IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE GENERAL MOTORS COMPANY DERIVATIVE LITIGATION	)))))	C.A. No. 9627-VCG REDACTED VERSION-- FILED: December 12, 2014

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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Preliminary Statement

In February 2014, GM initiated a series of vehicle recalls for a defect that under certain conditions can permit a vehicle's ignition switch to move from the "run" position to the "accessory" position while the vehicle is in motion. The recalls covered several vehicles for model years extending back to 2003. Following the recalls, GM has been sued in numerous personal injury and economic loss actions, has entered into a consent order with the National Highway Traffic Safety Administration (NHTSA) resulting in a $35 million fine, and has established a fund to compensate victims of accidents related to the faulty ignition switch. In this derivative action, a group of GM shareholders has sued eleven current GM directors and five former directors, purportedly on GM's behalf, alleging that they breached their fiduciary duties in connection with the defect and seeking to hold them personally liable for its consequences.

Plaintiffs have not made a demand on the board to bring this claim, alleging instead that demand is excused. They claim the directors are incapable of making an unbiased decision on a demand because the directors face a substantial likelihood of liability for (1) making conscious decisions to undermine GM's risk management processes—by "eliminating" the board's Finance and Risk Committee and by eliminating a "dedicated" Chief Risk Officer position—and (2) failing to oversee GM's vehicle safety and NHTSA reporting.

Because GM has adopted a Section 102(b)(7) provision exculpating its directors from liability for breach of the duty of care, to establish a substantial threat of liability plaintiffs must plead with particularity that the directors consciously breached their duty of loyalty or acted in bad faith. Plaintiffs do not satisfy this strict standard. The complaint lacks any factual allegations connecting the failures that led to the recall to director disloyalty or bad faith.

Moreover, the documents cited in the complaint undermine plaintiffs' conclusory assertions of director misconduct.

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At base, plaintiffs' claim rests on their criticism of how GM was managed. Plaintiffs concede that a committee of the board had responsibility for oversight of risk management, but they criticize which committee had that responsibility. Plaintiffs concede that GM had a Chief Risk Officer, but they believe that the position should have been kept separate from the Company's internal auditor.

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but they argue

that the information the directors received was not enough and not the right type. Plaintiffs concede that GM had a database dedicated to NHTSA reporting, but they criticize it for being insufficient. These criticisms do not demonstrate that the directors face a substantial likelihood of liability for breach of the duty of loyalty or acting in bad faith. As a result, the complaint should be dismissed pursuant to Rule 23.1 for failure to plead with particularity that demand is excused.

Background[1]

General Motors Company ("GM") is a Delaware corporation headquartered in Detroit. (Compl. ¶13) GM was formed in July 2009, when it acquired certain assets of General Motors Corporation ("Old GM") out of bankruptcy. (*Id*.) Plaintiffs here are current shareholders of GM. (*Id*. ¶¶11-12) They have sued 11 of GM's 12 current directors, as well as five former directors. (*Id*. ¶¶19-38)

[1] For purposes of this motion, defendants "accept as true the well pleaded factual allegations in the Complaint." *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 120 (Del. Ch. 2009). While plaintiffs are entitled to "all reasonable factual inferences" from the particularized facts alleged, "conclusory allegations are not considered as expressly pleaded facts or factual inferences." *Brehm v. Eisner*, 746 A.2d 244, 255 (Del. 2000).

A. GM Recalls Vehicles For An Ignition Switch Defect

In February 2014, GM recalled certain 2003-2007 model year vehicles due to a defect in the ignition switch. (Compl. ¶¶86-87) Over the following weeks, the recall was expanded to add other models. (*Id*. ¶¶89-90) GM recalled the vehicles because under certain conditions the ignition switch can move out of the "run" position to "accessory" while the vehicle is in motion. (*Id*. ¶57) If that occurs, the engine turns off and the airbags may not deploy in the event of an accident. (*Id*.)

Following the recall, NHTSA opened an investigation and, on May 16, 2014, GM and NHTSA signed a consent order to resolve the investigation. In the order, GM admitted that it had taken more than five working days from learning of the ignition switch defect to report it to NHTSA. Specifically, GM admitted:

> that it violated the Safety Act by failing to provide notice to NHTSA of the safety-related defect that is the subject of Recall No. 14V-047 within five working days as required by 49 U.S.C. § 30118(c)(1), 49 U.S.C. § 30119(c)(2), and 49 C.F.R. § 573.6(b).

(Ex. 1, Consent Order, ¶10) GM notified NHTSA of the ignition switch defect on February 7, 2014. (Compl. ¶86) Thus, GM admitted in the consent order only that it should have notified NHTSA of the defect before January 31, 2014—nothing more. The consent order does not assert or admit misconduct by GM's directors.

Shortly after GM announced the recall, GM's board retained Anton Valukas, former U.S. Attorney for the Northern District of Illinois, to investigate why it took as long as it did to recall vehicles containing the ignition switch defect. (Compl. ¶58) Mr. Valukas issued a report to the board concluding that there were a number of failures at GM and Old GM that led to the failure to initiate the recall sooner. However, as plaintiffs specifically note, the Report also concluded that "the Board of Directors was not informed of any problem posed by the Cobalt ignition switch until February 2014." (*Id*. ¶62) And plaintiffs do not allege that the Report concluded that either action or inaction by GM's directors was responsible for GM's failure to identify and correct the ignition switch defect sooner.

Plaintiffs allege that GM has suffered multiple injuries as a result of the defect and recall. They allege that GM has taken charges of $1.5 billion for the first and second quarters of 2014 (Compl. ¶¶2-3); is the subject of numerous product liability lawsuits and investigations by Congress, the SEC, and the Department of Justice that expose GM to potential liability (*id*. ¶¶4-5); paid a civil fine of $35 million pursuant to the NHTSA consent order (*id*. ¶4); and has established a fund to compensate accident victims and their families (*id.* ¶8). Plaintiffs seek to hold the directors personally liable for all of this alleged harm.

B. The Directors' Oversight Of GM

Before plaintiffs filed the complaint, GM produced to them, in response to a Section 220 books and records demand, documents relating to vehicle safety, quality, defects, and recalls that went to the full board or any of its committees. The complaint cites only a small fraction of the documents GM produced. Plaintiffs use these documents to attempt to stitch together a story that the directors acted in bad faith by intentionally weakening GM's risk management processes and by failing to oversee GM's vehicle safety and NHTSA reporting. In doing so, they repeatedly mischaracterize the documents by myopically focusing only on snippets of text and sometimes simply misstate the documents' contents.

1. The Directors' Oversight Of GM's Risk Management

The Section 220 documents that plaintiffs chose to cite in their complaint, along with the complaint itself, establish that the directors actively oversaw GM's management of risk.

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[2] All of the GM documents cited herein are cited in the complaint. (*See, e.g.*, Compl. ¶120 (citing Ex. 2)) These documents are integral to plaintiffs' claims and, accordingly, the Court can consider them in ruling on this motion to dismiss. *See, e.g.*, *Allen v. Encore Energy P'rs, L.P.*, 72 A.3d 93, 96 n.2 (Del. 2013). The exhibits are attached to the Transmittal Affidavit of Robert L. Burns, which indicates where in the complaint each document is cited. Where an exhibit contained pages that were redacted entirely as non-responsive, those pages have been omitted.

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Although plaintiffs do not refer in the complaint to the documents produced by GM reflecting meetings with the CRO or updates on the Company's top risks after March 2013, they do not allege that no such updates were provided.

2. The Directors' Oversight Of Vehicle Safety

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C. Company-Level Processes For Vehicle Safety And NHTSA Reporting

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Additionally, the complaint alleges that GM had in place a NHTSA reporting system. Specifically, it explains that "[s]ince the inception of the TREAD Act," GM has maintained a "TREAD database" in which the Company stored the data required to be reported to NHTSA under the statute. (Compl. ¶77) According to plaintiffs, the "database was organized to track and report data in categories created by NHTSA covering 24 different systems in a vehicle[], such as airbags or steering, and fire and rollovers." (*Id*. ¶79) The database contained information from a variety of sources, including service requests, technical assistance repair orders from detailers, surveys, field reports, On-Star, and a database maintained by GM's legal department to track data concerning lawsuits. (*Id*. ¶82) And plaintiffs allege that GM had "a specific team assigned to prepare NHTSA-required reports" utilizing this database. (*Id*.)

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Thus, plaintiffs' own allegations and the documents incorporated in their complaint affirmatively show that GM had in place a system for evaluating and identifying vehicle safety defects and a system for collecting and reporting data required by law to be reported to NHTSA. The complaint does not allege any facts indicating that the board had information that would have given it reason to believe that these systems were not functioning properly.

Argument

A "cardinal precept" of Delaware law is "that directors, rather than shareholders, manage the business and affairs of the corporation." *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984). This principle means that "[t]he decision whether to initiate or pursue a lawsuit on behalf of the corporation is generally within the power and responsibility of the board of directors." *Citigroup*, 964 A.2d at 120. The right of a stockholder to prosecute a suit on a company's behalf "is limited to situations where the stockholder has demanded that the directors pursue the corporate claim and they have wrongfully refused to do so or where demand is excused because the directors are incapable of making an impartial decision regarding such litigation." *Rales v. Blasband*, 634 A.2d 927, 932 (Del. 1993).

Here, plaintiffs did not make a pre-suit demand on GM's board. (Compl. ¶197) As a result, plaintiffs cannot pursue this claim on GM's behalf unless their complaint alleges with particularity facts sufficient to meet Delaware's strict standard for excusing demand. *See* Del. Ct. Ch. R. 23.1; *In re Goldman Sachs Group S'holder Litig*., 2011 WL 4826104, *6 (Del. Ch. Oct. 12, 2011).

The Delaware Supreme Court has articulated two familiar standards for evaluating whether demand is excused, depending on the theory asserted. When a plaintiff challenges an affirmative decision by the board, the complaint must allege with particularity facts sufficient to create a reasonable doubt that either (1) the directors are disinterested and independent, or (2) "the challenged transaction was otherwise the product of a valid exercise of business judgment." *Aronson*, 473 A.2d at 814. When a plaintiff claims board *inaction*, the plaintiff must plead particularized facts sufficient to create "a reasonable doubt that, as of the time the complaint [was] filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand." *Rales*, 634 A.2d at 934.

Plaintiffs' pleading burden under either *Aronson* or *Rales* is heightened in this case because GM has adopted a Section 102(b)(7) provision in its certificate of incorporation, exculpating the directors from liability for breaches of the duty of care. *See* 8 *Del. C.* § 102(b)(7.[9] When a company adopts such a provision, a shareholder can only state a claim for director liability by pleading facts sufficient to establish a breach of the directors' duty of loyalty or good faith. *See Stone v. Ritter*, 911 A.2d 362, 369-70 (Del. 2006). Pleading a breach of the duty of loyalty or good faith requires alleging "particularized facts that, if proven, would show that a majority of the defendants knowingly engaged in 'fraudulent' or 'illegal' conduct or breached 'in bad faith'" their fiduciary duties. *Wood v. Baum*, 953 A.2d 136, 141 (Del. 2008). Therefore, the complaint "must rest on facts that support a fair inference that the directors *consciously* acted in a manner contrary to the interests of [the Company] and its stockholders." *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 652 (Del. Ch. 2008) (emphasis added).

[9] The Court may consider GM's certificate of incorporation on this motion to dismiss for failure to make a pre-suit demand. *See In re Baxter Int'l, Inc. S'holders Litig.*, 654 A.2d 1268, 1270 (Del. Ch. 1995). GM's certificate reads in relevant part: "No director shall be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to the Corporation or its stockholders, [or] (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law…." (Ex. 10, at 3)

Here, plaintiffs allege that the directors (1) approved "the dissolution of the Finance and Risk Committee" and "the elimination of a dedicated CRO" (Compl. ¶206); and (2) failed to create a system of reporting or internal controls to oversee GM's vehicle safety and NHTSA reporting (*id*. ¶¶206, 208). The complaint, however, fails to allege particularized facts sufficient under Delaware law to excuse demand under either theory.[10]

I. Plaintiffs Have Not Alleged Particularized Facts Sufficient To Excuse Demand Under *Aronson* For Board Decisions.

Plaintiffs contend that demand is excused as to two decisions of the board: (1) "the dissolution of the Finance and Risk Committee"; and (2) "the elimination of a dedicated" Chief Risk Officer. (Compl. ¶206) Plaintiffs do not attempt to satisfy *Aronson*'s first prong by alleging that a majority of the board is interested or lacks independence with respect to either of these decisions.[11] Consequently, giv-

[10] To the extent that plaintiffs plead events prior to November 2010, the date they allege the board's misconduct began, those allegations are irrelevant to whether demand is excused. (Compl. ¶10 (identifying November 2010 as "the date Plaintiffs assert the Board's bad faith actions commenced"))

[11] Plaintiffs do allege that defendants Barra and Girsky are interested because they are GM executives. (Compl. ¶198) This contention is irrelevant because these two defendants do not comprise a majority of the board. Further, Ms. Barra did not join the board until January 15, 2014—long after the board made the decisions that plaintiffs challenge. (*Id*. ¶19) Her position as a GM executive would not render her interested as to decisions in which she is not alleged to have participated. Similarly, Mr. Girsky's role as an executive does not render him interested in decisions

en that GM has adopted a Section 102(b)(7) provision, plaintiffs must plead under *Aronson*'s second prong "particularized facts" demonstrating that "there was an 'intentional dereliction of duty' or 'a conscious disregard' for their responsibilities, amounting to bad faith." *Goldman Sachs*, 2011 WL 4826104, *12. The complaint does not contain such allegations.

A. The Complaint Does Not Plead With Particularity That The Board Dissolved The Finance And Risk Committee In Bad Faith.

Plaintiffs' allegation that the board acted in bad faith in "eliminating" the Finance and Risk Committee does not satisfy Delaware's stringent pleading requirements for excusing demand. As an initial matter, the very documents plaintiffs cite in support of their claim demonstrate that the board did not eliminate the Finance and Risk Committee.

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made by the board (although, unlike Ms. Barra, he was on the board at the time of the challenged decisions).

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These contentions are not supported by either well-pled allegations of fact or Delaware law.

1. Plaintiffs Have Not Alleged That GM's Directors Acted In Bad Faith When They Transferred Responsibility For Oversight Of Risk Management To The Audit Committee.

As an initial matter, plaintiffs have alleged no facts to support an inference that the directors consciously disregarded their fiduciary duties when they transferred responsibility for oversight of risk management to the Audit Committee from the Finance and Risk Committee. Plaintiffs' factual allegations do not include any discussion of why the directors decided to transfer risk management oversight, and so provide no factual basis for concluding that the decision was made in bad faith. The board's decision itself does not create an inference that the board knew the decision was improper. *See Wood v. Baum*, 953 A.2d 136, 142 n.16 (Del. 2008). Thus, plaintiffs' allegations regarding the directors' decision are insufficient from the start to find a substantial likelihood of director liability.

Moreover, plaintiffs are incorrect to assume that Delaware directors breach the duty of loyalty or act in bad faith if their decisions depart from "best practices." (Compl. ¶181) "Delaware law does not—indeed, the common law cannot—hold fiduciaries liable for a failure to comply with the aspirational ideal of best practices." *In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 697 (Del. Ch. 2005), *aff'd* 906 A.2d 27 (Del. 2006). Delaware law does not create director liability for failure to make the best decision "any more than a common-law court deciding a medical malpractice dispute can impose a standard of liability based on ideal—rather than competent or standard—medical treatment practices, lest the average medical practitioner be found inevitably derelict." *Id*. As a result, adherence to some idealized "best practices" is not the standard for evaluating fiduciaries' actions under Delaware law.

And even if directors' conscious disregard of "best practices" could ever be a basis for a breach of fiduciary duty claim, plaintiffs have alleged no factual basis for their conclusory assertion that it is a best practice to have a company's finance committee, instead of its audit committee, oversee risk management. Indeed, the New York Stock Exchange's Listed Company Manual (of which the Court can take judicial notice) includes oversight of risk management as one of the responsibilities of an audit committee. (Ex. 12, at Rule 303A.07(b)(iii)(D) *commentary* ("the committee must discuss guidelines and policies to govern the process by which risk assessment and management is undertaken")) The only facts plaintiffs offer in support of this alleged "best practice" are (1) an article in "The Corporate Board" regarding risk committees (Compl. ¶180), and (2)

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(*Id*. ¶163) Neither supports plaintiffs' "best practices" assertion.

The Corporate Board Article. Far from providing support for a conclusion that a dedicated "risk committee" is a "best practice," the article explains that "firms with board-level risk committees remain in the minority for American companies." (Ex. 13, at 6) Regardless, plaintiffs do not allege, nor is there any indication in the Section 220 material cited in the complaint, that the directors ever saw this article or would have had any reason to regard it as authoritative.

The Chief Risk Officer's Presentation.

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Plaintiffs also fail to explain how GM's Audit Committee was any less of a "risk committee" than was the Finance and Risk Committee.

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Thus, plaintiffs' claim would have to be that it was bad faith to transfer oversight of risk management from one committee that had other responsibilities to another committee that also had other responsibilities. There is no basis in Delaware law for such a theory of liability.

Finally, plaintiffs allege no facts indicating that the transfer of risk management oversight from the Finance and Risk Committee to the Audit Committee had any causal connection to the Company's failure to initiate the ignition switch recall before February 2014. To establish a substantial likelihood of liability based on some allegedly wrongful board decision, plaintiffs must plead a connection between the alleged wrongdoing and the harm to the corporation. *See South v. Baker*, 62 A.3d 1, 14 (Del. Ch. 2012) (plaintiffs must plead "facts establishing a sufficient connection between the corporate trauma and the board"). They have not done so.

2. Plaintiffs Have Not Alleged With Particularity That GM Failed To Transfer Responsibility For Oversight Of Risk Management To The Audit Committee.

The complaint similarly contains no particularized factual allegations supporting plaintiffs' alternate assertion that responsibility for oversight of risk management was not actually transferred to the Audit Committee.

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Under Delaware law, it is the directors' actions that matter. *See, e.g.*, *Citigroup*, 964 A.2d at 135 ("director liability is not measured by the aspirational standard established by the internal documents detailing a company's oversight system"); *South*, 62 A.3d at 17 (a committee's description of its responsibilities in its charter cannot satisfy a plaintiff's pleading burden).

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The Audit Committee's acceptance of responsibility for overseeing GM's risk management is confirmed by GM's 2013 proxy material—cited by plaintiffs in their complaint (Compl. ¶180)—which explains that responsibility for oversight of GM's risk management strategies and policies "ha[s] been assumed by the Audit Committee." (Ex. 15, 4/25/2013 Proxy Statement, at 23) Thus, the Audit Committee's actions establish definitively that the Committee undertook responsibility for oversight of risk management.

B. The Complaint Lacks Particularized Factual Allegations That The Board Combined The Roles Of Chief Risk Officer And General Auditor In Bad Faith.

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Plaintiffs contend that this decision was made in bad faith because (1) GM should have had a "dedicated" Chief Risk Officer (*id*. ¶176); (2) the General Auditor already had a "full plate" and was "overburdened" (*id.* ¶¶174, 176); and (3) it was a "conflict of interest" to have the General Auditor serve as the CRO (*id*. ¶174). But plaintiffs' factual allegations do not support these assertions, and plaintiffs do not even attempt to plead with particularity that the directors made the decision to ask the General Auditor to also serve as the Chief Risk Officer in conscious breach of their fiduciary duties—that is, in bad faith.

There is no legal or factual basis for plaintiffs' assertion that chief risk officer must be a "dedicated" position. Likewise, plaintiffs do not allege any particularized facts in support of their assertion that GM's General Auditor was too busy to also serve as chief risk officer, let alone that the directors knew this. Finally, while plaintiffs *assert* that it is a "conflict of interest" to have an internal auditor also serve as Chief Risk Officer, and that "[c]orporate governance experts have identified appointing the GA as CRO as bad corporate governance" (Compl. ¶174), the only thing plaintiffs cite in support of these assertions is a 2004 position statement issued by the Institute of Internal Auditors. (*Id*. ¶175; Ex. 16, Position Statement) That position paper does not say that an internal auditor should not also serve as chief risk officer or that doing so would be a conflict of interest. If anything, the paper supports the contrary conclusion, opining that "[i]nternal audit's expertise in considering risks, in understanding the connections between risks and governance and in facilitation mean that it is well qualified to act as champion *and even project manager* for ERM [Enterprise Risk Management]." (*Id*., at 3 (emphasis added))

Moreover, there is no basis for an inference that the directors had any reason to believe that asking the General Auditor to serve as the Chief Risk Officer was so unreasonable that it would be a breach of the duty of loyalty or bad faith. Plaintiffs do not allege that the position paper discussed above was shared with the directors. And the information that the directors did receive is contrary to plaintiffs' position:

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Finally, as with their allegations regarding which board committee oversaw risk management, plaintiffs do not allege that having the General Auditor assume the CRO's responsibilities was related in any way to GM's delay in identifying the ignition switch defect and initiating the associated recall. *See supra* at 24-25.

II. Plaintiffs Have Not Alleged Particularized Facts Sufficient To Excuse Demand For Failure To Oversee GM.

Oversight liability exists only where "(a) the directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (emphasis in original). "In either case, imposition of liability requires a showing that the directors *knew* that they were not discharging their fiduciary obligations." *Id*. (emphasis added). Further, because a claim seeking to establish *Caremark* liability is predicated on the board's ignorance of the loss-creating activities, "only a sustained or systematic failure of the board to exercise oversight" will establish "the lack of good faith that is a necessary condition to liability." *In re Goldman Sachs Group*, 2011 WL 4826104, *19, *quoting In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996). Because of these high standards, oversight liability is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *Caremark*, 698 A.2d at 967.

Further complicating their position, plaintiffs cannot establish a plausible inference of bad faith from the fact that the belated remediation of the ignition switch defect has resulted in harm to GM. The Delaware Supreme Court made clear in *Stone* that the failure of an oversight system to prevent corporate harm does not support an inference of director bad faith. In *Stone*, the court evaluated a shareholder claim of oversight liability asserting that the directors of a bank must not have overseen the bank's compliance with applicable federal regulations because the bank was fined $50 million for not complying with those regulations. 911 A.2d at 370-71. The court rejected the plaintiffs' theory of liability as "seek[ing] to equate a bad outcome with bad faith." *Id*. at 373. Using hindsight in this manner, the court held, improperly "fail[ed] to recognize that the directors' good faith exercise of oversight responsibility may not invariably prevent employees from violating criminal laws, or from causing the corporation to incur significant financial liability, or both." *Id*.

Thus, *Stone* and subsequent decisions applying its holding make clear that courts do not accept the conclusion "that since the Company suffered large losses, and since a properly functioning risk management system would have avoided such losses, the directors must have breached their fiduciary duties in allowing such losses." *Citigroup*, 964 A.2d at 128; *see also Goldman Sachs*, 2011 WL 4826104, *4, *18-23 (refusing to infer director bad faith from allegations that the company was fined $535 million by a regulator); *South v. Baker*, 62 A.3d 1, 8-9, 16 (Del. Ch. 2012) (allegation that a fatal mine accident resulted from management's failure to implement required safety policies was insufficient to establish director bad faith); *David B. Shaev Profit Sharing Account v. Armstrong*, 2006 WL 391931, *5 (Del. Ch. Feb. 13, 2006) (rejecting the contention that "only a board violating its fiduciary duties could possibly have remained ignorant of Citigroup's allegedly corrupt relationships with Enron and WorldCom").

As a result, to plead that the directors face a substantial likelihood of *Caremark* liability, plaintiffs face a tough challenge—a challenge the complaint does not come close to meeting.

A. Plaintiffs Have Not Alleged Particularized Facts Sufficient To Establish A Substantial Likelihood Of Liability For Failure To Oversee GM Vehicle Safety.

Plaintiffs first contend that demand on the board should be excused because GM's directors face a substantial likelihood of liability for failure to oversee GM vehicle safety. Thus, plaintiffs allege that the directors "failed to adopt such a system and/or to the extent they claim they had implemented such [a] system or controls, consciously failed to monitor or oversee its operations." (Compl. ¶208) But the Section 220 documents that plaintiffs selectively cite do not support a substantial likelihood of liability for a sustained or systematic failure of oversight under either of these alternative theories.

1. Plaintiffs' Complaint And The Documents It Relies On Foreclose Any Claim That The Directors Utterly Failed To Adopt Any System To Oversee GM Vehicle Safety.

As explained above, the complaint itself and the documents it relies on make clear that the directors did not utterly fail to establish a system of reporting or internal controls at GM regarding vehicle safety. *See supra* at 11-15. Rather, the directors oversaw the safety of GM's vehicles both through the full board and its committees.

Plaintiffs' own complaint is replete with examples of this oversight. For example, plaintiffs allege that:

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Plaintiffs include these allegations by way of criticizing the manner in which the directors oversaw vehicle safety. But plaintiffs cannot state a *Caremark* claim by criticizing *how* directors exercised their oversight duties; they must allege that the directors "utterly failed" to do so. Plaintiffs' allegations that the directors oversaw the Company in a flawed manner fall far short of allegations that would establish bad faith. *See South*, 62 A.3d at 18-19 (allegations conceding that the directors met with management to review management's plans for mine safety were inconsistent with a substantial likelihood of oversight liability).

The directors' oversight of vehicle safety is made even clearer by the documents on which the complaint relies. For example, these documents show:

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And these examples are just from the documents that plaintiffs chose to cite in their complaint. Even these cherry-picked documents refute the allegation that the directors utterly failed to oversee GM's risk management and vehicle safety.

2. Plaintiffs' Arguments That The Directors' Oversight Was Inadequate Do Not Establish A Substantial Likelihood Of Director Liability.

Plaintiffs seek to overcome this record of oversight by alleging that there were particular types of information the board did not review—specifically, that GM lacked "a reporting system that ensured that the General Counsel and Board were aware of serious safety issues and cases involving fatalities" (Compl. ¶122), and that the directors "failed to create a necessary policy or procedure whereby a report from outside counsel, which discussed the risk of punitive damages, was not reported to the GM General Counsel or to the Board" (*id*. ¶126). But these criticisms about the specific types of information provided to the board do not establish that the directors "utterly failed" to oversee GM.

Even if accepted as true, the allegations suggest at most that "there were other metrics not considered by the board that might have produced better results."

Goldman Sachs, 2011 WL 4826104, *16. But "the duty to act in good faith to be informed cannot be thought to require directors to possess detailed information about all aspects of the operation of the enterprise." *Caremark*, 698 A.2d at 971. As a result, even if the directors did not receive reports of specific lawsuits related to fatalities and punitive damages warnings in individual personal injury cases from GM's outside counsel, that would not constitute the bad faith or breach of the duty of loyalty required to establish a substantial likelihood of liability under *Caremark*.[13]

Even more fundamentally, plaintiffs have not pled with particularity that the directors intentionally decided to insulate themselves from such information in order to avoid learning of safety defects. The complaint contains no allegations of fact suggesting that the board ever made such a decision, or that the directors were even aware that management was not bringing such information to the board's attention. Equally importantly, nowhere in the complaint do plaintiffs allege that the board consciously decided not to review such information knowing that failure to do so would be a breach of fiduciary duty.

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[13] Plaintiffs do not allege that the board was involved in creating policies governing how the legal department functioned, such as what settlement amounts required General Counsel approval, which are the type of "nuts-and-bolts operational issues" that Delaware courts refuse to assume boards have a hand in. *South*, 62 A.3d at 16.

In sum, plaintiffs' criticisms of how GM's directors oversaw vehicle safety and risk management are insufficient to establish a substantial likelihood of director liability for failure to establish *any oversight system at all*—for "there is a vast difference between an inadequate or flawed effort to carry out fiduciary duties and a conscious disregard for those duties." *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009). Directors who do the former "are protected by the business judgment rule, even if they fall short in the attempt." *South*, 62 A.3d at 19. Plaintiffs' own allegations demonstrate that GM's board did not "utterly fail to implement any reporting or information system or controls"—and the documents on which the complaint relies reinforce that point.

3. Plaintiffs Have Not Pled With Particularity That The Directors Ignored "Red Flags."

In addition to asserting that the directors utterly failed to have any reporting system at all, plaintiffs also allege (inconsistently) that the directors failed to pay attention to information provided by the system they had in place by ignoring "warnings" about potential problems. To establish a substantial likelihood of oversight liability on this theory, however, the complaint must both allege with particularity a connection between the warnings and the events that allegedly harmed the corporation and also that the directors consciously ignored those warnings. Here, plaintiffs allege neither.

First, plaintiffs do not plead any "warnings" known to the directors that related in any way to the ignition switch defect. None of the various "warnings" plaintiffs allege that the directors received about corporate risks put the directors on notice that the ignition switch defect existed or gave them any reason to believe that GM lacked an adequate process for identifying and addressing such defects.

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These generalized "warnings" are not connected to vehicle quality or safety at all, much less to any unremediated vehicle defects. For an allegedly unheeded warning to serve as an indicator of bad faith, there must be some connection between the warning and the ultimate injury to the corporation. *See South*, 62 A.3d at 17 (collecting authority). Here, plaintiffs allege none.

Second, for a "warning" to establish a substantial likelihood of liability, plaintiffs must also allege with particularity that the directors ignored it. *See South*, 62 A.3d at 16-17. The documents cited in the complaint make clear, however, that the directors did not ignore the issues raised to them.

REDACTED

[14] Thus, this is not evidence of a problem the directors knew existed, but ignored.

REDACTED

14

REDACTED

REDACTED

Plaintiffs contend that this was yet one more "warning" that the directors ignored.

REDACTED

In sum, the record before the Court shows that the directors "exercised their business judgment in choosing and implementing a risk management system that they presumably believed would keep them reasonably informed of the company's business risks." *Goldman Sachs*, 2011 WL 4826104, *23. Plaintiffs do not allege with particularity any facts suggesting bad faith on the part of the directors in this endeavor. Clearly, events did not unfold as the directors and the Company intended. But "[g]ood faith, not a good result, is what is required of the board." *Id*.

B. Plaintiffs Have Not Alleged Particularized Facts Sufficient To Establish A Substantial Likelihood Of Liability For Failure To Oversee GM's NHTSA Reporting.

Plaintiffs also contend that the directors face a substantial threat of liability for "the lack of a process to ensure that regulators were timely notified of events that required notification." (Compl. ¶206) Not only do plaintiffs fail to include any particularized factual allegations supporting this bald conclusion, but both the allegations in the complaint and the documents the complaint relies on directly contradict the assertion that the board consciously failed to oversee GM's NHTSA reporting.

The complaint itself alleges that GM did have a system by which it made required reports to NHTSA. Plaintiffs concede that GM has, "[s]ince the inception of the TREAD Act," maintained a database "in which the Company stored the data required to be reported quarterly to NHTSA under the TREAD Act." (Compl. ¶77) As characterized by plaintiffs, the database "was organized to track and report data in categories created by NHTSA covering 24 different systems in a vehicles [sic], such as airbags or steering, and fire and rollovers." (*Id*. ¶79) The database collected information from numerous sources including service requests, technical assistance repair orders from dealers, field reports, On-Star, and a database maintained by GM's legal department to track data concerning lawsuits. (*Id*. ¶82)

And plaintiffs concede that GM used the information in the database for its reporting to NHTSA. Thus, plaintiffs affirmatively allege that GM had "a specific team assigned to prepare NHTSA-required reports," and that the team had access to the database. (Compl. ¶82) Plaintiffs also concede that "[t]he information in the TREAD database was available to investigators" at GM evaluating potential safety issues and considering recalls. (*Id*. ¶77) Plaintiffs do not allege that GM was ever sanctioned by NHTSA prior to 2014 for failure to fulfill any NHTSA reporting requirements. Thus, they allege no basis to infer that the board had any reason to believe GM's NHTSA reporting was inadequate before the 2014 ignition switch recall.[15]

Plaintiffs attempt to bolster their allegations on this issue with the NHTSA consent order signed by GM in May 2014 in connection with the ignition switch

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[15] Nor do plaintiffs show director bad faith with their allegation that in 2013 a NHTSA investigator opined that the perception at NHTSA was that GM "is slow to communicate, slow to act, and, at times, requires additional effort of ODI [Office of Defects Investigation] that we do not feel is necessary with some of your peers." (Compl. ¶109 (quoting Ex. 21, at GMHEC 222039)) Nowhere do plaintiffs allege that this concern was reported to the board. Moreover, plaintiffs concede that the most senior GM executive who received the email—the Vice President of Global Regulatory Affairs—reacted promptly, writing to the other GM recipients of the email that "[w]e need to address this immediately," and "we are not going to let this slide." (Compl. ¶110 (quoting Ex. 21, at GMHEC 222037))

defect. Plaintiffs cite the consent order as support for their allegation that "from the period 2003 through January 2014, GM and the Board repeatedly violated the TREAD Act in failing to submit truthful and adequate reports to NHTSA." (Compl. ¶85 (citing Ex. 1, Consent Order, ¶10)) But the consent order does not support the allegation.

First, the consent order does not admit any violation of the TREAD Act. The TREAD Act imposed certain specific NHTSA reporting requirements, regarding information including recalls in foreign countries and customer satisfaction campaigns and other activities and events that may assist NHTSA to promptly identify defects related to motor vehicle safety. *See* Pub. L. 106-414, 114 Stat. 1800 (Nov. 1, 2000). The TREAD Act is not the subject of the GM-NHTSA consent order. Rather, the consent order concerns specific provisions of the National Traffic and Motor Vehicle Safety Act of 1966 (the "Safety Act"), 49 U.S.C. § 30118(c)(1) and § 30119(c)(2), which are different from the reporting requirements of the TREAD Act. The consent order admits a violation of these provisions of the Safety Act, not any provision of the TREAD Act. (Ex. 1, Consent Order, ¶10)

Second, the consent order does not fault GM's directors or assert or admit any violation of any law by them. Nor does the admission that GM violated the

Safety Act establish a substantial likelihood of personal director liability. For instance, in *Stone v. Ritter*, a bank was fined $50 million for failure to adhere to federal regulations. 911 A.2d at 370-71. The court held that this was not enough to plead a substantial likelihood of director liability. *Id*. at 373; *see also Goldman Sachs*, 2011 WL 4826104, *4, 18-23 (the company paid the SEC a civil penalty of $535 million, plus an additional $15 million in disgorgement of profits, in response to the SEC's fraud claim, but the court held that the plaintiffs had not sufficiently pled a substantial likelihood of oversight liability); *South*, 62 A.3d at 8-9, 16 (dismissing demand futility claim based on allegations that the U.S. Mine Safety and Health Administration issued a report blaming a mine accident that resulted in a fatality on a company's failure to have the required mine safety policies).

Third, the violation of the Safety Act addressed in the NHTSA order is specific, and relates only to the 2014 ignition switch recall—Recall No. 14V-047. It does not say that GM failed to timely notify NHTSA of defects from 2003 through 2014. Rather, as plaintiffs quote elsewhere in their complaint, GM admitted in the consent order only "that it violated the Safety Act by failing to provide notice to NHTSA of the safety-related defect that is the subject of Recall No. 14V-047 within five working days" as required by the statute. (Ex. 1, Consent Order, ¶10)

Conclusion

For the foregoing reasons, plaintiffs have not pled with specificity facts sufficient to excuse demand, and this case should be dismissed pursuant to Rule 23.1.

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Respectfully submitted,

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