additional cost to the City.” *Id.*

ANSWER: In response to Paragraph 29, Motiv states that the allegations attempt to quote certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

30. For all repair work, Motiv acknowledged that the ERT was “critical to the City’s Fleet operation” and that:

- a. Motiv was required to “give priority service to the City and proceed with authorized work in an expeditious manner to ensure that all work is completed within the agreed upon schedule and to ensure that vehicle downtime is kept to a minimum,” *id.* at § 6.23;
- b. “Delivery of Parts required for repairs and performance of services will be made within seventy-two (72) hours of request,” *id.* at § 6.22;
- c. Motiv was required to return calls for service within 24 hours, *id.* at § 6.23;
- d. “[Motiv] will expedite repairs[] to the equipment as required by [2FM] in order to meet any reasonable time frames set forth by [2FM],” *id.* at § 6.16;
- e. Absent authorization by the City, “[a]ny vehicle delivered to [Motiv] or an Authorized Subcontractor for repair services must be returned to the City within three (3) business days,” *id.* at § 6.15; and
- f. “If there are delays due to lack of parts, insufficient manpower or other circumstances, then [Motiv] will notify [2FM] immediately of the delay,” *id.* at § 6.16.

ANSWER: In response to Paragraph 30, Motiv states that the allegations attempt to quote certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

31. Motiv further agreed to “perform or cause to be performed [all work required of it under the Contract] in accordance with the terms and conditions of the Contract and to the reasonable satisfaction of the City.” *Id.* at § 6.29.

ANSWER: In response to Paragraph 31, Motiv states that the allegations attempt to quote certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

32. Motiv was required to promptly correct any work required under the Contract that was defective or failed to conform to the standards set forth in the Contract and to bear all costs of correcting such defective or nonconforming work. *Id.*

ANSWER: In response to Paragraph 32, Motiv states that the allegations attempt to characterize certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

33. The Contract also requires Motiv to furnish and deliver “all necessary labor, materials, parts, accessories, assemblies, and/or components either in conjunction with non-warranty repair services or separately for various City-owned Vehicles and Equipment purchased under this Contract, in accordance with the terms and conditions of this specification.” *Id.* at §§ 6.1, 6.12.

ANSWER: In response to Paragraph 33, Motiv states that the allegations attempt to quote certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

34. In addition, Motiv agreed that any work in progress at the termination date of the Contract will be “completed in the most expedient method available,” and in no event will Motiv vacate its obligations under this agreement until all work issued to it prior to the expiration of the Contract has been completed and accepted. *Id.* at § 6.31.

ANSWER: In response to Paragraph 34, Motiv states that the allegations attempt to quote and/or characterize certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

35. Motiv also agreed that, in the event that the vehicle is irreparable, it would provide a written explanation of the problems to 2FM. *Id.* at § 6.17.

ANSWER: In response to Paragraph 35, Motiv states that the allegations attempt to characterize certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

36. Motiv acknowledged that “initial acceptance of any delivery will not be considered as a waiver of any provision of these Specifications and will not relieve the Contractor of its obligation to supply satisfactory vehicles or equipment which conform to the Specifications, as shown by any test or inspections for which provisions are herein otherwise made.” *Id.* at § 4.27.

ANSWER: In response to Paragraph 36, Motiv states that the allegations attempt to quote certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

37. Motiv also acknowledged that:

any acceptance or inspection by the City of any part or repaired equipment provided pursuant to the terms and conditions of this contract does not constitute a waiver of these terms and conditions, and in no way relieves [Motiv] of its obligation to comply with the terms and conditions of this contract, including any standard or performance and warranty requirement stated herein.

Id. at § 6.21.

ANSWER: In response to Paragraph 37, Motiv states that the allegations attempt to quote certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

Motiv Authorized Third Parties to Provide Maintenance and Repair Services.

38. The Contract required Motiv to provide maintenance and repair services in the Chicago area. *Id.* at § 6.13. As of October 5, 2012, Motiv did not operate any repair or service locations directly. **Ex. A** at 67, Attachment to the Contract, Letter dated October 5, 2012 from Jim Castelaz, President & CEO of Motiv to Michael Smith at the City.

ANSWER: In response to Paragraph 38, Motiv states that the allegations attempt to characterize certain terms and conditions of the Contract as well as the cited correspondence from

Jim Castelaz. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial. In further response, Motiv denies that as of October 5, 2012, it did not operate any repair or service locations directly. Motiv denies all other allegations in Paragraph 38, whether express or implied.

39. Motiv designated Tri-Angle Fabrication & Body Company, Inc. (“Tri-Angle”) as its repair and maintenance shop for body and powertrain for ERTs purchased under the Contract. **Ex. A**, Contract § 8.7; **Ex. A** at 66, Attachment to the Contract, Letter dated April 17, 2012 from Jim Castelaz, President & CEO of Motiv to Joe Gonzalez of Tri-Angle; **Ex. A** at 67, Attachment to the Contract, Letter dated October 5, 2012 from Jim Castelaz, President & CEO of Motiv to Michael Smith at the City.

ANSWER: In response to Paragraph 39, Motiv states that the allegations attempt to characterize certain terms, conditions and attachments to the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial. In further response, Motiv denies that it designated Tri-Angle Fabrication & Body Company, Inc. as its repair and maintenance shop for body and powertrain repairs.

40. Motiv further confirmed that Tri-Angle “will serve as a maintenance location for the trucks for all non-chassis maintenance and service, including body work, repairs, field service of Motiv’s electronic Powertrain and service of other truck electronics.” **Ex. A** at 94, Attachment to the Contract, Letter dated April 27, 2012 from Jim Castelaz, President & CEO of Motiv to Joe Gonzalez of Tri-Angle.

ANSWER: In response to Paragraph 40, Motiv states that the allegations attempt to quote and/or characterize certain terms and conditions of the Contract and attachments thereto. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

41. Motiv also identified Cumberland Service Center, Inc. (“Cumberland”) as the repair and maintenance shop for the ERT chassis. **Ex. A**, Contract § 8.7.

ANSWER: In response to Paragraph 41, Motiv states that the allegations attempt to characterize certain terms, conditions and attachments to the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial. In further response, Motiv states that it admits that Motiv identified Cumberland Service Center, Inc. as the repair and maintenance shop for chassis repairs.

The City May Terminate the Contract For Defaults That Motiv Does Not Timely Cure

42. Section 3.63 of the Contract provides:

- A. The City may. . . by written notice of default to [Motiv], terminate the whole or any part of this contract in any one of the following circumstances:
1. If [Motiv] fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or
 2. If [Motiv] fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of ten (10) calendar days (or such other period as the Chief Procurement Officer may authorize in writing) after receipt of notice from the Chief Procurement Officer specifying such failure.

Id. at § 3.63.

ANSWER: In response to Paragraph 42, Motiv states that the allegations attempt to quote certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

Motiv Also Must Indemnify The City Against Any and All Losses.

43. Section 3.27 of the Contract provides:

3.27 Indemnity

[Motiv] must defend, indemnify, keep and hold harmless the City, its officers, representatives, elected and appointed officials, agents and employees from and against all losses, including those related to:

1. Injury, death or damage of or to any person or property;
2. Any infringement or violation of any property right (including any patent, trademark or copyright);
3. [Motiv's] failure to perform or cause to be performed [Motiv's] covenants and obligations as and when required under the Contract, including [Motiv's] failure to perform its obligations to any subcontractor;
4. The City's exercise of its rights and remedies under this Contract; and
5. Injuries to or death of any employee of [Motiv] or any subcontractor under any workers compensation statute.

Id. at § 3.27.

ANSWER: In response to Paragraph 43, Motiv states that the allegations attempt to quote certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

44. Section 3.27 further defines “losses”:

“Losses” means, individually and collectively, liabilities of every kind, including losses, damages and reasonable costs, payments and expenses (such as, but not limited to, court costs and reasonable attorneys’ fees and disbursements), claims, demands, actions, suits, proceedings, judgments or settlements, any or all of which in any way arise out of or relate to [Motiv’s] breach of this Contract or to [Motiv’s] negligent or otherwise wrongful acts or omissions or those of its officers, agents, employees, consultants, subcontractors or licensees.

Id.

ANSWER: In response to Paragraph 44, Motiv states that the allegations attempt to quote certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

45. “The indemnities in this section survive expiration or termination of this Contract for matters occurring or arising during the term of this Contract or as the result of or during [Motiv’s] performance of service beyond the term.” *Id.*

ANSWER: In response to Paragraph 45, Motiv states that the allegations attempt to quote certain terms and conditions of the Contract. As a result, the allegations constitute a legal conclusion and do not require either an admission or denial.

The ERT Has Failed to Function, and Motiv Has Failed to Repair or Replace it, as Required by the Contract.

46. On November 4, 2013, the City placed an order with Motiv pursuant to the Contract for one ERT.

ANSWER: Motiv denies the allegations in Paragraph 46.

47. The City paid Motiv \$1,307,312.94 for the ERT.

ANSWER: Motiv denies the allegations in Paragraph 47. In further response, Motiv states that while it was paid approximately \$1,307,312.94 for the first electric refuse truck, Motiv denies that the City paid that amount.

48. On January 6, 2014, Motiv provided the City with the ERT which is the subject of this action.

ANSWER: Motiv admits the allegations in Paragraph 48.

49. Since January 6, 2014, the ERT has experienced mechanical and software problems that regularly prevented the City from using the vehicle altogether.

ANSWER: Motiv denies the allegations in Paragraph 49.

50. Because the ERT has experienced chronic mechanical and/or software problems and/or has been out for repair work by Motiv, the City has been deprived, and continues to be deprived, of the use of the ERT for over half of the time since the City purchased the ERT.

ANSWER: Motiv admits that the electric refuse truck has been subject to repairs. Motiv denies all other allegations in Paragraph 50.

51. Specifically, the City has been deprived, and continues to be deprived, of the use of the ERT for at least 1,096 days as of February 14, 2019, as follows:

- a. 108 days from January 6 through April 23, 2014;
- b. 156 days from October 21, 2014 through March 25, 2015;
- c. 314 days from January 11 through November 20, 2016;
- d. 19 days from February 10 through February 28, 2017;
- e. 24 days from May 17 through June 9, 2017;
- f. 34 days from August 2 through September 4, 2017;
- g. 77 days from September 22 through December 7, 2017;
- h. 34 days from January 26 through February 28, 2018;
- i. 20 days from March 20 through April 8, 2018; and
- j. 302 days from April 11, 2018, through to the date of filing this Complaint.

ANSWER: Motiv lacks sufficient information to either admit or deny the allegations in paragraph 51.

52. From January 6 through April 23, 2014, the ERT was out of service for 108 days because the hydraulic system emitted excessive noise. During these 108 days, Motiv was unable to repair this noise problem. After the City brought in a hydraulic expert from a component manufacturer to repair the problem, the ERT was placed back into service on April 24, 2014.

ANSWER: Motiv lacks sufficient information to either admit or deny the allegations in paragraph 52.

53. From October 21, 2014 through March 25, 2015, the ERT was inoperable for 156 days because it had mechanical and software problems and was out for repairs by Motiv.

ANSWER: Motiv lacks sufficient information to either admit or deny the allegations in paragraph 53.

54. During these 156 days, the City asked Motiv for updates on the status of the ERT over seven times. Motiv responded to the City with a growing list of required repair work:

- a. On October 21, 2014, Motiv stated that the ERT had a non-functioning cab heater because of a “power management issue” that would require “a permanent software solution;”
- b. On January 21, 2015, Motiv informed the City that it had repaired the cab heater and replaced some electric components, but two Motiv engineers were still working on the controls for a “Bendix” heater installed on the air brake system; and
- c. On March 25, 2015, Motiv informed the City that it had replaced the ERT’s cab heater with a diesel-powered heater and fixed some systems to automatically reset after faults. Motiv also informed the City that the ERT continued to have trouble with the battery charger, there was a “[p]ossibility of hydraulic steering cutting out for a couple seconds,” and “[i]f the truck is sent back and the existing issues are too much of a problem, we can take the truck back and keep working on them.”

ANSWER: Motiv admits that, as the parties intended, the first electric refuse truck required repair and upgrades based on real-world usage.

55. On March 25, 2015, Motiv recommended that the City take back the ERT and place it back in service. Motiv also promised a full report on the ERT by the following week.

ANSWER: Motiv admits that it has repaired and upgraded the first electric refuse truck and asked the City to place it back into service for further use and learning.

56. On March 26, 2015, Motiv returned the ERT to the City.

ANSWER: Motiv admits the allegations in paragraph 56.

57. On May 15, 2015, seven weeks after Motiv returned the ERT to the City, Motiv provided the City with a “Report of Major Rework on MVN1 Chicago Refuse Truck” (“Report”), a copy of which is attached as **Exhibit B**, describing “a major rework of the vehicle.” Motiv evaluated twenty issues and problems with the ERT that Motiv had identified during the October 21, 2014 through May 15, 2015 time period. *Id.* at 10-20. Motiv also stated in the Report that:

[t]oo much time was spent in trying to refine the electrical approach. This resulted in leaving the vehicle out of service and the customer without solid information on the work being attempted. Motiv had moved from “support” mode to “engineering” mode without appropriate consultation with the customer.

Id. at 10. Motiv acknowledged that it had only provided interim solutions to several of these issues and failed to resolve others. *Id.* at 10-14, 16-20.

ANSWER: Paragraph 57 attempts to quote and/or characterize the Report referenced in that allegation. Motiv states that the Report speaks for itself and denies Plaintiff’s efforts to characterize same.

58. Between July 7 and November 20, 2015, the ERT experienced eight failures requiring it to be taken out of service for repair work by Motiv.

ANSWER: Motiv lacks sufficient information to either admit or deny the allegations in paragraph 58.

59. During this 137-day period, the City was again deprived of the use of the ERT for a total of 62 days because it was out for repair work by Motiv as follows:

- a. From July 7 through July 16, 2015 (9 days), because an Auxiliary Power Unit (“APU”) had overheated and had to be replaced.
- b. From August 13 through August 26, 2015 (14 days), because the ERT suffered a hydraulic leak.
- c. From August 31 through September 3, 2015 (3 days), because the truck shut down and the battery charger did not function.
- d. On September 9 and 10, 2015 (2 days), the City was only able to use the ERT for partial routes because only five of the ten batteries were operating.
- e. From September 11 through September 16, 2015 (6 days), because the batteries, which were not functioning due to a software issue, had to be reset.
- f. From September 24 through October 1, 2015 (8 days), because a hydraulic leak needed to be repaired and a battery had to be replaced.
- g. From October 13 through October 16, 2015 (4 days), because melted wiring and the

motor-loop coolant pump had to be replaced.

- h. From November 3 through November 20, 2015 (18 days), because two charger fuses and a wire needed to be replaced. The wire was not in stock and needed to be ordered. On November 19, 2015, Motiv returned the ERT to the City. On November 20, 2015, Motiv finished repairing the charger.

ANSWER: Motiv lacks sufficient information to either admit or deny the allegations in paragraph 59.

60. From January 11 through November 20, 2016, the City was deprived of the use of the ERT for 314 days because the ERT's component heating system and hydraulic system stopped working and the ERT was out for repair work by Motiv.

ANSWER: Motiv lacks sufficient information to either admit or deny the allegations in paragraph 60.

61. During this 314-day period, Motiv reported additional problems requiring repair or replacement as follows:

- a. On January 24, 2016: there was a short in the electrical system and the air compressor control unit needed to be reprogrammed by its manufacturer Bendix.
- b. On February 1, 2016: it had found an additional short in the system.
- c. On February 10, 2016: it had removed the air compressor control unit and sent it to Bendix for repairs.
- d. April 6, 2016: it had made several hardware and software updates to the ERT and worked with Bendix on the braking system.
- e. On August 31, 2016: it was working to complete several hardware and software changes that needed to be made to the ERT.
- f. On September 6, 2016: it had completed software changes, but still needed to:
 - i. Replace battery cables;
 - ii. Program and replace a failed battery;
 - iii. Test or replace a power controller; and
 - iv. Finish its work on the fuse box and cutoff switch.

- g. On September 22, 2016: it was waiting on a backordered part in order to complete further mechanical repairs to the ERT.
- h. On September 27, 2016: it still had to repair or replace:
 - i. a 12 volt battery;
 - ii. an APU;
 - iii. radiator fans;
 - iv. the battery management interface (“BMI”); and v. air compressor components.
- i. On October 21, 2016: it was still investigating and repairing three items.
- j. On November 4, 2016: it had replaced a faulty component and had to test the ERT.

ANSWER: Motiv lacks sufficient information to either admit or deny the allegations in paragraph 61.

- 62. On November 21, 2016, Motiv returned the ERT to the City.

ANSWER: Motiv admits that it has repaired and upgraded the first electric refuse truck and asked the City to place it back into service for further use and learning.

63. On November 23, 2016, the City’s Department of Procurement Services (“DPS”) sent a “Notice of Default and Request for Cure” (“Notice”) to Motiv, a copy of which is attached as **Exhibit C**, providing notice of Motiv’s default under the Contract.

ANSWER: Motiv admit that the City’s Department of Procurement Services sent a purported Notice of Default and Request for Cure.

64. Specifically, DPS notified Motiv that its failure to deliver a properly, fully-functioning ERT to the City, and failure to promptly correct the defective ERT, were events of default under the Contract. **Ex. C**, Notice, at 4.

ANSWER: The allegations of Paragraph 64 attempt to characterize a document purportedly attached to the Complaint. Motiv denies that Paragraph 64 accurately characterizes the document or any legal effect thereof.

65. DPS directed Motiv to cure its defaults and deliver a fully-functioning ERT to the City that would meet the Contract requirements within 10 calendar days of receipt of the Notice. *Id.*

ANSWER: The allegations of Paragraph 65 attempt to characterize a document purportedly attached to the Complaint. In further response, Motiv states that the copy of the complaint Motiv received from Plaintiff's counsel on or about February 14, 2019 did not contain an Exhibit C.

66. On December 6, 2016, Motiv responded to DPS stating that it had returned the ERT to the City on November 21, 2016. A copy of Motiv's December 6, 2016 response is attached as **Exhibit D**.

ANSWER: Motiv admits that it sent a written response to the City's Notice of Default and Request for Cure. Motiv denies all other allegations of Paragraph 66, including Plaintiff's efforts to characterize the contents of that response.

67. Motiv did not cure its defaults under the Contract, however, because it did not deliver a fully-functioning ERT to the City that met the Contract requirements.

ANSWER: Motiv denies the allegations of Paragraph 67.

68. Since November 21, 2016, the ERT has continued to suffer from chronic problems.

ANSWER: Motiv admits that the first electric refuse truck has undergone repairs. Motiv denies all other allegations of Paragraph 68.

69. Between December 8, 2016 and September 4, 2017, the ERT experienced six additional failures.

ANSWER: Motiv lacks knowledge sufficient to admit or deny the allegations of Paragraph 69.

70. The City was deprived of the use of the ERT for a combined total of 98 days during this 271-day period, while the ERT was out for repair work by Motiv as follows:

- a. From December 8 through December 12, 2016 (4 days), because its APU failed.
- b. From January 23 through January 31, 2017 (9 days), because of problems with its airbrake system and a broken APU.
- c. From February 10 through February 28, 2017 (19 days), because its APU failed.
- d. From April 10 through April 17, 2017 (8 days), because two of its APUs failed and had to be replaced.
- e. From May 17 through June 9, 2017 (24 days), because the air compressor control unit failed and had to be replaced.
- f. From August 2 through September 4, 2017 (34 days), because its batteries would not accept a charge.

ANSWER: Motiv lacks knowledge sufficient to admit or deny the allegations of Paragraph 70.

71. On September 5, 2017, Motiv returned the ERT to the City.

ANSWER: Motiv admits that it has repaired and upgraded the first electric refuse truck and asked the City to place it back into service for further use and learning.

72. From September 22 through December 7, 2017, the City was deprived of the use of the ERT for 77 days because the ERT's power steering stopped working and another APU needed to be replaced.

ANSWER: Motiv lacks knowledge sufficient to admit or deny the allegations in Paragraph 72.

73. On December 8, 2017, the ERT was returned to the City.

ANSWER: Motiv admits that it has repaired and upgraded the first electric refuse truck and asked the City to place it back into service for further use and learning.

74. From January 26 through February 28, 2018, the City was deprived of the use of the ERT for 34 days because it was out for repairs and tests by Motiv.

ANSWER: Motiv lacks knowledge sufficient to admit or deny the allegations in Paragraph 74.

75. On March 1, 2018, Motiv returned the ERT to the City.

ANSWER: Motiv admits that it has repaired and upgraded the first electric refuse truck and asked the City to place it back into service for further use and learning.

76. From March 20 through April 8, 2018, the City was deprived of use of the ERT for 20 days, because the ERT's power take-off system stopped functioning.

ANSWER: Motiv lacks knowledge sufficient to admit or deny the allegations in Paragraph 76.

77. On April 9, 2018, Motiv returned the ERT to the City.

ANSWER: Motiv admits that it has repaired and upgraded the first electric refuse truck and asked the City to place it back into service for further use and learning.

78. On April 11, 2018, the ERT's air compressor stopped functioning again, and on April 12, 2018, the City towed it to the Cumberland facility.

ANSWER: Motiv lacks knowledge sufficient to admit or deny the allegations in Paragraph 78.

79. On April 18, 2018, Motiv reported to the City that it would be working with Cumberland to test the ERT.

ANSWER: Motiv admits that it informed the City that Motiv would work with Cumberland to repair, test and upgrade the first of the electric refuse trucks. Motiv lacks information sufficient to admit or deny whether it so notified the City on April 18, 2018 or at any time before or after April 18, 2018.

80. As of the date of filing of this Complaint, the ERT remains at the Cumberland facility and has not been returned to the City.

ANSWER: Motiv admits the allegations in Paragraph 80.

81. The City has been, and continues to be, deprived of the use of the ERT since April 11, 2018.

ANSWER: Motiv denies the allegations in Paragraph 81.

82. As of the date of filing of this Complaint, Motiv has failed to adequately repair the ERT.

ANSWER: Motiv denies the allegations in Paragraph 82.

83. As of the date of filing of this Complaint, Motiv has failed to provide the City with a functioning ERT.

ANSWER: Motiv denies the allegations in Paragraph 83.

The City Again Requested Motiv Cure its Breach of the Contract

84. On May 17, 2018, the City again demanded that Motiv cure its breach of the Contract by providing the City with a replacement ERT. A copy of the City's May 17, 2018 letter is attached as **Exhibit E**.

ANSWER: The allegations of Paragraph 84 attempt to characterize a written document. Motiv denies the characterizations are accurate.

85. As of the date of filing of this Complaint, Motiv has refused to repair the ERT, replace the ERT with an ERT that complies with the Contract, or to refund the City the cost of the non-functioning ERT.

ANSWER: Motiv denies the allegations in Paragraph 85.

COUNT I
Breach of Contract

86. Plaintiff restates and realleges paragraphs 1 through 85 as if fully stated herein.

ANSWER: Motiv incorporates by reference its answers to Paragraphs 1 through 85 as if fully stated herein.

87. The City and Motiv entered into the Contract, pursuant to which the City paid Motiv \$1,307,312.94 in exchange for, among other things, a functioning ERT and Motiv's agreement to maintain, warrant, and repair the ERT.

ANSWER: Motiv admits that it entered into a Contract with the City for the purchase of electric refuse trucks. Motiv denies all other allegations in Paragraph 87.

88. Pursuant to the Contract, Motiv was obligated *inter alia* to:

- a. furnish and deliver an ERT that complies with the terms and conditions of the Contract specifications, Ex. A, Contract, at § 6.1;
- b. furnish and deliver an ERT, complete with all attachments and ready for use, within 270 days of the purchase order, *id.* at § 4.19;
- c. promptly correct all defects and non-compliant aspects of the ERT discovered during inspection at no cost to the City, *id.* at § 4.20;
- d. warrant the ERT against defective design, material and workmanship, *id.* at § 8.5;
- e. repair all items required under Motiv's warranties, *id.* at §§ 6.8, 6.12;
- f. complete repair work and return the ERT to the City within three (3) business days of being delivered to Motiv for repair, *id.* at § 6.16;
- g. warrant all repair parts and work for 90 days and replace all defective parts and make any repairs that are required or made necessary because of defective design, material, workmanship, or non-compliance with the Contract's specifications, *id.* at § 6.8;
- h. replace repair parts that fail to endure the minimum warranty period at

no additional cost to the City, id.;

- i. furnish all necessary labor, materials, parts, accessories, assemblies, and/or components in conjunction with non-warranty repair services, id., at §§ 6.1, 6.12;
- j. remove, re-perform or correct all work identified to be defective or as failing to conform to the standards set forth in the Contract, id. at § 6.29;
- k. complete repair work that was ongoing at the termination of contract; id., at § 6.31; and
- l. in the event the vehicle is irreparable, provide a written explanation of the vehicle's problems to 2FM, id., at § 6.17.

ANSWER: The allegations in Paragraph 88 attempt to characterize and/or quote the terms and conditions of the Contract. As a result, the allegations constitute legal conclusions and do not require a response.

89. The City has performed all of its obligations under the Contract.

ANSWER: Motiv denies the allegations in Paragraph 89.

90. Motiv has failed to perform its obligations under the Contract, including, but not limited to, failing to:

- a. furnish and deliver a functioning ERT to the City that was designed and constructed for reliable year-round use in the range of weather conditions encountered in Chicago and a daily shift of up to ten hours;
- b. furnish and deliver an ERT, complete with all attachments and ready for use, within 270 days of the purchase order;
- c. promptly correct all defects and non-compliant aspects of the ERT discovered during inspection at no cost to the City;
- d. repair and return the ERT to the City within three (3) business days of being delivered to Motiv for repair;
- e. promptly remove, re-perform or correct all work on the ERT identified to be defective or as failing to conform to the standards set forth in the Contract;

- f. perform all repair work required under the original warranties;
- g. perform all repair work required under the 90-day warranties after any repair was completed and the ERT was placed back in service;
- h. repair parts that failed to endure the minimum warranty period;
- i. furnish the necessary labor, materials, parts, accessories, assemblies, and/or components in conjunction with non-warranty repair services;
- j. replace all defective parts and perform any repair work on the ERT that are required or made necessary by reason of defective design, material or workmanship, or by reason of non-compliance with the Contract; and
- k. complete repair work on the ERT that was in progress at the termination date of the Contract; and
- l. provide a written explanation of the ERT's problems regarding its irreparability.

ANSWER: Motiv denies the allegations in Paragraph 90.

91. The City has been damaged as a result of Motiv's breaches of the Contract in an amount to be determined at trial, but at least \$1,307,312.94.

ANSWER: Motiv denies the allegations in Paragraph 91.

WHEREFORE, the City respectfully requests that this Court enter an order:

- A. Finding Motiv to be in breach of the Contract;
- B. Entering judgment in favor of the City and against Motiv for the \$1,307,312.94 purchase price of the ERT, plus the costs incurred by the City during each day that the ERT was inoperable in an amount to be determined at trial;
- C. Awarding the City its reasonable attorneys' fees pursuant to the Contract, **Ex. A**, Contract at § 3.27;
- D. Awarding the City its costs pursuant to 735 ILCS 5/5-108;
- E. Awarding the City any applicable post-judgment interest pursuant to 735 ILCS

5/2-1303; and

F. Granting such other relief as is just and equitable.

ANSWER: To the extent the City's "WHEREFORE" clause constitutes a factual allegation, Motiv denies that the City is entitled to the relief requested in that clause.

COUNT II
Indemnity

Simultaneous with the filing of this Answer, Affirmative Defenses and Counterclaim, Motiv has filed a Motion to Dismiss Count II pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state claim upon which relief can be granted. As a result, Motiv need to respond to the allegations of Count II.

92. Plaintiff restates and realleges paragraphs 1 through 91 as if fully stated herein.

ANSWER:

93. As set forth above, Motiv has a duty to indemnify the City against any and all losses, including those related to Motiv's failure to perform, or cause to be performed, its covenants and obligations under the Contract and the City's exercise of its rights and remedies under the Contract. **Ex. A**, Contract at § 3.27.

ANSWER:

94. Motiv is liable to the City for any "losses, damages and reasonable costs, payments and expenses (such as, but not limited to, court costs and reasonable attorneys' fees and disbursements), claims, demands, actions, suits, proceedings, judgments or settlements, any or all of which in any way arise out of or relate to [Motiv's] breach of this Contract. . . ." *Id.*

ANSWER:

WHEREFORE, the City respectfully requests this Court to enter an order:

A. Entering judgment for the City and against Motiv, ordering Motiv to indemnify

the City for any and all damages and reasonable costs, payments and expenses (such as, but not limited to, court costs and reasonable attorneys' fees and disbursements), claims, demands, actions, suits, proceedings, judgments or settlements actually and reasonably incurred in this action based on Motiv's conduct and the City's exercise of its rights and remedies under the Contract;

- B. Awarding the City its reasonable attorneys' fees pursuant to the Contract, *id.*;
- C. Awarding the City its costs pursuant to 735 ILCS 5/5-108; and
- D. Granting the City such other and further relief as the Court deems just and appropriate.

COUNT III
Breach of Express Warranty

Simultaneous with the filing of this Answer and Affirmative Defenses, Motiv has filed a Motion to Dismiss Count III pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for because Plaintiff's warranty claim is time-barred. As a result, Motiv need not respond to the allegations of Count III.

95. Plaintiff restates and realleges paragraphs 1 through 94 as if fully stated herein.

ANSWER:

96. Motiv warranted that the ERT and all mounted/furnished equipment would be warranted against defective design, material, or workmanship for the greater time period of:

- a. the full extent of the respective Original Equipment Manufacturer's standard published warranty;
- b. two years/36,000 miles parts and labor for the complete base unit;
- c. three years/36,000 miles parts and labor for the drivetrain;
- d. five years/100,000 miles parts and labor for chassis rust-through;

- e. two years/36,000 miles parts and labor for the body;
- f. five years parts and labor for LED lighting;
- g. one year parts and labor Non-OEM accessories; and h. one year parts and labor for other items.

Ex. A, Contract, at §§ 6.8, 8.5.

ANSWER:

97. Motiv warranted *inter alia* that the ERT was designed to function reliably in year-round weather conditions, including the range of temperature extremes encountered in Chicago, Illinois. *Id.* at § 6.36.6.

ANSWER:

98. Motiv also agreed to repair the ERT for any defective design, material or workmanship during the warranty periods set out in the Contract. *Id.* at §§ 6.8, 6.29.

ANSWER:

99. Motiv further agreed to warrant and repair the ERT for 90 days after any repair work was completed and the ERT was placed back in service. *Id.* at § 6.8.

ANSWER:

100. Motiv further agreed that it would replace any repair part that fails to endure this minimum warranty period at no additional cost to the City. *Id.*

ANSWER:

101. The City relied upon these representations and warranties in purchasing the ERT.

ANSWER:

102. Motiv has failed to provide to the City a functional, reliable ERT that, as warranted:

- a. was free from defective design, material, or workmanship;
- b. was designed and constructed for reliable year-round use in Chicago, Illinois;
- c. was capable of operating for daily shifts of up to ten hours;
- d. had the warming capacity to run all of its systems continuously in the range of weather conditions encountered in Chicago, including start-up from overnight winter parking; and
- e. had hydraulic and electrical systems capable of operating within an ambient temperature range of -30°F to +120°F.

ANSWER:

103. As a result of Motiv's breach of its express warranties, the ERT provided to the City was not worth the \$1,307,312.94 the City paid.

ANSWER:

104. The City has been damaged as a result of Motiv's breach of its express warranties in an amount to be determined at trial, but at least \$1,307,312.94.

ANSWER:

WHEREFORE, the City respectfully requests that this Court enter an order:

- A. Finding Motiv to be in breach of its express warranties regarding the ERT;
- B. Entering judgment in favor of the City and against Motiv for the \$1,307,312.94 purchase price of the ERT;
- C. Awarding the City incidental and consequential damages pursuant to 810 ILCS 5/2-715, including, but not limited to, the costs incurred by the City during each day that the ERT was inoperable in an amount to be determined at trial;
- D. Awarding the City its reasonable attorneys' fees pursuant to the Contract, **Ex. A**, Contract at § 3.27;
- E. Awarding the City its costs pursuant to 735 ILCS 5/5-108;

F. Awarding the City any applicable post-judgment interest pursuant to 735 ILCS 5/2-1303; and

G. Granting such other relief as is just and reasonable.

AFFIRMATIVE DEFENSES

1. Plaintiff's Complaint fails to state a claim upon which relief can be granted because, among other things, Plaintiffs cannot establish the elements of a breach of contract.

2. Plaintiff has failed to mitigate its damages, if any.

3. Plaintiff's efforts to recover the claimed damages would amount to an unjust enrichment.

4. Plaintiff's claims are barred by the statute of limitations and the doctrine of laches.

5. Plaintiff's claims are barred because it has failed to substantially perform its obligations under the Contract.

6. Plaintiff's claims are barred because its failure to perform its obligations under the contract have so substantially frustrated the purpose of the contract as to render Motiv's performance thereunder impossible.

**COUNTERCLAIM FOR
BREACH OF CONTRACT/BREACH OF THE DUTY OF GOOD FAITH**

The Parties

1. Motiv is a Delaware corporation with its principal place of business in Foster City, California.

2. Founded in 2009, and headquartered in the San Francisco Bay Area, Motiv is committed to freeing fleets from their dependence on fossil fuels. Motiv manufactures a complete, body-ready, all electric chassis for use in medium-duty vehicles, including step vans, box trucks,

work trucks, shuttle buses, school buses, trolleys and other specialty vehicles. With more than 500,000 miles logged in Fortune 50 fleet deployments, Motiv's all-electric chassis eliminates 100% of vehicle emissions, dramatically reduces operating and maintenance costs, and creates a healthier environment for riders and communities.

3. The City is an Illinois municipal corporation and a home rule unit of local government organized under Article VII of the Constitution of the State of Illinois and the laws of the State of Illinois.

Factual Allegations

I. The City Applies for and Receives a Grant from the United States Department of Energy to Explore the Feasibility of Electrified Garbage Trucks Through a Development Program Involving the Purchase of a Minimum of Five Electric Garbage Trucks.

4. In October 2011, and as part the Chicago Climate Action Plan, the City applied for (and received) a Research, Design & Development ("RD&D") Grant from the United States Department of Energy ("DOE"). A copy of the grant application and accompanying grant documents is attached to Motiv's Notice of Removal at Group Exhibit A and is incorporated herein by reference. According to the federal government, a research, design and development grants is defined generally to involve "a systematic study directed toward fuller scientific knowledge or understanding of the subject studied, [and the development component] is the systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes." See <https://www.grants.gov/web/grants/learn-grants/grant-terminology.html>

5. Pursuant to the terms of the RD&D grant, the DOE asked the City to state the goals of the grant and report throughout the grant period "significant results, including major findings, developments, or conclusions (both positive and negative) and key outcomes or other

achievements.” DOE also asked the City to include “a discussion of stated goals not met.”

6. For its part, the City represented to the DOE that the “projective objectives” supporting the grant included the City’s “purchase [of] five all-electric refuse trucks for the Chicago Department of Fleet Management.” The City further represented the grant’s “project scope” to include the purchase of “a minimum of five all-electric heavy-duty trucks with refuse collection and packing bodies to gather refuse in dense, visible locations by the Chicago Department of Streets and Sanitation.”

7. At the time the City applied for the DOE grant, as well as at the time it contracted with Motiv, the City understood that an all-electric refuse truck did not exist, that the technology needed for such a truck was experimental, and that, in awarding this contract to Motiv, the City effectively would partner with Motiv in an experiment to develop of an all-electric refuse truck. The operational use of a refuse truck imposes significant demands on power that differ from other electric vehicles. The City’s grant application reflected this understanding.

8. In its grant application, the City represented that the “tasks to be performed” included “to demonstrate that the extreme requirements for stop-and-go refuse pickup along with hydraulic refuse packing and ejection can be met through an all-electric, battery-powered vehicle.” To this end, the City again represented that it would “purchase a minimum of five all-electric heavy duty trucks with refuse collection and packing bodies....” Specifically, the City stated:

[Chicago Department of Fleet Management] proposes to purchase *a minimum of five* all-electric heavy-duty trucks with refuse-collection and packing bodies for daily use collecting refuse in dense and highly visible locations by the City of Chicago Department of Streets and Sanitation. The project goal *is to demonstrate* that the extreme requirements for stop-and-go refuse pickup along with hydraulic refuse packing and ejection can be met through an all-electric, battery-powered vehicle. The project will require the supplier to address operation of the collection and packer body using electric or electric-hydraulic systems, seeking greater efficiencies than today's all-hydraulic, constant-power refuse bodies. USDOE’s grant funds will be used to offset the incremental cost of the all-electric refuse

truck, and [Chicago Department of Fleet Management] will fund the base-cost.

The project will yield a field deployable, market-ready downsize electric refuse truck along with data demonstrating its utility and efficiencies. The results of this *technology demonstration* will encourage other users of downsize refuse trucks in high-density areas to replace their own fleets of diesel powered trucks with all-electric models. It is hoped the resultant data and fleet demand will encourage other supplier teams to form and develop their own, similar trucks, growing the market of highly efficient, alternatively powered vehicles. [Chicago Department of Environment] will create a bid process that will abide by USDOE's grant terms and conditions.

(emphasis added)

9. The grant documents broke down the Project into eleven phases: (1) Award phase; (2) Bid Phase; (3) Contract Phase; (4) Initial Truck Order Phase; (5) Initial Build Phase; (6) Initial Delivery Phase; (7) Truck Testing Phase; (8) Final Build Phase; (9) Final Truck Order Phase; (10) Final Delivery Phase; and (11) Data Monitoring Phase.

10. With respect to the Contract Phase, the City represented that “[o]nce a bid is awarded, [Chicago Department of Fleet Management] will order and place into service a minimum of five all-electric refuse trucks.”

11. As part of the Initial Build Phase, the City acknowledged that it would be purchasing the very first all-electric refuse truck in North America, and that such a truck had not yet been developed.

12. The Initial Delivery Phase and Truck Testing Phase contemplated that the prototype all-electric garbage truck would be delivered, tested, and verified.

13. The Final Truck Order Phase was the time at which “[t]he remaining trucks will be ordered.”

14. Finally, the Data Monitoring Phase was supposed to be the time for “ongoing monitoring and data collection” so that the City could report back to the DOE to expand the “base

of knowledge” relative to electrified garbage trucks. Pursuant to the express language of the DOE grant documents:

Over the years, this base of knowledge, techniques, people, and infrastructure is drawn upon again and again for application to commercial technology and the economy, to health and safety, to cost-efficient environmental protection, to the solution of social problems, to numerous other aspects of the public welfare, and to other field endeavor.

15. The City required all bidders, including Motiv, to “carefully examine” the proposal and contract documents, including the DOE grant documents, prior to submitting any bid.

16. Based on its pre-contract review of the Contract documents, including the grant documents, Motiv submitted a bid understanding that the parties intended to develop previously undeveloped technology—electric garbage trucks—through a process of manufacturing and testing a total of five such trucks pursuant to the eleven phases specified in the City’s grant application.

II. The City Partners with Motiv to Develop the “Heretofore Undeveloped” Electric Garbage Trucks.

17. The City selected Motiv as the winning bidder, and on or about October 15, 2012, the City and Motiv entered into a contract (the “Contract”) for all-electric garbage trucks. A copy of the Contract (including all Contract exhibits), is attached to Motiv’s Notice of Removal as Group Exhibit A and is incorporated herein by reference.

18. Consistent with Motiv’s pre-contract understanding and intent, the Contract expressly incorporates the DOE grant documents “as if fully set forth” in the Contract.

19. Pursuant to the express terms of the Contract, the DOE grant documents control and take precedence over any conflicting term or provision in the Contract.

20. Pursuant to the Contract, the parties intended a partnership through which Motiv would develop and the City would road test in real world conditions, the previously undeveloped technology associated with electric refuse trucks.

21. The parties understood and agreed that the electric garbage trucks contemplated in the Contract were experimental.

22. Pursuant to the Contract, the parties expressly anticipated that a minimum of five trucks would be required to develop, test and perfect this experimental technology.

23. The parties expressly acknowledged and agreed that the first five trucks would be experimental in nature, and the City agreed that “experimental trucks are acceptable.”

24. On or about January 6, 2014, Motiv delivered, and the City accepted, the first of the experimental electric garbage trucks.

25. While the experimental electric garbage truck suffered performance issues, on May 15, 2015, Motiv expressly informed the City what the Contract already contemplated, that since the truck was a “prototype, [m]any of the problems and issues that [have been] revealed could only be identified through extended use under a variety of conditions.”

26. Motiv further informed the City “changes to address the needs discovered in practical use will likely continue.”

27. Finally, Motiv informed the City that subsequent models would incorporate the lessons learned and the more mature technology would resolve the performance issues.

28. Despite the fact that the parties were still in the contractually contemplated Phase 7-Truck Testing Phase, on November 23, 2016 the City provided Motiv with a Notice of Default, asserting that that the truck was not “fully functioning” and “otherwise inoperable for extended periods of time.”

29. On May 17, 2018, the City requested that Motiv replace the prototype truck because of its performance issues.

30. To date, the City has not ordered the other four experimental electric garbage

trucks, despite issuing a blanket purchase order for them, and the parties have not transitioned to the contractually contemplated Phases 8-11—the Final Build Phase, Final Truck Order Phase, Final Delivery Phase, and Data Monitoring Phase, respectively.

31. Motiv never would have entered into a contract for the purchase of one experimental garbage truck. To the contrary, Motiv and the City contracted specifically to test and develop the technology so that after five electric garbage trucks, Motiv would have sufficient experience with and knowledge of the application to perfect the technology.

32. Garbage trucks place significantly more and different demands on power trains than other forms of heavy- and medium-duty trucks. For example, they must be able to carry the additional weight of the garbage, which weight continually increases during the intended-use of the truck; they do not travel great distances but rather experience extreme stop-and-go travel and much slower speeds thereby decreasing the ability to self-generate electricity (thereby requiring more batteries and thus carrying more weight); and they require the additional demands of a hydraulic system capable of compacting and expelling the garbage. The power-management systems, software and components necessary for this application had never been used in this type of application.

33. The parties agreed and understood that the development of the technology would require the real-world testing of experimental garbage trucks.

III. Motiv Was First to Market All-Electric Garbage Trucks But Has Lost its Position as the Market Leader Because of the City's Refusal to Perform under the Contract.

34. As the City itself alleges, Motiv manufactured the very first all-electric garbage truck in North America, and the City understood that the industry was in its infancy. Only one electric garbage truck had ever been used in real-world applications prior the truck Motiv designed for Chicago; namely, a single truck in a suburb of Paris, France in 2011, *i.e.*, less than a year

before the Contract.

35. In 2017, *i.e.*, five years *after* Motiv entered the Contract with the City and three years *after* Motiv manufactured the first electric garbage truck prototype, the electric-garbage truck market was estimated to be a \$10 billion a year market globally. See <https://www.trucks.com/2017/05/09/peterbilt-battery-electric-garbage-truck/>

36. As a result, Motiv was the first to enter this growing market and was uniquely positioned to exploit its leadership in the electric garbage truck market in North America.

37. Motiv was depending on the experience and knowledge it would gain from the Contract with the City to further develop and maintain its position as the market leader for electric garbage trucks. As a result, Motiv invested significant internal resources toward the development, design and testing of electric garbage trucks.

38. Since the City's refusal to follow through with its contractual obligations, however, at least four other companies have released their own electric garbage trucks to the North American market.

39. Wrightspeed, Inc.; Recology, Inc.; Mack Trucks (a division of Swedish manufacturer Volvo) and Peterbilt have all released experimental electric garbage trucks of their own since 2016, which trucks are currently being road-tested by cities such as Palo Alto and Seattle.

COUNT I – BREACH OF CONTRACT

40. Motiv restates and realleges paragraphs 1 through 40 as if full stated herein.

41. The Contract is a valid and enforceable contract between the City and Motiv.

42. The Contract required the City to partner with Motiv toward the development and testing of previously undeveloped technology, namely fully-electric garbage trucks for the North

American market, through the purchase, road testing of and reporting on the performance of, and any issues with, at least five such trucks.

43. The purpose of the Contract and the partnership between the City and Motiv was to test and perfect the technology to accommodate the demands of urban refuse pick-up in a North American city.

44. The City breached the Contract by failing to comply with the terms of the development project, including not purchasing five complete experimental garbage trucks for use in real-world conditions and not subjecting the trucks to the contemplated data collection, monitoring and reporting phases.

45. The City's inherent duty of good faith and fair dealing required it to fully comply with the Contract's terms to allow Motiv the opportunity to develop and perfect the technology.

46. Motiv has been damaged by the City's breach. While the actual amount of Motiv's damages will be determined at trial, Motiv estimates that its damages are in the millions of dollars, including the profit from the sale of the first five trucks, the contemplated profit from the maintenance on the first five trucks and the profit and lost opportunity costs resulting from the loss of market share and its position as a market leader in the electric garbage truck market.

WHEREFORE, Motiv respectfully requests that this Court enter Judgment finding the City in breach of the Contract, awarding Motiv damages that include its lost profit on the sale and service of five electric trucks as well as the lost profit for its loss of market share, awarding Motiv its costs and post judgment interest, and awarding Motiv such additional and further relief as this Court deems just and appropriate.

Dated: May 22, 2019

Respectfully Submitted,

MOTIV POWER SYSTEMS, INC.

By: /s/ Michael J Summerhill

One of Its Attorneys

Michael J. Summerhill

msummerhill@freeborn.com

John T. Shapiro

jshapiro@freeborn.com

FREEBORN & PETERS LLP

311 South Wacker Drive

Suite 3000

Chicago, IL 60606

(312) 360-6000

(312) 360-6520 (facsimile)

Attorneys for Defendant

Motiv Power Systems, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2019, I electronically filed the foregoing **ANSWER, AFFIRMATIVE DEFENSES & COUNTERCLAIM OF DEFENDANT MOTIV POWER SYSTEMS, INC.** under the CM/ECF system. I further certify that I served a copy of the **ANSWER, AFFIRMATIVE DEFENSES & COUNTERCLAIM OF DEFENDANT MOTIV POWER SYSTEMS, INC.** by electronic mail on the same date upon the following individuals:

Diane M. Pezanoski

Diane.pezanoski@cityofchicago.org

Fiona A. Burke

Fiona.burke@cityofchicago.org

Christina Chung

Christina.chung@cityofchicago.org

City of Chicago, Department of Law

30 N. LaSalle Street

Suite 1400

Chicago, IL 60602

/s/ Michael J. Summerhill

One of the Attorneys for Defendant
Motiv Power Systems, Inc.