

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION

I.D. #07873

EMERSON ELECTRIC CO., )  
 a Missouri corporation, and )  
 MORSE INDUSTRIAL CORPORATION, )  
 a wholly-owned subsidiary of )  
 EMERSON ELECTRIC CO., )  
 )  
 Plaintiffs )  
 )  
 v. ) NO:  
 )  
 BORG-WARNER CORPORATION, )  
 a Delaware corporation, )  
 )  
 Defendant )

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COMPLAINT FOR DECLARATORY  
JUDGMENT AND OTHER RELIEF

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Plaintiffs, EMERSON ELECTRIC CO. and MORSE INDUSTRIAL CORPORATION, by their attorneys, PHELAN, POPE & JOHN, LTD., complain of Defendant, BORG-WARNER CORPORATION, as follows:

1. EMERSON ELECTRIC CO. ("EMERSON") is a Missouri corporation having its principal place of business at 8000 West Florissant Avenue, St. Louis, Missouri. MORSE INDUSTRIAL CORPORATION ("MORSE") is a wholly-owned subsidiary of EMERSON having its principal place of business in Ithaca, New York.
2. BORG-WARNER CORPORATION ("BORG-WARNER") is a Delaware corporation having its principal place of business at 200 South Michigan Avenue, Chicago, Illinois.
3. On November 2, 1982, EMERSON and BORG-WARNER entered into an Asset Purchase Agreement ("Purchase Agreement") whereby EMERSON agreed to purchase substantially all of the

business and assets of a division of BORG-WARNER known as the Morse Industrial North America Operations of Borg-Warner, which included the Morse Chain Division. (The Purchase Agreement is attached hereto as Exhibit "A".)

4. At the time of the purchase, BORG-WARNER knew that the Morse Chain Division plant was contaminated with trichlorethylene ("TCE"), a chemical which has been identified by the United States Environmental Protection Agency as a hazardous substance and toxic pollutant under the Clean Water Act. BORG-WARNER also knew that the plant was in violation of state and federal laws regulating waste discharge. Notwithstanding this knowledge, BORG-WARNER expressly warranted and represented to EMERSON that the Morse facility complied with all applicable environmental standards and regulations and that BORG-WARNER knew of no basis for any claim against the plant.

5. EMERSON and MORSE recently discovered the TCE contamination and they are undertaking emergency remedial clean-up measures. They have filed this action seeking a judgment declaring that BORG-WARNER is obligated under the express terms of the Purchase Agreement to indemnify EMERSON and MORSE for all liabilities, costs and legal fees which arise out of BORG-WARNER's contamination of the Morse facility and BORG-WARNER's fraudulent misrepresentations of the condition of the plant at the time of its sale to EMERSON. EMERSON and MORSE also seek recovery for compensatory and punitive

damages proximately caused by BORG-WARNER's fraudulent misrepresentations.

6. The Morse facility, located in Ithaca, New York has been used for the manufacture of industrial power transmission products since 1906.

7. The plant was purchased by BORG-WARNER in 1929 and was operated as a division of BORG-WARNER until December 31, 1982, the effective date of closing for the Purchase Agreement.

8. BORG-WARNER used TCE in the manufacturing process at the Morse facility to degrease metal parts prior to their final assembly. BORG-WARNER also conducted on-site distillation of used TCE, thereby rendering it suitable for reuse in the plant's cleaning and degreasing operations.

9. The use of TCE by BORG-WARNER was suspended some time in the 1970's, long before EMERSON's purchase of the Morse facility.

10. MORSE has never used the chemical TCE, and its manufacturing operations since December 31, 1982 have not contributed in any manner to the TCE contamination of the facility.

11. At the time of the purchase, the Morse facility was authorized under State Pollution Discharge Elimination System (SPDES) permit #NY-0002933, issued by the New York State Department of Environmental Conservation, to discharge waste water created in its operations in the natural receiving waters below the manufacturing plant.

12. The SPDES Permit #NY-0002933 which was issued in August, 1982 is due to expire in August, 1987.

13. A review of the Morse facility files, conducted in preparation for the renewal of the SPDES permit, revealed two "confidential memoranda" exchanged between BORG-WARNER employees which reported that in August 1972, an underground, fire protection reservoir ("reservoir") at the facility was contaminated with TCE.

14. The reservoir is an underground concrete basin used to provide backup fire protection for the sprinkler system. Overflow from the reservoir is discharged pursuant to the SPDES permit to Six Mile Creek, one-half mile from the facility.

15. A preliminary sample of the reservoir taken by MORSE in January, 1987, confirmed the TCE contamination which was found by BORG-WARNER in 1972.

16. Upon learning that TCE contaminated waste was being released from the reservoir, EMERSON and MORSE immediately notified the New York State Department of Environmental Conservation ("DEC"). The DEC is currently monitoring the cleanup efforts.

17. EMERSON and MORSE have already incurred significant expenses in eliminating the emergency situation caused by BORG-WARNER's undisclosed contamination of the site.

18. At the time it negotiated the Purchase Agreement BORG-WARNER had actual knowledge of the contamination of the

facility since the senior executive at BORG-WARNER who received the above-mentioned "confidential memoranda" in 1972 was also intimately involved in the negotiations of the Purchase Agreement with EMERSON in 1982.

19. During February and March, 1987, EMERSON and MORSE made repeated demands that BORG-WARNER indemnify them for all liabilities and costs which may arise out of BORG-WARNER'S contamination of the site.

20. Despite its factual misrepresentations and its breach of the express contract warranties, BORG-WARNER has refused to indemnify plaintiffs.

#### COUNT I

#### **DECLARATORY JUDGMENT AS TO BORG-WARNER'S CONTRACTUAL INDEMNIFICATION OBLIGATIONS**

1-20. Plaintiffs repeat and reallege Paragraphs 1 through 20 as Paragraphs 1 through 20 of Count I.

21. Pursuant to Paragraph 11.1 of the Purchase Agreement, BORG-WARNER expressly agreed to indemnify EMERSON and any subsidiary, including MORSE, for all losses, claims, damages, liabilities, costs, counsel fees and other expenses arising out of any breach by BORG-WARNER of any representation, warranty, covenant, agreement or other obligation incurred under the Purchase Agreement.

22. BORG-WARNER made the following express warranties and representations in the Purchase Agreement:

- (a) the Morse facility does not have any liabilities, accrued, absolute, contingent or otherwise and BORG-WARNER knows of no basis for any claim against the Morse facility for any liability or obligation (Paragraph 3.7 of the Purchase Agreement);
- (b) the assets transferred conform to all applicable laws; BORG-WARNER has no notice of any violation of any law; and the use of the property complies with all applicable environmental standards established by law or regulation (Paragraph 3.19 of the Purchase Agreement);
- (c) BORG-WARNER is not in violation of any applicable statute, law, ordinance, decree, rule or regulation of any governmental body (Paragraph 3.23 of the Purchase Agreement); and
- (d) there is no suit, claim, action or proceeding now pending which is not fully insured or threatened, nor to BORG-WARNER's knowledge are there any reasonable grounds for such claims. (Paragraph 3.24 of the Purchase Agreement)

23. Contrary to BORG-WARNER's express representations and warranties, the reservoir at the Morse facility did on the date of the Purchase Agreement contain sludge and water contaminated with TCE which was being released into the environment, and the Morse facility did on the date of the Purchase Agreement have at least one unpermitted effluent discharge point for which a SPDES permit was required and at least one permitted effluent discharge point wherein the applicable SPDES permit had been violated.

24. BORG-WARNER, being fully aware as early as 1972 of the TCE contamination of the reservoir and that TCE contaminated waste was being released from the reservoir, made each of the foregoing representations and warranties with full knowledge that they were false and with the intent to defraud EMERSON

and MORSE.

25. Paragraph 11.1 of the Agreement also requires BORG-WARNER to indemnify EMERSON and MORSE for any obligation, debt or liability of BORG-WARNER not expressly assumed by EMERSON under the terms of the Purchase Agreement.

26. Nowhere in the list of assumed liabilities enumerated in Paragraphs 1.2 or 1.3(a) of the Agreement did EMERSON agree to assume any liability whatsoever arising out of potential environmental contamination created by BORG-WARNER and existing long before the Purchase Agreement was consummated.

WHEREFORE, EMERSON ELECTRIC CO. and MORSE INDUSTRIAL CORPORATION, pursuant to the provisions of Section 2-701 of the Illinois Code of Civil Procedure, respectfully request that judgment be entered declaring that BORG-WARNER is obligated under the indemnification provisions of the Purchase Agreement to indemnify and hold harmless, EMERSON and MORSE from and against all liabilities, losses, damages, claims, costs (including attorneys' fees) arising from the presence of, or leakage, overflow, discharge or other release from, the reservoir or any other part of the facility of any waste materials, pollutants and/or contaminants including, but not limited to:

- (a) Costs of removal and disposal of the contents of the reservoir and of cleaning the reservoir;
- (b) Costs of studies commissioned to evaluate levels of contamination arising from the presence of, or leakage, overflow, discharge or other release of waste materials, pollutants and/or contaminants from,

the reservoir (such contamination is herein called "Contamination");

- (c) Costs of cleaning up, removing or remedying any contamination at the Morse facility;
- (d) Any and all fines, penalties, costs or remedial obligations, including monitoring, imposed by any federal, state or local regulatory agency with respect to the Contamination or with respect to any Effluent Violation;
- (e) Any and all actions, claims or demands for damages arising from personal injury (including death or emotional distress) and/or property damage attributable or related to the Contamination and/or any Effluent Violation; and
- (f) Any and all costs and expenses related to MORSE employee health care or workers compensation claims necessitated by or arising from the Contamination.

## COUNT II

### **FRAUD**

1-20. Plaintiffs repeat and reallege Paragraphs 1 through 20 of Count I as Paragraphs 1 through 20 of Count II.

21. At the time of EMERSON's purchase of the Morse plant, BORG-WARNER made certain representations of material fact including that it knew of no claim contingent or otherwise against the plant; that the business complied with all applicable environmental standards; that BORG-WARNER was not in violation of any governmental law or regulation; and that it knew of no basis for any claim against the plant. Those representations were made for the purpose of inducing EMERSON to purchase the Morse operations.



22. Contrary to the foregoing representations, the reservoir at the Morse facility did on the date of the Purchase Agreement contain sludge and water contaminated with TCE which was being released into the environment and the Morse facility did on the date of the Purchase Agreement have at least one unpermitted effluent discharge point for which a SPDES permit was required and at least one permitted effluent discharge point wherein the applicable SPDES permit had been violated.

23. The "confidential memoranda" exchanged between BORG-WARNER employees which reported the TCE contamination in 1972 confirms that BORG-WARNER knew that the reservoir was contaminated with TCE, since the senior executive at BORG-WARNER who received the above-mentioned "confidential memoranda" was also intimately involved in the negotiations of the Purchase Agreement with EMERSON. (See attached Exhibits "B" and "C".)

24. EMERSON believed the representations made in the Purchase Agreement to be true and reasonably relied on those representations in choosing to purchase the Morse operations.

25. As the direct and proximate result of BORG-WARNER's fraudulent misrepresentations, EMERSON and MORSE have incurred and will continue to incur costs in the investigation and clean-up of the TCE contamination. They are further exposed to potential liability by third parties including actions for damages arising from personal injury and/or property

damage as well as fines, penalties, costs and/or remedial obligations imposed by federal, state or local regulatory agencies.

WHEREFORE, EMERSON ELECTRIC CO. and MORSE INDUSTRIAL CORPORATION respectfully request that judgment be entered against BORG-WARNER CORPORATION for compensatory and punitive damages and for such other relief as the court deems appropriate, including, without limiting the available remedies, partial rescission of the Purchase Agreement.

EMERSON ELECTRIC CO. and  
MORSE INDUSTRIAL CORPORATION,

BY: 

William J. Kunkle, Jr.,  
One of Their Attorneys

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