

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

<p>MARINE POWER HOLDING, L.L.C.</p> <p style="text-align: center;">Plaintiff</p> <p style="text-align: center;">VERSUS</p> <p>MALIBU BOATS, LLC</p> <p style="text-align: center;">Defendant</p>

CIVIL ACTION NO. _____

SECTION _____

DISTRICT JUDGE _____

MAGISTRATE JUDGE _____

COMPLAINT

Marine Power Holding, L.L.C. (“Marine Power”), brings its complaint and states its causes of action against Malibu Boats, LLC (“Malibu”).

PARTIES, JURISDICTION AND VENUE

1. Marine Power, is a limited liability company organized and existing under the law of Louisiana with its principal places of business at Harahan and Ponchatoula, Louisiana.

2. Malibu, is a limited liability company organized under the law of Delaware with a principal place of business in Loudon, Tennessee. Malibu may be served with process through its registered agent, The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware, 19801.

3. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a). Under 28 U.S.C. § 1332, Marine Power is a citizen of Louisiana and Malibu is a citizen of Delaware and Tennessee. The parties are therefore completely diverse in citizenship. Additionally, the matter in controversy exceeds the value of \$75,000.00 exclusive of interest and costs.

4. Malibu is personally subject to the jurisdiction of this Court because Malibu contracted with Marine Power in Louisiana and acted in Louisiana. Those acts give rise to Marine Power's suit. Further, this Court may exercise general *in personam* jurisdiction over Malibu by reason of Malibu's systemic contacts with Louisiana.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b). A substantial part of the events and/or omissions occurred within this district. Specifically, Malibu submitted to Marine Power the purchase order at issue for Marine Power to fabricate engines in Louisiana.

BACKGROUND

6. Marine Power designs, manufactures and sells high performance sport boat engines.

7. Malibu manufactures and sells sport boats.

8. In 2013 Marine Power and Malibu entered into a business relationship. Malibu sent purchase orders to Marine Power for sport boat engines that Marine Power would fabricate in Louisiana.

9. On February 7, 2014, Malibu sent Marine Power purchase order 11252440 (the "440 PO") for 200 5.7L "350 HP, Electric Shift engines (the "5.7L Engines").

10. On February 14, 2014, Malibu cancelled the 440 PO and sent to Marine Power purchase order 1125557 (the "557 PO"). Marine Power attaches as Exhibit "A" a copy of the 557 PO.

11. Marine Power accepted the 557 PO in Louisiana. Marine Power worked in Louisiana to fulfill the terms of the 557 PO. The law of Louisiana governs the 557 PO.

12. The 557 PO called for Marine Power to manufacture 571 engines for a total purchase price of \$5,954,102.00. The 557 PO does not provide any dates or details for Marine Power's delivery of these engines. The 557 PO recites that it is a "BLANKET PURCHASE

ORDER” and that “DELIVERY DATE REQUIREMENTS WILL BE IN ACCORDANCE WITH ISSUED DELIVERY ORDERS.”

13. On March 25, 2014, Malibu sent to Marine Power a delivery order in connection with the 557 PO, calling upon Marine Power to deliver to Malibu on April 2, 2014 26 of the 5.7L Engines. Marine Power attaches as Exhibit “B” a copy of this delivery order. On April 2, 2014 Marine Power delivered to Malibu 26 of the 5.7L Engines and Malibu accepted these engines.

14. On April 3, 2014 Malibu sent to Marine Power a revision of the 557 PO -- the “557B PO,” that also says the words, “DELIVERY ORDER.” Marine Power attaches as Exhibit “C” a copy of the 557B PO. Although the 557B PO purports to recite the date of its creation as “2/14/2014” Malibu in reality created it on April 3, 2014. The 557B PO does not recite a date for Marine Power to deliver any of the 348 5.7L Engines, the 6.0L engines or the 6.2LS3 engines that the 557B PO references.

15. On April 3, 2014 Marine Power responded to Malibu concerning the 557B PO via an email. Marine Power attaches as Exhibit “D” a copy of its email, dated April 3, 2014, to Malibu. In this email Marine Power noted that it preferred a three week lead time to make deliveries but that it would, if Malibu so wished, ship the “next load of the 5.7’s (112557B) as early as Monday [April 7, 2014].” Marine Power asked Malibu to let Marine Power “know what works for you [Malibu].” Malibu did not respond.

16. Marine Power, on April 10, 2014, shipped to Malibu 26 of the 5.7L Engines under the 557B PO.

17. In early 2013 Malibu and Marine Power discussed the prospect of Marine Power supplying Malibu with most of another engine -- the 6.2LS3 engine -- that Malibu required for model year 2015. In the fall of 2013 Malibu prepared and sent to Marine Power a supplier

agreement for the model years 2015 and 2016. This agreement contemplated Malibu ordering from Marine Power thousands of engines at a price in excess of \$23,000,000.00.

18. The size and the scope of the production that the supplier agreement forecast demanded that Marine Power incur significant costs. To illustrate, Marine Power would bear the expense of an extensive tooling process to produce the volume of engines to meet Malibu's requirements. Further, Marine Power would incur large investments in parts and inventory, certifications for Malibu's shipments to Europe and other expenses.

19. Marine Power raised with Malibu the issue of these capital commitments. Marine Power reported to Malibu that it/Marine Power was willing to incur these expenses if Malibu would make a firm commitment to Marine Power for a minimum number of engines that Malibu would order and purchase for model years 2015 and 2016.

20. On March 5, 2014, Malibu sent to Marine Power a proposed inventory plan (the "Inventory Plan"). Marine Power attaches as Exhibit "E" a copy of the Inventory Plan. The Inventory Plan dealt with Marine Power manufacturing engines for Malibu's model years 2015 and 2016 boats. The Inventory Plan contains two components – item "A. Build Plan" and item "B. Consumption Plan." The Inventory Plan envisions Marine Power building the 5.7L Engines, the 6.0L engines, the 6.2LS3 engines and the 6.2L LSA engines from March through June of 2014. The Inventory Plan projected that Malibu would take delivery of the engines from July of 2014 through March of 2015. The Inventory Plan specifically recites this: "Scenario A – if no engines required prior to 01JUL14." The Inventory Plan does not reference in any way the 557 PO.

21. By the end of March of 2014 Malibu informed Marine Power that it did not wish to pursue a long term agreement with Marine Power for Marine Power to manufacture engines

for Malibu's model years 2015 and 2016 boats. Marine Power told Malibu that it was willing to continue the negotiations.

22. When the negotiations between Malibu and Marine Power ended in late March of 2014, Marine Power suggested that the parties continue with the purchase order system that they already had in place.

23. On March 27, 2014 Malibu notified Marine Power that Malibu would not be using Marine Power as a supplier of any engines for model year 2015.

24. Prior to the unsuccessful conclusion of the parties' negotiation of a long term supply agreement Malibu had not raised with Marine Power any issue about any engine that Marine Power had manufactured and delivered. Up to this point, Malibu had never rejected a delivery or complained about the quality, the condition or the timing of the delivery of any engine that Marine Power manufactured. At the end of March of 2014 Malibu's conduct changed drastically.

25. On March 28, 2014 Malibu wrote Marine Power to summarize a telephone conference call the prior day between the representatives of Marine Power and Malibu. Marine Power attaches as Exhibit "F" a copy of the email with attachment, dated March 28, 2014, from Ritchie Anderson at Malibu to Mr. Gilly at Marine Power. Malibu informed Marine Power that it would not "move forward" with Marine Power "for 2015." Malibu requested Marine Power to tell it/Malibu whether Marine Power continue to supply Malibu with the "LS3 engines for the remaining 2014 model year" and "how Marine Power would like to handle the current P.O. [sic] that . . . [it has] for the 675 engines that [Malibu] requested for safety stock."

26. On March 28, 2014 Marine Power responded to Malibu's email of the same day. Marine Power attaches as Exhibit "G" a copy of its letter, dated March 28, 2014, to Malibu. In this letter Marine Power stated as follows:

Marine Power will continue to build for all confirmed purchase orders. We have only received one delivery order and we will be meeting the request. Please send us an official delivery schedule for the confirmed purchase orders for approval of both parties. If Malibu wants Marine Power to stop building for the purchase orders then please send a written stop order. If a stop order is received, negotiations will begin on a cancellation fee. Fee negotiations will include inventory on hand, on order, development cost, time value of money and any other cost associated with the confirmed purchase order. Confirmed purchase orders will not be cancelled until Marine Power acknowledges in writing that a cancellation agreement has been completed and therefore terminates the PO's.

27. Thereafter, Marine Power requested Malibu to provide it/Marine Power with delivery orders. To set forth its position and to attempt to prompt Malibu to inform Marine Power what Malibu proposed to do, on April 1, 2014, Marine Power wrote to Malibu. Marine Power attaches as Exhibit "H" a copy of its letter, dated April 1, 2014, to Malibu.

28. In its letter of April 1, 2014 Marine Power stated that the 557 PO recited that Malibu would provide Marine Power with "delivery date requirements. To date Marine Power is currently manufacturing engines for Malibu but Malibu has only provided Marine Power with one delivery order." Additionally, in this letter Marine Power set out proposals for Malibu to consider should Malibu wish to end its relationship with Marine Power.

29. On April 3, 2014 Mr. Ditchfield at Malibu telephoned Mr. Gilly at Marine Power. For the first time Malibu took the position that the Inventory Plan that on March 5, 2014 it sent to Marine Power was a "delivery schedule" for the 557 PO. Marine Power did not agree with Malibu's erroneous characterization of the Inventory Plan. From a practical standpoint Marine Power could not, on April 3, 2014, make deliveries to Malibu on March 10 and 24, 2014.

Nevertheless, Marine Power stated that it would continue to build for Malibu the engines in the 557 PO, revised by the 557B PO, as well as the engines in Malibu's purchase orders 1125993, 1126534, 1127530, 1126533 and 1124193. Messrs. Gilly and Ditchfield also discussed option 3. a. through g. for resolution that Marine Power set out in its letter of April 1, 2014 to Malibu. On April 3, 2014, Mr. Gilly wrote Mr. Ditchfield to memorialize the substance of their telephone conference earlier that day. Marine Power attaches as Exhibit "I" a copy of Marine Power's letter (sent via email), dated April 3, 2014, to Malibu.

30. On April 4, 2014, Malibu wrote Marine Power and erroneously contended without specification that "Marine Power is already in breach of certain delivery schedules." Marine Power attaches as Exhibit "J" a copy of this letter. Malibu did not, however, cancel any purchase order. Instead, Malibu proposed this: "(1) on April 11, 2014 to terminate all outstanding purchase orders with the exception of purchase order 1125993; (2) . . . to tender a one-time lump sum payment to Marine Power in the amount of \$200,000.00, within thirty (30) days of April 11, 2014; (3) . . . purchase from Marine Power all engines that Marine Power has completed by April 11, 2014, which were constructed in furtherance of the outstanding purchase orders; (4) on April 11, 2014, Marine Power execute and deliver to Malibu a full and final release . . . of Malibu under all outstanding purchase orders, with the exception of 1125993; and (5) . . . purchase all engines contemplated by purchase order 1125993."

31. On April 7, 2014 Marine Power wrote to Malibu to inquire whether Malibu wished to elect the option of canceling all open POs for a fee of 15% of the price of the POs plus \$150,000.00 fee for retooling or to continue with the open POs, including the 557 PO. Marine Power attaches as Exhibit "K" a copy of this letter. Marine Power for the fourth time requested Malibu to furnish it/Marine Power with a delivery schedule for the 557 PO.

32. On April 10, 2014, Malibu wrote to Marine Power and erroneously asserted that Marine Power had breached its obligations under the 557 PO. Marine Power attaches as Exhibit "L" a copy of Malibu's letter, dated April 10, 2014, to Marine Power. In total contradiction of its representations on April 3, 2014 Malibu falsely alleged that with respect to the 557 PO "Marine Power has not delivered in accordance with the schedule to which Mr. Gilly committed on March 5, 2014," again characterizing the Inventory Plan as a "delivery schedule." Marine Power's assertion on April 10, 2014 that Malibu was in breach of the 557 PO was plainly pretextual.

33. On April 11, 2014 Malibu again wrote to Marine Power. Marine Power attaches as Exhibit "M" a copy of this letter. This letter plainly demonstrates Malibu's bad faith and pretextual behavior. Mr. Ditchfield writes to Mr. Gilly and opens with these two sentences: "You did not receive a reply to your email of 03 April 2014 (Subject: Re:Delivery Order for the Next 26) because PO 112557B already had a delivery date indicated for the 26 engines in accordance with the delivery schedule. This agreed upon delivery schedule provides the dates upon which each allotment of engines is/was required to be delivered by Marine Power." Malibu's assertions were and remain unfounded. The 557 PO recites in bold lettering that "DELIVERY DATE REQUIREMENTS WILL BE IN ACCORDANCE WITH ISSUED DELIVERY ORDERS." The 557 PO itself is not a "delivery order." The Inventory Plan that Malibu on March 5, 2014 sent to Marine Power is not a "delivery order." Furthermore, the Inventory Plan does not reference the 557 PO.

34. In its letter of April 11, 2014 to Marine Power Malibu also complains about Marine Power not furnishing it/Malibu with the serial numbers of the engines that Marine Power

had completed. Marine Power furnishing Malibu with serial numbers of completed engines is not a term or condition of the 557 PO.

35. On April 14, 2014, Marine Power wrote to Malibu. Marine Power attaches as Exhibit "N" a copy of its letter, dated April 13, 2014, to Malibu. In this correspondence Marine Power noted that the Inventory Plan "did not reference any purchase orders nor did any purchase orders reference the [Inventory Plan]." Additionally, the 557 PO stated that "delivery date requirements will be in accordance with issued delivery orders." Marine Power reiterated its commitment to meeting Malibu's "delivery requirements from your plan. Marine Power will ship all of the attached serials [sic] numbers this week as we now know to use [the Inventory Plan] as firm shipping dates." Marine Power also inquired whether Malibu would revise again the 557 PO as it had on April 3, 2014.

36. Marine Power further informed Malibu that Marine Power would that week ship to Malibu a number of the 5.7L Engines as partial satisfaction of the 557 PO. Marine Power believed that its actions resolved the issues that Malibu raised in its letter of April 11, 2014 to Marine Power. Malibu did not respond.

37. On April 15, 2014, Malibu wrote to Marine Power and unilaterally and in bad faith terminated the 557 PO. Marine Power attaches as Exhibit "O" a copy of this letter. Malibu reported that on April 11, 2014 – the day that Malibu wrote Marine Power to complain about untimely deliveries under the 557 PO -- it received a shipment from Marine Power of the 5.7L Engines. Aside from withholding this information in its letter of April 11, 2014 to Marine Power Malibu shifted its complaint to this: the shipment "contains a number of engines that Marine Power is required under PO 112557 to hold as inventory." There is nothing in the 557 PO that

obligated Marine Power to hold certain of the 5.7L Engines as inventory. Malibu's false assertion demonstrates its bad faith and pretextual behavior.

38. In an attempt to justify its bad faith behavior and wrongful termination of the 557 PO, Malibu made a number of false statements. First, Malibu claimed Marine Power did not follow the Inventory Plan, that Malibu wrongly styles as a "production and delivery schedule." Second, Malibu deemed Marine Power's shipment of the 5.7L Engines "nonconforming" because the serial numbers on the delivered engines did not match the serial numbers that it/Malibu expected to receive. That is another baseless excuse to reject Marine Power's shipment and to terminate the 557 PO. The serial numbers on the engines exist for tracking and accounting purposes only. They do not have anything to do with the performance or the quality of the engines.

39. Malibu's pretextual assertions show that it lacked any good faith ground to reject the 5.7L Engines or to terminate the 557 PO. Without any justification for doing so, Malibu in bad faith breached the 557 PO.

40. Marine Power incurred substantial expenses to perform its obligations under the 557 PO. Marine Power is now confronted with significant damages owing to Malibu's breaches of the 557PO.

COUNT ONE –BREACH OF CONTRACT/BAD FAITH BREACH OF CONTRACT

41. Marine Power repeats and realleges paragraphs 1. through 40. as if fully set forth herein.

42. Marine Power and Malibu entered into the 557 PO, a valid and enforceable contract. Through it, Marine Power agreed to fabricate and Malibu agreed to buy the engines listed in the 557 PO.

43. As a party to that 557 PO, Marine Power is a proper party to sue for its breach.

44. Marine Power entirely or substantially performed its obligations under the 557 PO.

45. Malibu breached its obligations under the 557 PO.

46. Malibu's breaches of the 557 PO have damaged Marine Power.

47. Malibu breached the obligations that it owed Marine Power under the 557 PO. Malibu, intentionally and maliciously, breached its obligations under the 557 PO. Malibu's conduct constitutes bad faith breach of contract.

48. Marine Power is entitled to receive a judgment for all of its foreseeable and unforeseeable damages that Malibu's bad faith breach of the 557 PO caused Marine Power.

COUNT TWO – DETRIMENTAL RELIANCE

49. Marine Power repeats and realleges paragraphs 1. through 48. as if fully set forth herein.

50. Should the Court determine that the 557 PO is not an enforceable contract Marine Power asserts a claim against Malibu for detrimental reliance and unjust enrichment under article 1967 of the Civil Code of Louisiana.

51. Malibu made promises to Marine Power that Malibu would pay Marine Power for fabricating the engines listed in the 557 PO.

52. Marine Power reasonably relied on Malibu's promises. For two years prior to April 15, 2014, Marine Power provided support to Malibu under various business scenarios. Based upon Malibu's promises and POs, Marine Power made substantial investments in tooling, inventory [ADD]. Malibu's wrongful termination of the 557 PO severely damaged Marine Power.

53. Malibu knew or should have known that Marine Power would rely on Malibu's promises.

54. The Court may avoid injustice only enforcing Malibu's promises to Marine Power regarding the 557 PO or, alternatively, awarding Marine Power damages.

55. Marine Power requests a trial by jury on all issues.

WHEREFORE, Marine Power respectfully prays as follows:

a. That the Clerk of Court issue proper long-arm process to serve upon Malibu, requiring Malibu to answer this complaint within the time required by law; and

b. That the Court enter a judgment in its favor and against Malibu, awarding it damages in an amount to be determined at trial against Malibu for bad faith breach of the 557 PO or, in the alternative, for its detrimental reliance on Malibu's promises regarding the 557 PO together with interest, its attorneys' fees, costs and such other as well as all other relief as may be just and equitable.

Respectfully submitted,

PHELPS DUNBAR LLP

BY: /s/ Bruce V. Schewe

Patrick A. Talley, Jr. (Bar # 1616)
Bruce V. Schewe, T.A. (Bar # 11771)
Bryant S. York (Bar # 34165)
PHELPS DUNBAR LLP
Canal Place
365 Canal Street • Suite 2000
New Orleans, Louisiana 70130-6534
Telephone: (504) 566-1311
Facsimile: (504) 568-9130
Email: patrick.talley@phelps.com
bruce.schewe@phelps.com
bryant.york@phelps.com

**ATTORNEYS FOR MARINE POWER
HOLDING, L.L.C.**

SERVICE UPON:

Malibu Boats, LLC
per La. R.S. 13:3201-3207