

UNITED STATES COURT OF FEDERAL CLAIMS

XP VEHICLES, INC., a California Corporation,)
1001 Bridgeway, #166)
Sausalito, CA 94965)

and)

LIMNIA, INC., a Delaware Corporation,)
601 Van Ness Ave., Suite E3 613)
San Francisco, CA 94102)

Plaintiffs,)

Case No.1:12-cv-00774-MMS

v.)

THE UNITED STATES DEPARTMENT)
OF ENERGY,)

Defendant.)
_____)

FIRST AMENDED VERIFIED COMPLAINT

(For Breach of Contract, Unlawful Taking, Estoppel and 28 U.S.C. §1498(a) Compensation)

Parties

1. Plaintiff XP VEHICLES, INC. (“XPV”), a dissolved California corporation, was at all times relevant an advanced technology vehicle company. XPV has the capacity and authority to sue Defendant pursuant to Cal. Corp. Code §§ 2010, 2001, and Fed. R. Civ. P. 17(b)(2). It is a real party in interest under Fed. R. Civ. P. 17(a).

2. Plaintiff LIMNIA, INC. (f/k/a “FuelSell Technologies, Inc.”) (collectively “Limnia”), is a Delaware corporation in good standing that was, at all times relevant, an advanced technology energy system company. It is a real party in interest under Fed. R. Civ. P. 17(a).

3. At all times relevant, XPV and Limnia were Silicon Valley-based innovative “green technology” sister companies.

4. Defendant is THE UNITED STATES DEPARTMENT OF ENERGY (“DOE”), a federal agency.

Jurisdiction and Venue

5. Jurisdiction and venue are pursuant to U.S. Const. Art. III and 28 U.S.C. §§ 1491 and 1498(a).

Facts

Background

6. Pursuant to 42 U.S.C. § 17013, DOE—through Secretary of Energy Steven Chu (“Chu”), Director of Advanced Technology Vehicle Manufacturing Loan Program Lachlan Seward (“Seward”), their staff, advisors and consultants—administered the “Advanced Technology Vehicle Manufacturing Loan Program” (the “ATVM Loan Program”).

7. Congress created the ATVM Loan Program to support the manufacture of advanced technology vehicles and components in the United States and to reduce U.S. dependency on foreign oil. In 2008, Congress authorized DOE to make \$25 billion in ATVM loans. DOE currently has approximately \$16 billion of unused lending authority.

8. At all times relevant, DOE had actual or constructive knowledge that the ATVM Loan Program evaporated private investment capital for advanced technology vehicle manufacturing and distribution because venture capital and institutional lenders could not compete with government interest and repayment terms (1%-3% and up to 35 years, respectively).

9. Pursuant to 42 U.S.C. §§ 16511 and 16513, DOE—through Chu, Seward, their staff, advisors and consultants—also administered the “§ 1703 Loan Guarantee Program” (the “LGP”).

10. Congress created the LGP to support innovative clean energy projects that are typically unable to obtain conventional private financing due to high technology risks by authorizing DOE to guarantee up to eighty percent of a loan for projects that “avoid, reduce, or sequester air pollutants or anthropogenic emissions of greenhouse gases; and employ new or significantly improved technologies as compared to commercial technologies in service in the United States at the time the guarantee is issued.” DOE currently has approximately \$34 billion of unused lending authority.

11. Since 2002, Limnia and XPV have collaborated with DOE scientists at Sandia National Laboratory (“Sandia”) and elsewhere on advanced technology vehicle development. Limnia and XPV provided DOE with confidential business information, intellectual property and prototypes of advanced technology vehicle energy storage systems, chassis and body materials and construction, and electronics, and DOE provided Limnia and XPV a grant, technical support and validation services.

XPV’s ATVM Loan Program Application

12. Responding to a DOE solicitation, on November 10, 2008, XPV applied for \$40 million in ATVM Loan Program funds to mass produce an advanced technology, family-friendly SUV-style vehicle (“XPV’s SUV”). It offered DOE collateral independently valued at over \$100 million as security for this loan.

13. At all times relevant, XPV had operations, including potential manufacturing facilities, in Detroit (through Roush Automotive and other contract facilities), the San Francisco Bay area, Nevada and Utah.

14. XPV's team included highly experienced industry sales executives, managers and designers (including the senior creation staff for the Corvette and the Mustang) and aerospace industry professionals. They designed XPV's SUV to be affordable (less than \$20,000 in its base configuration); to have a virtually unlimited range without the need for either gasoline, garage or extension cords to charge; to recharge rapidly via a "hot-swap" system; to be produced quickly and cheaply by subcontracting existing and underutilized factories, workers and machines; and to be easily repaired.

15. One key innovation, based on a decade of research, was the use of polymer plastics and skinned expanded foam pressure membranes to replace metal doors, body panels, hoods and roofs on a lightweight alloy frame. Consequently, XPV's SUV could have a curb weight of less than 1,400 pounds (approximately one-third the weight of a Toyota Prius). This design also improved vehicle safety because the foam-skinned polymer membranes functioned as a wraparound, pre-deployed "airbag" to withstand impacts and damp out crash damage.

16. At all times relevant, XPV's SUV's critical parts had either been tested or used in industry-proven "off the shelf" applications. For example, the SUV's pressure membrane body technology was widely used in military applications, aerospace systems, naval and homeland security deployments worldwide, airbags, watercraft, Mars landing equipment and even buildings and arenas.

17. At all times relevant, XPV was in discussions with private sources of capital including Wells Fargo Bank; developing a distribution network; and otherwise preparing to

commence production and sales. XPV's pending customers and financial partners included the Ranson Green Community Development Foundation, ZAP, Detroit Electric, XPV's sister company Limnia and over forty distributors and resellers accounting for potential sales in excess of the first anticipated production run.

18. XPV's ATVM Loan Program application contained confidential business information, as defined by 10 C.F.R §§ 1004.10(b)(4) and (11), and 5 U.S.C. § 552(b)(4), including a patented solid-state NaALH (aka "NALH") energy storage system and patented pressure membrane technology, among other things.

19. DOE, in nondisclosure agreements and in consideration for XPV's and Limnia's submission of ATVM Loan Program applications, promised to guard this confidential business information from unauthorized disclosure, use or infringement.

20. DOE also promised to evaluate ATVM Loan Program applications on a "first in, first out" basis; to treat all applicants fairly and to provide a level review using objective published criteria; and to make ATVM Loan Program funds available beginning by the end of December 2008, but no later than January 2009, to those who qualified for such funds.

21. On December 2, 2008, DOE acknowledged receipt of XPV's application and requested additional information. *See Exhibit 1*. XPV provided this additional information and on December 31, 2008, XPV's application was deemed substantially complete. DOE said that it would specifically request additional information as needed. *See Exhibit 2*. Upon information and belief XPV's ATVM Loan Program application was among the first deemed substantially complete by DOE.

22. At all times relevant, XPV qualified for ATVM Loan Program funds under DOE's published criteria and was in fact deemed a "qualified applicant" by DOE. DOE's own

Excel comparison matrices dated December 29, 2008, and March 2, 2009, placed XPV in the top 5% of all applicants.

23. DOE's representations and promises led XPV to believe that DOE would begin processing XPV's ATVM Loan Program application upon receipt but no later than the end of December 2008, and that the review process would take a matter of weeks consistent with normal commercial lending practices and procedures.

24. However, XPV soon found that DOE had reneged on its promises and that DOE's review was taking months not weeks. Discomfited by DOE's delay, which effectively blocked XPV's access to private capital loans and investment and prevented XPV for gearing up for production, XPV repeatedly offered DOE engineering, financial and other information to proactively speed and inform the agency's review.

25. At all times relevant, XPV was unaware both that its ATVM Loan Program application had been "set aside" in favor of applications from politically-connected government cronies and that DOE had "fixed" the ATVM loan process to benefit political donors. XPV also was unaware that DOE had no intention of approving XPV's ATVM Loan Program application under any circumstances, notwithstanding all of its representations and assurances to the contrary, because XPV competed with government-favored companies. Instead, to the best of XPV's knowledge, DOE was acting in good faith, and in accordance with the law, to carry out Congress's intent by lending up to \$25 billion for the development and production of advanced technology vehicles in the United States to reduce U.S. dependency on foreign oil.

26. On April 23, 2009, Jason Gerbsman, DOE's Chief of Staff and Senior Investment Officer at the Loan Programs Office Automotive Division notified XPV that:

[XPV] has submitted a substantially complete application and has been assigned to both a technical eligibility and merit review team, as well as a financial

viability analysis team. The technical team is very close to finishing their evaluations on both eligibility and project merit, and the financial team will be launching a more detailed and interactive due diligence phase of the [XPV] application review very soon. Following the technical and financial evaluation under the second stage of the process, we will move into the underwriting phase where our goal is to negotiate a conditional commitment, including a detailed term sheet. This will be followed by the fourth phase of the loan process where the final details will be negotiated and the loan will be closed.

27. On May 26, 2009, Gerbsman offered XPV an in-person meeting to discuss “next steps.”

28. On May 28, 2009, XPV flew a representative from California to meet with Gerbsman. Gerbsman said that DOE had determined “everything was in order” with XPV’s ATVM Loan Program application; that “everything looked good”; and that XPV “appeared to be fully compliant and passed technical review.”

29. Shortly thereafter, XPV discovered that Tesla Motors, Inc. (“Tesla”) and Fisker Motors, Inc. (“Fisker”) were receiving special assistance from DOE staff with the ATVM Loan Program application process. Fisker was even given extraordinary access to DOE staff time, offices and conference rooms in DOE’s headquarters at no charge. Both Tesla and Fisker were XPV competitors.

30. XPV requested similar assistance from DOE staff but was denied it because, as DOE staff put it, XPV’s application was so good that special assistance was not needed.

31. Notwithstanding DOE’s delays and the bankruptcy of other industry players due to these companies’ failure to meet consumer needs, XPV continued to grow. On June 15, 2009, XPV informed DOE that it was a semi-finalist in the Forbes “America’s Most Promising Companies List” for that year.

32. In late June 2009, XPV had occasion to speak with a corporate executive who was seeking DOE funds. The executive said that he had been “screwed over” by DOE and had

wanted to know if others had similar experiences. He said that his company had suffered “bad dealings” with Matt Rogers, a “stimulus advisor” to Chu from McKinsey & Company, and Steven Spinner, a DOE loan program office official. Spinner, an accomplished campaign contribution “bundler” who had raised millions of dollars for the White House, was given this important government position in exchange for his fundraising. Spinner too had worked at McKinsey & Company and, according to a biography posted by the Center for American Progress, was a Tesla advisor and investor.

33. The executive claimed that Rogers and Spinner were playing favorites with government money. He gave XPV Spinner’s personal cell phone number and told XPV to call Spinner and ask why XPV’s ATVM Loan Program application had stalled. XPV texted Spinner and then called him. Spinner answered the phone and said words to the effect of “Do not ever call me again. The awards have already been decided.”

34. On June 24, 2009, DOE announced \$8 billion in ATVM loans to Ford Motor Company (“Ford”), Nissan North America, Inc. (“Nissan”) and Tesla. DOE gave Tesla \$465 million at a rate of 1.6% and on extremely favorable below-market terms to manufacture an expensive electric car targeted at wealthy actors, media personalities and businessmen, not average American families.

35. On June 29, 2009, XPV wrote to Gerbsman again asking for action on its ATVM Loan Program application. XPV told Gerbsman that other lenders were hanging back until after DOE issued its term sheets.

36. Over the next seven weeks, Gerbsman and other authorized DOE representatives repeatedly assured XPV that “everything was fine”; “everything is on-track”; and “you [XPV]

appear to meet every criteria” with respect to its ATVM Loan Program application. XPV was even told that “we [DOE] should be able to announce [a loan] any day now...”

37. However, on August 21, 2009, DOE denied XPV’s ATVM Loan Program application. *See Exhibit 3.*

38. DOE, through Seward, said that XPV’s application was “determined to be eligible” in accordance with the “evaluation criteria” in 10 C.F.R. § 611.103 but that DOE was “not in a position to award every eligible application [ATVM Loan Program funds].” DOE said necessity required it to “choose applications that are most likely to use [ATVM Loan Program] proceeds in a way that will best achieve the goals of the program” and that XPV’s application was rejected on this basis after a “merit review.” DOE did not disclose the criteria used to weigh competing qualified applications nor explain how or why XPV fell short in the supposed “merit review.”

39. XPV then asked DOE to specify its reasons for denial.

40. In an email to DOE’s Chris Foster, XPV requested DOE’s merit review documents and asked how DOE could reasonably conduct a ten-month comparative review of XPV’s ATVM Loan Program application without working with a single company engineer or senior project staff member for even one percent of the time that DOE staff spent with Tesla, Nissan, Ford and/or Fisker (the ATVM Loan Program “winners”) during the same period of time.

41. Foster did not answer.

42. On or about August 26, 2009, XPV called Foster directly and Foster picked up the phone.

43. Foster told XPV that he would pull XPV's file and read to XPV the reasons given there for DOE's denial.

44. Foster said that the file indicated that DOE had denied XPV's application because XPV's SUV did not use E85 gasoline; XPV was not planning on building "enough" vehicles; XPV was not planning on government sales; XPV's electric motors and batteries were too futuristic and not developed for commercial use; XPV's SUV was a "hydrogen car"; and XPV had underestimated the cost of metal body fabrication.

45. At all times relevant, however, DOE had actual knowledge that the "reasons" it had given for denying XPV's ATVM Loan Program application were baseless pretexts.

46. First, none of the politically-connected ATVM Loan Program winners used E85 gasoline in all-electric vehicles.

47. Second, XPV's SUV was designed for fast and inexpensive mass production. This is why it was based on the use of commonly available parts from existing commercial sources with multiple points of supply and why it could be sold at a base price of only \$20,000. Unlike the vehicles produced by the government crony companies funded by DOE, XPV's SUV was not merely a specialty product aimed at rich people seeking to make a social or political statement through their choice of vehicle. Instead, it was designed to be affordable and available to the vast majority of American families and consumers, thereby ensuring that there would be a mass market and a high volume of potential sales.

48. Third, XPV's business plan specifically provided for large government and fleet sales. Defendants were aware this plan had been developed by an experienced automotive fleet sales expert responsible for over \$2 billion in sales for domestic automakers.

49. Fourth, XPV's SUV's "futuristic" electric motor and battery configuration had been in commercial and government use for decades.

50. Fifth, XPV's SUV was an electric and not a hydrogen vehicle.

51. Sixth, XPV's SUV minimized the number of metal parts, using safer and easier to source and fabricate polymers and plastics.

52. As XPV was explaining to Foster that the "reasons" given for DOE's denial were actually no reasons at all, Seward entered Foster's office and directed him to terminate the call. Seward told Foster to advise XPV that it would receive a letter from DOE with respect to its concerns.

53. Despite the passage of weeks, no letter was forthcoming.

54. Therefore, on September 21, 2009, XPV wrote to Chu requesting reconsideration of DOE's denial of its ATVM Loan Program application. *See Exhibit 4.* In this letter, XPV demonstrated that the "reasons" for DOE's denial read by Foster from XPV's file were false. It asked Chu to explain why DOE staff repeatedly assured XPV that approval would be forthcoming and that no additional information was necessary; to describe the merit review criteria; and to justify why government-crony companies that applied after XPV were reviewed earlier, given the benefit of extensive access to and interaction with DOE staff (a benefit denied to XPV), and then awarded funds.

55. On October 23, 2009, Seward wrote to XPV. *See Exhibit 5.* He did not answer XPV's questions to Chu. Instead, Seward attempted to backfill the record with new but equally baseless justifications for DOE's denial of XPV's qualified application.

56. To begin with, Seward said that XPV's application was "deemed Substantially Complete on November 10, 2009." In fact, XPV's application had been deemed substantially complete on December 31, 2008.

57. Seward said that the "proposed technology appeared...to be at a development stage and not yet ready for commercialization" and that the "assumption that the vehicle concept would be ready for production in three years" was a "significant weakness" due to the "high level of risk associated with the design." In fact, XPV's SUV technology had been used commercially by the U.S. Department of Defense, NASA and the automobile industry; the politically-connected companies that were awarded ATVM Loan Program funds were no further ahead in production than XPV; and elements of XPV's "high risk design" were already in use by Toyota and Nissan in the retail consumer market worldwide.

58. Seward said "the proposed project's impact on fuel economy...was determined to be weak." In fact, non-gasoline powered automobiles were uniformly acknowledged by DOE and other industry experts as the most significant source of fuel economy improvement. Moreover, XPV's SUV promised better fuel economy than any of the ATVM Loan Program "winners" (Tesla, Nissan, Ford or Fisker) proposed or actually offers to this day.

59. Seward said "A review of the advanced fuels in your project and the feasibility of that energy source...was questionable." In fact, the fuels, products and subparts of the "questionable" energy source are readily available to consumers at REI Sporting Goods, Amazon.com and Safeway supermarkets, among other places.

60. Seward said "A review of the calculations and assumptions supporting your claims for reductions in petroleum use were deemed to be unrealistic." In fact, XPV's

calculations and assumptions were confirmed by institutional research and white papers from respected government and university agencies.

61. Seward said that XPV's project "may be commercializable in the future, but is far too early in the development process to qualify" for an ATVM loan. In fact, XPV was at least as far along in the "development process" as Tesla and Fisker, the politically-connected companies funded by DOE.

62. Seward's letter was the first time any of these issues had been raised by DOE with XPV, notwithstanding ten months of "review" including multiple meetings, phone calls and emails.

63. Furthermore, not only had DOE never before raised these "issues" with XPV, it had affirmatively declined, over a period of months, to seriously consult with XPV's engineers and denied XPV the "interactive" review that it had promised to give in April 2009, and that it had in fact given to the politically-connected ATVM Loan Program winners Tesla and Fisker.

64. Critically, DOE did *not* say in Seward's October 21, 2009, letter or at any other time that XPV had offered inadequate security for the ATVM Loan Program funds; that XPV was a repayment risk; that XPV had failed to demonstrate that there was a "reasonable prospect of repayment" of the proposed loan; that XPV had failed to demonstrate it was capable of building, distributing or selling the proposed SUV; or that XPV had failed to demonstrate "financial viability without the loan" as required by law.

65. To this day, neither Foster nor Chu nor Seward nor anyone else at DOE has ever provided XPV with DOE's "merit review" evaluation records or criteria. DOE has repeatedly refused Freedom of Information Act requests aimed at securing disclosure of these records and criteria.

66. At all times relevant, XPV qualified for the requested ATVM Loan Program funds pursuant to 10 C.F.R. Part 611.

67. At all times relevant, XPV had numerous viable offers from potential investors, manufacturing partners, distributors and customers. However, DOE's wrongdoing, including its purposeful delay and baseless denial of XPV's ATVM Loan Program application, denied XPV the benefit of these business opportunities.

Limnia's ATVM Application

68. Or about February 1, 2009, Limnia applied for \$15 million in ATVM Loan Program funds to produce a "best of breed and state of the art" advanced technology vehicle component energy storage system using Limnia's patented technology. Sandia was designated as a key subcontractor in this effort.

69. On April 10, 2009, DOE denied Limnia's application on the grounds that the components in question "[did] not appear to be designed for installation in an advanced technology vehicle..." See Exhibit 6. However, these grounds were false and a mere pretext to preserve ATVM Loan Program funds for government-favored companies and/or to protect those companies from competition.

70. On April 11, 2009, Limnia requested reconsideration, reminding DOE the relevant patents stated that the components in question were meant for use in advanced technology vehicles; that Sandia's vehicle technologies group was the prime subcontractor for the project; and that DOE had funded the technology's development specifically for such use. See Exhibit 7.

71. On May 13, 2009, DOE again denied Limnia's application because the components were "not installed in the advanced technology vehicle." This time, though, it asked

for more information. See Exhibit 8. On June 3, 2009, Limnia responded with the requested information. It again requested reconsideration pointing out that the questioned components “*must* be installed prior to use in an advanced technology vehicle and are, accordingly, designed for such installation, and therefore [are]... ‘qualifying components.’” See Exhibit 9.

72. DOE never responded to this letter.

73. At all times relevant, Limnia qualified for the requested ATVM Loan Program funds pursuant to DOE’s criteria at 10 C.F.R. Part 611.

Limnia’s LGP Application

74. At all times relevant, DOE recognized that the LGP application fees and process were unduly onerous and burdensome.

75. On or about February 1, 2009, Limnia participated in a conference call with John Podesta, Chu, and Interior Secretary Kenneth Salazar, during which Chu said that he felt the LGP fees and process were unduly onerous and burdensome. Chu further promised to waive the application fee.

76. Relying on this promise, Limnia filed a LGP application on or about February 10, 2009, with a cover letter stating that it was Limnia’s understanding DOE had waived the application fee.

77. Limnia heard nothing from DOE until February 26, 2009, the application deadline. On that day, DOE’s Myrtle Gross called and said that the initial application fee of \$18,000 had to be wired by midnight for Limnia’s LGP application to be considered. This was Limnia’s first and only notice that DOE reneged on its promise to waive the LGP application fee.

78. Limnia had the funds to make payment but could not complete the transaction by the midnight deadline. Therefore, it considered the matter as closed.

79. On February 27, 2009, Daniel Tobin, DOE's Loan Programs Office Senior Investment Officer, called Limnia and said that there were "a few days of flexibility" to send in the application fee and promised to provide wire instructions. Tobin also promised to "pre-review" the application and to call back with feedback for Limnia's investors.

80. Over the next six weeks, Limnia sent DOE emails and letters, and made phone calls, seeking what Tobin had promised. However, Limnia never heard back from Tobin or anyone else at DOE with wire instructions or the promised pre-review. Instead, on April 9, 2009, DOE dismissed Limnia from the LGP without recourse because of "non-remittance of the required application fee..." See Exhibit 10.

81. Limnia requested reconsideration of this decision which DOE denied.

DOE's Cronyism and Program Abuses

82. Because DOE's "merit review" criteria and process were so opaque, the taxpayer-funded ATVM Loan Program and LGP became cash cows for government cronies.

83. Politics and political pressure infected these programs, shaping, in whole or in part, the judgment of DOE's ultimate decision makers including Chu, Seward, their staff, advisors and consultants.

84. In February 2011, GAO issued an investigative report on DOE's ATVM Loan Program. See Exhibit 11 "Advanced Technology Vehicle Loan Program Implementation Is Under Way, but Enhanced Technical Oversight and Performance Measures Are Needed," GAO-11-145 (Feb. 28, 2011).

85. GAO found that DOE had made billions in loans without engaging “engineering expertise needed for technical oversight.” As a result, GAO said “DOE cannot be adequately assured that the projects will be delivered as agreed.”

86. Furthermore, GAO found that “DOE has not developed sufficient performance measures that would enable it to fully assess the extent to which it has achieved its...program goals” contrary to sound administrative agency practices.

87. DOE’s irrational failure to employ appropriate engineering expertise for application reviews and its arbitrary and capricious refusal to use objective administrative performance measures facilitated the politicization of DOE’s loan program.

88. In truth, DOE’s ATVM Loan Program was nothing more than a veil for political officials to steer hundreds of millions of taxpayer dollars to government cronies, including Tesla and Fisker.

89. For example, Tesla’s loan of \$465 million, announced on June 24, 2009, was obtained in whole or material part through the efforts and influence of its political patrons.

90. These patrons included Steven Westly, who was a major campaign contributions “bundler” for the White House. Westly’s fundraising bought him special White House access and an appointment on a key DOE advisory board. Upon information and belief, Westly sat on Tesla’s board from March 2007 to December 2009, during the time when DOE gave Tesla \$465 million taxpayer dollars.

91. These patrons also included DOE’s Spinner, an accomplished campaign contribution “bundler” whose fundraising had bought him a primary role in DOE’s Loan Program Office. Upon information and belief, Spinner, too, was at all times relevant a Tesla investor and advisor.

92. Tesla's patrons' contributions, and the political access secured thereby, were material factors in DOE's favorable treatment of and preferences for Tesla during the ATVM Loan Program application process and in DOE's decision to lend Tesla nearly half a billion taxpayer dollars at highly favorable, below-market terms and rates.

93. Predictably, Tesla's business results have not justified DOE's special favors.

94. For example, Tesla, using taxpayer money to build a luxury vehicle aimed at rich actors, media personalities and businessmen, has repeatedly missed production targets, burned through cash and required DOE to repeatedly renegotiate loan terms to survive.

95. On November 12, 2012, Tesla notified the Securities and Exchange Commission that:

On January 20, 2010, we entered into a loan facility with the Federal Financing Bank (FFB), and the Department of Energy (DOE), pursuant to the Advanced Technology Vehicles Manufacturing (ATVM) Incentive Program. This loan facility was amended in June 2011 to expand our cash investment options, in February 2012 to modify the timing of certain future financial covenants and funding of the debt service reserve account, and in June 2012 to allow us to effect certain initiatives in our business plan. We entered into another amendment with the DOE in September 2012 to remove our obligation to comply with the current ratio financial covenant as of September 30, 2012 and amend the timing of pre-funding the principal payment due in June 2013. Under the DOE Loan Facility, the FFB has made available to us two multi-draw term loan facilities in an aggregate principal amount of up to \$465.0 million. Up to an aggregate principal amount of \$101.2 million had been made available under the first term loan facility to finance up to 80% of the costs eligible for funding for the powertrain engineering and the build out of a facility to design and manufacture lithium-ion battery packs, electric motors and electric components (the Powertrain Facility). Up to an aggregate principal amount of \$363.9 million has been made available under the second term loan facility to finance up to 80% of the costs eligible for funding for the development of, and to build out the manufacturing facility for, our Model S sedan (the Model S Facility). Under the DOE Loan Facility, we are responsible for the remaining 20% of the costs eligible for funding under the ATVM Program for the projects as well as any cost overruns for each project. As of August 31, 2012, we have fully drawn down the aforementioned facilities.

96. In other words, Tesla has spent all of the taxpayer funds it was given but it needs new ATVM loan repayment terms because it cannot keep its original commitments.

97. In 2008, Tesla promised to construct a factory in 2009 and then begin mass production of the vehicle known as the “Model S.” On November 7, 2012, it reported delivering a total of 256 such vehicles. Between 2008 and 2012, Tesla sold fewer than 2,500 of its “Roadster” models worldwide. Now, it promises “mass production” of the “Model S” will begin in 2013.

98. Fisker’s ATVM loan of \$528.7 million, announced on September 22, 2009 (approximately one month after DOE rejected XPV’s ATVM Loan Program application), also was obtained in whole or material part through the efforts and influence of political patrons.

99. Fisker’s patrons were John Doerr and the investment firm of Kleiner, Perkins, Caufield & Byers (“KPCB”). At all times relevant, Doerr was a KPCB partner along with former Vice President Al Gore, among others, and KPCB was a Fisker investor. Doerr and his partners donated millions to the 2008 Obama campaign and related Democrat political causes, buying preferential government treatment for their business interests. Among other things, Doerr’s contributions purchased high-level White House access and a seat on the President’s Council on Jobs and Competitiveness.

100. Contributions by Fisker’s patrons, and the political influence secured thereby, were material factors in DOE’s favorable treatment of and preferences for Fisker during the ATVM Loan Program application process and in its decision to lend Fisker over half a billion taxpayer dollars at incredibly favorable rates and terms.

101. Predictably, Fisker’s performance has not justified DOE’s favors.

102. For example, DOE gave Fisker approximately \$169.3 million for “engineering integration” of a high-cost electric luxury car in Finland, and approximately \$359 million for manufacturing a low-cost plug-in hybrid sedan in the U.S. known as “Project Kx.” *See Exhibit 12* “Conditional Commitment Letter by and between United States Department of Energy and Fisker Automotive, Inc. – Execution Copy (Sept. 18, 2009).”

103. DOE committed approximately \$359 million to Project Kx without a seeing prototype or properly verifying Fisker’s engineering, sales and supply chain claims. Nevertheless, DOE asserted in a White House press release that Fisker’s loan would “create or save about 5,000 jobs” just for domestic parts suppliers” and parroted Fisker’s claim that “up to 75,000–100,000 [Project Kx] vehicles will roll off assembly lines in the U.S. every year beginning in late 2012.”

104. Fisker did not make a Kx prototype available to the public or begin Kx production in 2010.

105. Fisker did not make a Kx prototype available to the public or begin Kx production in 2011, although it promised “mass production” would begin by the end of 2012.

106. On or about February 7, 2012, after Fisker had spent over \$170 million taxpayer funds, DOE froze its credit facility due to many missed deadlines. In June 2012, Fisker made the Kx prototype available to the public. The “low cost” sedan funded by DOE in 2009 turned out to be a \$55,000 luxury car called the “Atlantic.”

107. DOE had said that 75,000–100,000 Fisker Kx cars would be rolling off domestic assembly lines by the end of 2012. On October 18, 2012, Fisker reported that mass production of the “Atlantic,” which still has yet to begin, was delayed until 2014 or 2015.

108. Since 2008, Fisker has sold approximately 1,500 vehicles world-wide. Upon information and belief, the \$170 million of taxpayer money spent by Fisker to date has “saved or created” one hundred or fewer jobs.

109. In March 2012, and in response to complaints by Limnia and others, GAO reported on DOE’s LGP performance. *See Exhibit 13* “DOE Loan Guarantees: Further Actions Are Needed to Improve Tracking and Review of Applications,” GAO-12-157 (Mar. 2012).

110. GAO found that DOE treated LGP applicants inconsistently, favoring some and disadvantaging others; lacked systematic mechanisms for LGP applicants to administratively appeal its decisions; often ignored its own underwriting standards and skipped review steps; and re-reviewed rejected applications on an ad hoc basis. It also found that DOE’s practice of “[o]mitting or poorly documenting reviews reduces LGP’s assurance that it has treated applicants fairly and equitably.”

111. In October 2012, emails released by Congress confirmed politics had impermissibly infected DOE’s loan programs, and were shaping the judgment of DOE’s decision makers with respect to funding determinations. *See, e.g. Exhibit 14* (Email from Jonathan Silver, former Executive Director, DOE Loan Programs Office, to James C. McCrea, DOE LPO credit advisor, dated June 25, 2010, stating “WH wants to move Abound [project] forward. Policy will have to wait...”); *Exhibit 15* (Email from James C. McCrea to B. Oakley, dated September 9, 2010, stating “Pressure is on real heavy...due to interest from VP”); *Exhibit 16* (Email from Monique Fridell to Kimberly Heimert, et. al., dated May 25, 2010, stating “DOE has made a political commitment to get Unistar through the approval process by 6/15”); *Exhibit 17* (Email from James C. McCrea to Monique Fridell, dated June 1, 2010, stating “Secretary [of

Energy]...is adamant that this transaction is going to OMB by the end of the day Fri if not sooner. Not a way to do things but a direct order.”).

112. Thus, DOE bent the rules for White House allies such as Sen. Harry Reid and Rep. Steny Hoyer, and government cronies received special personal access to high-ranking DOE loan program officials. *See, e.g. Exhibit 18* (Email from James C. McCrea to “barbiar”, dated December 5, 2009, stating “[Harry] Reid may be desperate. WH may want to help. Short term considerations may be more important than long term considerations and what’s a billion anyhow?”); *Exhibit 19* (Email from James C. McCrea to Julie Stewart, dated May 25, 2010, stating “7th Floor has decided mid June CRB...there has been a commitment from S1 [Secretary Chu] to Steny Hoyer on this. Nothing like over committing and under delivering”); *Exhibit 20* (Email from Brightsource Chairman John Woolard, an LGP applicant, to Jonathan Silver, DOE Loan Office Director, dated November 10, 2010, stating “Thanks for offering to meet at your house tomorrow morning.” Silver replied “Came [sic] anytime. Guest bedroom is ready.”)

DOE’s Abuse of XPV and Limnia

113. DOE did not review XPV’s and Limnia’s ATVM Loan Program applications in good faith and in accordance with DOE’s regulations, policies and promises. Instead, DOE’s decision makers stonewalled XPV and Limnia to benefit Tesla, Fisker and others favored because of their political contributions and connections. This damaged XPV and Limnia severely.

114. To begin with, when DOE “fixed” the ATVM Loan Program and LGP to benefit government cronies, it knowingly and intentionally rendered XPV’s and Limnia’s ATVM Loan Program and LGP applications futile. Through multiple written and verbal representations from DOE officials and staff with actual and apparent authority to bind the agency, DOE intentionally

induced XPV, Limnia and others similarly situated to spend hundreds of thousands of dollars and invest thousands of hours of engineering and professional time on a meaningless snipe hunt.

115. DOE's ATVM Loan Program abuses, including delaying term sheets and wrongly denying loans among other things, hamstring XPV's and Limnia's ability to raise private capital, to begin production and to sell XPV's SUV to customers who were ready, willing, able and eager to do so.

116. DOE fixed the ATVM Loan Program and the LGP to protect and advance the business and political interests of government cronies at XPV's and Limnia's expense. For example:

- a. DOE made ATVM loans only to companies with political clout, contributions and influence-peddling patrons.
- b. DOE discriminated among applicants based on political contributions and connections.
- c. DOE: (1) changed the ATVM Loan Program funds distribution date and the "first in, first out" review process to benefit Tesla, Fisker and other politically-connected companies; (2) arranged for Tesla, Fisker and others in the favored class to have their applications reviewed first; (3) arranged for Tesla, Fisker and others in the favored class to receive special favors from DOE officials and unique DOE staff assistance; and (4) arranged for Tesla, Fisker and others in the favored class to be walked through the "review" process, approved and then given money. However, XPV, Limnia and other similarly situated companies that lacked political connections and political patrons were denied these things. Instead, they were afforded only pretextual diligence and application reviews.

For example, XPV spoke with Carol Battershel, who claimed to be the due diligence technical lead on XPV's ATVM Loan Program application. XPV offered her complete access to company engineers and management to assist the review process. Battershel declined, saying that she had gotten everything she needed "off [XPV's] website."

- d. DOE ignored standard commercial lending procedures and its own rules, guidance and policies—including the use of competent engineers to carry out technical review and the consistent application of the same funding criteria to each application—whenever necessary to benefit government cronies.
- e. DOE's political officials made final ATVM Loan Program and LGP review and funding decisions without material regard for DOE's published criteria and regulations. For example, in or about October 2009, XPV and Limnia were told by a DOE contractor that Seward had been angered by XPV's and Limnia's public complaints about DOE's loan program administration and that Seward told his staff in late 2008 that it would be "a cold day in hell before I let them [XPV and Limnia] get any money."
- f. Notwithstanding billions in lending authority; a Presidential directive to put "one million electric cars on the road"; and multiple qualified applicants (including XPV and Limnia), DOE has not made even one ATVM loan since September 2009. DOE's refusal to give effect to Congressional and Presidential directives by making ATVM loans to *all* qualified applicants, up to the limit of the lending authority, is the result of a political determination to protect government favorites

such as Fisker and Tesla from competition and not because of merit or other legitimate factors.

- g. Upon information and belief and at all times relevant, DOE “carved out” funds from DOE’s authorized lending authority and “held” these funds for government cronies who made political contributions; provided political support for and assistance to the Administration; and/or hired political fixers to obtain “top-tier status” and “special relationships.”
- h. DOE repeatedly renegotiated the Tesla and Fisker loans contrary to sound commercial lending practices to avoid political embarrassment and to protect those companies’ political patrons.
- i. DOE denied XPV’s and Limnia’s ATVM Loan Program applications on baseless pretexts. These included false XPV application “defects” and the assertion that an energy storage component developed by Limnia with DOE and patented for use in an advanced technology vehicle was, in fact, not an advanced technology vehicle component for ATVM Loan Program purposes.
- j. DOE promised to waive the LGP application fee for Limnia. Hours before the payment deadline, DOE reneged. The next day, DOE contacted Limnia promising to accept late payment. Again, DOE reneged.
- k. DOE hid the “merit review” data, criteria, reviewer identities, reviewer work histories, and other information from XPV, Limnia, all other ATVM Loan Program applicants and the public. This information, if disclosed, would have allowed XPV, Limnia and others similarly situated to evaluate the efficacy and

fairness of that review. Instead, DOE has wrongly refused to make this information available.

1. DOE willfully, intentionally and substantially overestimated government crony company production capabilities and sales performance to justify ATVM Loan Program funding. For example, DOE promised that Fisker alone would have “75,000–100,000” ATVM Loan Program-funded cars rolling off of U.S. assembly lines. Paradoxically, DOE denied XPV’s Loan Program application because XPV allegedly would not produce “enough” vehicles, yet in 2012, the politically-connected companies funded by DOE, combined, sold fewer than 25,000 advanced technology vehicles nationwide.

117. As a direct consequence of DOE’s wrongdoing, broken promises and political cronyism, XPV and Limnia were improperly denied ATVM Loan Program and LGP funds; deprived of an equal opportunity to have their applications judged fairly, on a level playing field and in accordance with law; wrongly refused funds that they were entitled to receive under applicable DOE criteria, including 10 C.F.R. Part 610; and prevented from creating good American jobs through the production, marketing and sale of advanced technology vehicles and systems developed in conjunction with DOE’s own scientists.

DOE Sells Out Limnia’s and XPV’s Secrets

118. Limnia and XPV have collaborated with DOE on advanced technology vehicle development for over a decade.

119. Pursuant thereto, they provided DOE with confidential business information, technical documents, software, intellectual property, patented chemistry and devices, and

prototypes, among other things (collectively the “Protected Information”) relating to advanced technology vehicle energy systems, chassis, body materials and electronics.

120. DOE, in turn, repeatedly promised and agreed to guard the Protected Information from unauthorized disclosure, use and infringement. For example:

- a. On or about March 8, 2002, there was a transfer of Protected Information from Limnia to DOE that was covered by and subject to a non-disclosure agreement of even date.
- b. On or about May 24, 2006, there was a transfer of Protected Information from Limnia to DOE that was covered by and subject to a non-disclosure agreement of even date.
- c. On or about November 10, 2008, there was a transfer of Protected Information from XPV to DOE that was covered by and subject to DOE’s promises of ATVM Loan Program application confidentiality.
- d. On or about December 12, 2008, there was a transfer of Protected Information from Limnia to DOE that was covered by and subject to a non-disclosure agreement of even date.
- e. On or about February 1, 2009, there was a transfer of Protected Information from Limnia to DOE that was covered by and subject to DOE’s promises of ATVM Loan Program application confidentiality.

121. At all times relevant, DOE agreed and was obligated to guard and keep confidential the Protected Information and to prevent its unauthorized disclosure, use and infringement. This included the patented NALH energy storage system and pressure membrane technology, among other things.

122. At all times relevant, DOE worked closely with General Motors Company (“GM”) on many projects and viewed it as a key government client. GM contracted with Sandia on a variety of projects, including advanced technology vehicle energy systems. At all times relevant, DOE was committed to GM’s success, even at XPV’s and Limnia’s expense.

123. On or about September 11, 2008, an XPV representative was invited to tour the Sandia facility. There, in a room where large glove-boxes and chemical testing equipment were used, he saw a table with a presentation that was prepared for another group. On that table were duplicates of an energy system that Limnia had built, tested, patented and disclosed to DOE.

124. The signs on the table read: “General Motors hydrogen vehicle production system” and “NALH General Motors Reversible Hydrogen Vehicle Energy System built by General Motors and Sandia.”

125. At all times relevant, DOE knew that the “NALH” system and chemistry and the device on the table labeled “built by General Motors and Sandia” were Protected Information given to DOE, and that DOE, in turn, had promised to guard against unauthorized disclosure, use and infringement. In fact, when Sandia scientists Chris Moen and Daniel Dedrick were informed of this discovery, they admitted that there might be “a problem with that” and suggested XPV and Limnia contact GM for a “partnership” so that “there was no acrimony.”

126. At all times relevant, DOE knew that the Protected Information it had given to GM was valuable. As Sandia confirmed on January 6, 2009, the NALH energy system was “well situated to exceed the performance of battery systems” and could outperform more traditional advanced technology vehicle batteries “by a factor of 3.” *See Exhibit 21* Sandia Memorandum dated January 6, 2009 at 5.

127. Given that there are more than 2800 different potential chemistries that GM and Sandia conceivably could have used for their advanced technology vehicle energy system; that neither XPV nor Limnia had disclosed Protected Information to GM; and DOE's close ties with GM and its commitment to GM's success, DOE is the only plausible conduit through which GM obtained the Protected Information.

128. Additionally, upon information and belief, DOE surreptitiously turned over Protected Information, including pressure membrane technology and the NALH energy system, to the Ford Motor Company ("Ford").

129. On or about March 12, 2012, Limnia and XPV discovered that Ford had created a "pressure membrane design group" that was developing and had manufactured pressure membrane technology-based seats, seat belts and auto body parts. Upon information and belief, this design group and these products were based on and/or covered by Protected Information given to DOE and that DOE had promised to guard against unauthorized disclosure, use and infringement.

130. On or about December 22, 2012, Limnia and XPV discovered a Ford PowerPoint presentation that had been prepared in 2012 for DOE to summarize "Ford/BASF-SE/UM Activities in Support of the Hydrogen Storage Engineering Center of Excellence."

131. This PowerPoint presentation referenced the patented NALH chemistry given by Limnia and XPV to DOE and that DOE, in turn, had promised to guard against unauthorized disclosure, use and infringement.

132. Given the unique nature of the pressure membrane technology and NALH energy system; that neither XPV nor Limnia disclosed Protected Information to Ford; and DOE's

relationship with and political commitment to Ford's success, DOE is the only plausible conduit through which Ford obtained Protected Information.

Claims for Relief

First Claim for Relief: Breach of Contract (Protected Information).

133. XPV and Limnia repeat paragraphs 1-132.

134. DOE breached its contractual duty to guard Protected Information from unauthorized disclosure, use and infringement. Instead, DOE disclosed and provided Protected Information to GM and Ford, including NALH energy system and pressure membrane technology.

135. As a result, plaintiffs have suffered direct and consequential damages in excess of \$250 million.

Second Claim for Relief: Fifth Amendment Taking (Protected Information).

136. XPV and Limnia repeat paragraphs 1-135.

137. DOE has taken plaintiff's property (i.e. the Protected Information), valued in excess of \$200 million, without paying compensation in violation of the Fifth Amendment of the U.S. Constitution.

Third Claim for Relief: 28 U.S.C. § 1498(a) Damages (Protected Information).

138. XPV and Limnia repeat paragraphs 1-137.

139. The NALH energy system given by Sandia to GM, and the pressure membrane technology apparently given by Sandia to Ford, were both an "invention described in and covered by a patent of the United States."

140. These inventions were and are being used or manufactured by or for the United States without license or the lawful right to use or manufacture same.

141. Therefore, plaintiffs are entitled to reasonable and entire compensation for such use and manufacture, including reasonable costs and fees for expert witnesses and attorneys incurred in pursuing this action.

Fourth Claim for Relief: Breach of the Duty of Good Faith and Fair Dealing (Protected Information).

142. XPV and Limnia repeat paragraphs 1-141.

143. The nondisclosure agreements between Limnia and XPV, respectively, with DOE contained an implied duty of good faith and fair dealing which obligated the parties not to do anything which would have the effect of destroying or injuring the right of the other party to receive the fruits of their contractual bargain with respect to the relevant confidentiality and non-disclosure provisions of their various contracts.

144. DOE, however, intentionally evaded the spirit of its agreements, willfully rendered imperfect performance, and otherwise acted in bad faith to favor and benefit GM and Ford.

145. DOE's breach of its duty of good faith and fair dealing has caused plaintiffs direct and consequential damages, including but not limited to lost profits, exceeding \$250 million.

Fifth Claim for Relief: Estoppel (ATVM Loan Program Applications).

146. XPV and Limnia repeat paragraphs 1-145.

147. DOE promised XPV and Limnia that it would fairly and objectively evaluate their ATVM Loan Program applications and lend funds to qualified companies without regard for political contributions or White House connections.

148. DOE reasonably expected and intended for XPV and Limnia to rely on these promises and they in fact did so.

149. At all times relevant, both XPV and Limnia were qualified applicants for ATVM Loan Program funding under DOE's applicable criteria, including 10 C.F.R. Part 611. XPV and Limnia each remain capable of performing their obligations pursuant to their respective ATVM Loan Program applications.

150. At all times relevant, DOE had the lending authority and obligation to fund ATVM Loan Program loans to XPV and Limnia.

151. But DOE's affirmative misconduct as set forth herein to benefit government cronies and/or to punish XPV and Limnia for publically expressing concerns about DOE's administration of its loan programs, XPV's and Limnia's ATVM Loan Program applications would have been granted.

152. DOE is therefore estopped from denying XPV's and Limnia's ATVM Loan Program applications and obligated to provide commitments and funding in accordance therewith and on substantially the same terms and conditions given to Tesla and Fisker.

Sixth Claim for Relief: Estoppel (LGP Application).

153. Limnia repeats paragraphs 1-152.

154. DOE promised Limnia that it would waive the LGP application fee. After DOE broke this promise, it promised that Limnia could pay the fee after the February 26, 2009 deadline and have its application "pre-reviewed" as well.

155. DOE reasonably expected and intended for Limnia to rely on these promises and Limnia in fact did so. It was prepared to pay the application fee and repeatedly requested instructions on how to do so, as well as an opportunity to discuss the "pre-review" DOE promised.

156. However, DOE refused to acknowledge Limnia's communications and rejected Limnia's LGP application without recourse.

157. This rejection was the result of affirmative misconduct by DOE to protect the interests of government crony companies and/or to punish Limnia for publically expressing its concerns about DOE's loan program administration.

158. DOE is therefore estopped from refusing to accept Limnia's LGP application and obligated to provide an on the merits review independent of political considerations.

Seventh Claim for Relief: Implied-in-Fact Contract (Fair Review of ATVM Loan Program Applications).

159. XPV and Limnia repeat paragraphs 1-158.

160. There was an implied-in-fact contract between both XPV and Limnia with DOE concerning their respective ATVM Loan Program applications.

161. DOE offered and XPV and Limnia each accepted the opportunity to submit these applications.

162. In consideration for these applications, which required XPV and Limnia each to expend substantial sums for accounting, business and technical information, including a National Environmental Policy Act ("NEPA") review, DOE agreed to provide a fair process and a level playing field among all applicants, whether they were politically connected and had made large campaign donations or not.

163. At all times relevant, DOE's representatives had actual authority to and did bind DOE to this contract.

164. At all times relevant, XPV and Limnia fully performed their contractual obligations.

165. However, DOE breached its contractual obligations by denying XPV and Limnia the fair opportunity and objective review that they had bargained for and DOE had agreed to provide; by skewing, manipulating and fixing the ATVM Loan Program to benefit government favorites; by wrongly denying XPV's and Limnia's ATVM Loan Program applications; and by favoring political cronies over companies that did not make political contributions or have influential patrons with White House connections.

166. As a result, plaintiffs have suffered direct and consequential damages, including but not limited to lost profits, in excess of \$250 million.

Eighth Claim for Relief: Breach of the Duty of Good Faith and Fair Dealing (Implied-in-Fact Contract).

167. XP repeats paragraphs 1-166.

168. The implied-in-fact contracts between XPV and Limnia, respectively, with DOE regarding a fair and level review of their ATVM Loan Program applications contained an implied duty of good faith and fair dealing obligating the parties not to do anything which would have the effect of destroying or injuring the right of the other to receive the fruits of its contractual bargain.

169. DOE, however, intentionally evaded the spirit of this contract, willfully rendered imperfect performance and otherwise acted in bad faith to favor and benefit government cronies by denying XPV and Limnia the funds that they were entitled to receive.

170. DOE's breach of its duty of good faith and fair dealing caused plaintiff direct and consequential damages, including but not limited to lost profits, exceeding \$250 million.

Relief Requested

WHEREFORE XPV and Limnia request the following relief:

A. Such direct, consequential and punitive damages as each plaintiff may be entitled to under law, but no less than a total of \$450 million.

B. Reasonable and entire compensation for the use and manufacture of the NALH-based energy system and the pressure membrane technology, each being an invention described in and covered by a patent of the United States that was or is being used or manufactured by or for the United States without license or the lawful right to use or manufacture same, including reasonable costs incurred in pursuing this action and as allowed by 28 U.S.C. § 1498(e) such as reasonable fees for expert witnesses and attorneys.

C. Such equitable relief as each may be entitled to under law, including approval of XPV's and Limnia's ATVM Loan Program applications with commitments and funding in accordance therewith and on substantially the same terms and conditions given to Tesla and Fisker; and final agency review, on the merits independent of political considerations, of Limnia's LGP application.

D. Actual costs and attorney fees.

E. Such other relief as this Court deems just.

Respectfully submitted,

/s/ Daniel Z. Epstein
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Signed: January 10, 2013

XPV Verification

I am Scott Redmond, a stockholder, officer and director of XP Vehicles, Inc., a plaintiff in this action.

I have read the forgoing complaint and hereby verify and declare on XPV's behalf that its factual allegations are true, except to those matters stated on information and belief and as to those matters I believe them to be true to the best of my knowledge.

XP VEHICLES, INC.


 Date: 1/8/13
By: Scott Redmond
Its: PRESIDENT + CEO

Limnia Verification

I am Scott Redmond, a stockholder, officer and director of Limnia, Inc., a plaintiff in this action.

I have read the forgoing complaint and hereby verify and declare on Limnia's behalf that its factual allegations are true, except to those matters stated on information and belief and as to those matters I believe them to be true to the best of my knowledge.

LIMNIA, INC.

 Date: 1/8/13
By: Scott Redmond
Its: PRESIDENT + CHAIRMAN