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Transaction ID 56775888
Case No. 9627-VCG

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: February 13, 2015

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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Preliminary Statement

Plaintiffs contend that sixteen current or former GM directors consciously breached their duty of loyalty to GM despite having no personal or economic motive to do so, and despite knowing that their breaches concerned the safety of GM's customers and others on the roads. Neither the complaint nor plaintiffs' brief offers any plausible reason why these directors would choose to do so. To sustain such a claim against admittedly disinterested directors, Delaware law requires plaintiffs to plead with particularity an extreme set of facts regarding the directors' conduct. Plaintiffs here allege no such facts. They do not allege facts showing that the directors knew about the ignition switch defect. Nor do they allege facts showing that the directors consciously disregarded their duty of oversight or intentionally undermined GM's risk management processes. Rather, they offer only conclusory assertions and inaccurate characterizations of documents, while ignoring the portions of the documents they rely on that contradict their theories.

Defendants' opening brief exposed the lack of factual allegations underlying plaintiffs' assertion that the directors acted in bad faith in transferring responsibility for oversight of risk management from the Finance and Risk Committee to the Audit Committee and appointing the head of Internal Audit to serve as the Chief Risk Officer. Both decisions are consistent with the structure at many U.S. com-

panies, and plaintiffs do not allege that the directors knew their decisions were outside the norm as to constitute bad faith. Plaintiffs' brief does not refute any of these points.

Defendants' opening brief also detailed the evidence, from the documents plaintiffs relied on in the complaint, that GM's directors oversaw risk management, including vehicle quality and safety. Plaintiffs nevertheless repeatedly assert that the directors "did nothing" when advised by GM's Chief Risk Officer "that the Company was not adequately protecting against risk." (Pl. Br. 59; *see also id*. at 49, 50) But the complaint does not allege with particularity that the CRO ever gave the directors any such advice. And the record before the Court conclusively refutes plaintiffs' assertion that the directors "did nothing." Rather, the directors:

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Thus, the documents *plaintiffs* chose to cite in their complaint establish that GM's directors oversaw risk management, including vehicle quality and safety, which disproves definitively plaintiffs' assertion that the directors "did nothing."

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In sum, the complaint does not satisfy Delaware's heightened standard for pleading demand futility. While this Court is required to accept as true the complaint's particularized allegations of fact, it is not required to accept plaintiffs' inaccurate characterization of those facts, misrepresentation of documents cited in the complaint, or generalized assertions that are untethered to any allegations of fact. Nor is the Court required to disregard the contents of documents the complaint references simply because plaintiffs choose to ignore them in their brief. Finally, the Court cannot draw inferences from the "absence" of facts in the board documents GM produced pursuant to Section 220 (Pl. Br. 37) when plaintiffs have put before the Court only a small subset of the documents produced.

Argument[1]

Plaintiffs acknowledge that to establish demand futility under either *Aronson* or *Rales*, they must plead that a majority of the board faces a substantial likelihood of liability. (Pl. Br. 42) Plaintiffs do not contest that this substantial likelihood of liability must be based on a breach of the duty of loyalty, because GM has adopted a Section 102(b)(7) provision exculpating its directors from liability for breach of

[1] Plaintiffs' brief contains a lengthy fact section that largely restates parts of the complaint. (Pl. Br. 3-36) Where defendants' opening brief addressed an allegation from the complaint, and plaintiffs' brief only restates the allegation without responding, defendants do not repeat their opening brief here unless necessary to the discussion of the legal argument.

the duty of care. Finally, plaintiffs acknowledge that, to plead a breach of the du of loyalty, they must allege with particularity that the directors acted in bad faith—that is, they must plead particularized facts supporting an inference that the directors consciously acted contrary to the interests of GM. (Pl. Br. 50, citing *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 652 (Del. Ch. 2008)) Plaintiffs have not met their burden.

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

Plaintiffs argue that demand is excused under the second prong of *Aronson* based on the board's decisions to (1) transfer responsibility for oversight of risk management from one board committee to another, and (2) appoint the General Auditor to also serve as Chief Risk Officer. (Pl. Br. 44-54) Plaintiffs' allegations do not satisfy *Aronson*.[2]

A. The Complaint Does Not Plead With Particularity That The Board Transferred Responsibility For Risk Management Oversight To The Audit Committee In Bad Faith.

Defendants' opening brief explained why plaintiffs' allegations regarding the board's decision to transfer responsibility for risk management oversight from the Finance and Risk Committee to the Audit Committee provide no basis for a

[2] Most of the *Aronson* section of plaintiffs' brief concerns purported board inaction, which is evaluated under *Rales*, not *Aronson*. Defendants respond to those arguments in Part II below.

conclusion that the decision was made in bad faith. First, the complaint contai no factual allegations regarding why the directors made the decision or what information they relied on in making it. (Def. Br. 22) Second, the assertion that the board made this decision in bad faith is undermined by the record before the Court, which establishes that many U.S. corporations assign their audit committees to oversee risk management. (Def. Br. 23-24, 29 & Exs. 12-14) Finally, the complaint lacks allegations of fact indicating that the transfer of risk management oversight responsibility to the Audit Committee had any causal connection to the harm plaintiffs allege here—GM's failure to initiate the ignition switch recall earlier. (Def. Br. 25-26)

Plaintiffs respond to none of these points. Instead, they argue that the Court should infer bad faith because (1) the transfer of oversight responsibility to the Audit Committee "nullified" GM's "safeguards," and (2) the directors failed to transfer certain responsibilities to the Audit Committee, leaving gaps in the directors' risk management oversight.[3] Neither claim is well-pled.

[3] Plaintiffs abandon their allegation that the directors breached their duty of loyalty because assigning the Audit Committee to oversee risk management was not a "best practice." (Compl. ¶181) That allegation was not sustainable in the face of (1) the authority to the contrary (Def. Br. 23), and (2) the lack of factual support for the supposed "best practice." (*Id*. at 24-25)

1. The Complaint Does Not Allege With Particularity That The Audit Committee's Oversight "Nullified" GM's "Safeguards."

Plaintiffs argue that the transfer of risk management oversight to the Audit Committee constituted bad faith because it "nullified" any "safety and accountability safeguards" GM had in place. (Pl. Br. 53) But the complaint does not allege with particularity that the Audit Committee's oversight of risk management was any different than the Finance and Risk Committee's. Nor does it identify any safeguards that were nullified, or explain how the transfer nullified them.

Equally importantly, the complaint does not allege with particularity that the directors *knew* the Audit Committee would oversee risk management less effectively than the Finance and Risk Committee. As a result, even if plaintiffs had alleged that the Audit Committee's oversight was deficient in some way (which they have not), their allegations would still be insufficient to establish the "intentional dereliction of duty" necessary to establish a substantial likelihood of liability for breach of the duty of loyalty. *In re Goldman Sachs Group S'holder Litig.*, 2011 WL 4826104, *12 (Del. Ch. Oct. 12, 2011).

Plaintiffs assert that the Audit Committee was "already heavily overtaxed by its role in overseeing GM's emergence from bankruptcy." (Pl. Br. 48) They support this assertion only with the allegation that the Audit Committee was "tasked

with overseeing 27 other matters." (*Id.*, citing Compl. ¶181) But they ignore th the Finance and Risk Committee too was tasked with overseeing many other matters. (Compl. ¶162; Def. Br. 25, citing Ex. 14)[4] Further, the Audit Committee's actions after the transfer of responsibility establish that it was not too "overtaxed" to assume the tasks previously performed by the Finance and Risk Committee.

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2. The Complaint Does Not Allege With Particularity That The Board Failed To Transfer Some Oversight Responsibilities To The Audit Committee.

Plaintiffs also attempt to establish bad faith through their assertion that the directors transferred only "certain" responsibilities for oversight of risk management to the Audit Committee, but left no board committee with the other risk management oversight responsibilities. (Pl. Br. 34, citing Compl. ¶185) Plaintiffs' only support for this assertion is that the board did not amend the Audit Commit-

[4] Plaintiffs contend that the Finance and Risk Committee's "primary role was risk oversight." (Pl. Br. 25) No particularized factual allegation supports this assertion. The Committee's charter does not reflect a prioritization of the Committee's many responsibilities. (Ex. 14 at GM 1281-83)

[5] Plaintiffs argue that defendants' Exhibit 7 "is not referenced in plaintiffs' Complaint," and so is "not properly before the Court." (Pl. Br. 13) Exhibit 7 was cited in paragraphs 67 and 187 of the complaint.

tee's charter to add the responsibilities it deleted from the Finance and Risk Committee's charter. (Pl. Br. 34-35) REDACTED

Thus, the absence of a charter amendment is not evidence that the board failed to transfer responsibility. Further, GM's proxy material explained that "responsibility for assisting the Board in its oversight of our risk management strategies and policies" had been "assumed by the Audit Committee." (Ex. 15 at 23) The proxy material did not suggest that the Committee only assumed some of the risk management oversight responsibilities—it spoke of "responsibility" for risk management oversight as a whole.

Finally, even assuming for argument's sake that certain risk management oversight responsibilities were not transferred to the Audit Committee, plaintiffs do not allege with particularity that this was done in bad faith, or that the directors knew some responsibilities were not assumed by the Audit Committee. As a result, plaintiffs have not pled with particularity the intentional dereliction of duty or conscious disregard necessary to excuse demand.

B. The Complaint Does Not Allege With Particularity That The Board Combined The Roles Of Chief Risk Officer And General Auditor In Bad Faith.

Plaintiffs' brief also fails to show that they have alleged with particularity that the board acted in bad faith when it appointed the General Auditor to serve as the Chief Risk Officer. As with their claim about the transfer of oversight responsibility to the Audit Committee, the complaint contains no factual allegations about why the directors made the decision or what information they relied on in making it.[6] Nor does the complaint allege with particularity that having the General Auditor serve as CRO was causally connected to the specific harm at issue in this case. Plaintiffs again simply ignore defendants' opening brief on these points. (Def. Br. 28-30)[7]

In the complaint, plaintiffs alleged that having an internal auditor serve as CRO is a conflict of interest that corporate governance experts have identified as "bad corporate governance." (Compl. ¶174) Their only claimed support for this

[6] Plaintiffs assert that the board replaced the prior CRO because he delivered a negative report about GM's risk management processes. (Pl. Br. 31-32) But plaintiffs do not allege with particularity that the CRO delivered any such report or that the CRO's reports had anything to do with the board's decision to replace him. *See infra* at 11-14 (refuting plaintiffs' assertion that the CRO told the directors that GM's risk management was deficient).

[7] Plaintiffs assert, with no citation to any support, that the replacement of the initial CRO "resulted in deaths and serious injuries from GM's defective ignition switch." (Pl. Br. 58) The Court need not credit such conclusory assertions. *See Wood v. Baum*, 953 A.2d 136, 140 (Del. 2008).

assertion was a 2004 position statement by the Institute of Internal Auditors that fact says no such thing, as defendants' opening brief explained. (*Id.* ¶175; Def. Br. 28-29) Plaintiffs' brief does not defend the complaint's inaccurate characterization of the position statement, but instead simply reasserts the conclusory assertion of a conflict of interest, now with no support cited whatsoever. (Pl. Br. 33) But "conclusory allegations are not considered as expressly pleaded facts or factual inferences," and so the Court need not accept plaintiffs' unsupported say-so. *Wood*, 953 A.2d at 140.

Plaintiffs also assert that the General Auditor was too busy to act as CRO. (Pl. Br. 33) But the complaint alleges no facts and cites no documents to support this assertion. (Def. Br. 28) REDACTED

Moreover, even if appointing the General Auditor as CRO was a poor decision, that still would not establish director bad faith because plaintiffs do not allege with particularity that the directors *knew* it was a poor decision.

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C. The Complaint Does Not Plead With Particularity That The Board's Oversight Of Risk Management Was "In Disarray" Prior To The Board's Decisions.

Underlying plaintiffs' accusations of bad faith regarding both board decisions is their assertion that the decisions were improper because they were made "at a time when all available information disclosed" to the directors indicated "that GM's risk policies and procedures were in disarray and not functioning properly." (Pl. Br. 25)[8] However, plaintiffs cite no particularized allegations from the complaint to support this conclusory assertion. And the documents in the record estab-

[8] Plaintiffs argue that even if individually the two board decisions do not suggest a substantial likelihood of liability, together they do. (Pl. Br. 46-47) But the decision cited by plaintiffs in support of their position, *CalPERS v. Coulter*, 2002 WL 31888343 (Del. Ch. Dec. 18, 2002), is inapposite, for it was evaluating allegations of a lack of director independence. *Id.* at *5. Considering allegations together makes sense when evaluating whether directors are too interconnected to be independent, because multiple connections may suggest a deeper relationship than just one connection. It does not make sense, however, when evaluating whether directors face a substantial likelihood of liability for discrete affirmative decisions of the kind plaintiffs allege under *Aronson*. "[T]he court cannot draw any inferences from allegations that are not themselves well pleaded; zero plus zero is zero." *In re Career Educ. Corp.*, 2007 WL 1029092, *3 (N.D. Ill. Mar. 29, 2007).

lish that when the directors made the challenged decisions, in November 2011 a August 2012, there was *no* suggestion that GM risk management was "in disarray."

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In sum, plaintiffs' attempt to assert bad faith because the directors made these decisions despite the CRO's warnings of disarray and dysfunction fails for lack of particularized allegations supporting the claim. The complaint does not support the assertion that the CRO told the directors of unaddressed problems in GM's management of the risks associated with vehicle safety.

II. The Complaint Does Not Allege Particularized Facts Sufficient To Excuse Demand Under *Rales* For Board Inaction.

Plaintiffs do not dispute that, in order to establish that the directors face a substantial likelihood of liability for failure to oversee GM under *Rales*, they must plead with particularity that the directors "utterly failed" either to implement a reporting system or to monitor the output of the reporting system they established. *See Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006). Plaintiffs criticize the directors' oversight of GM vehicle safety and NHTSA reporting, but they have not pled

with particularity an utter failure of oversight.[11] Nor have they pled with particularity that the directors face a substantial likelihood of liability for failing to act in the face of a known duty to do so.

A. The Complaint Does Not Allege Particularized Facts Sufficient To Establish A Substantial Likelihood Of Liability For Failure To Oversee GM Vehicle Safety.

Plaintiffs do not argue that the directors "utterly failed" to oversee GM vehicle safety. Nor could they. Both the complaint and the documents it references establish that the directors did oversee vehicle safety. (Def. Br. 11-14, 33-35) Instead, plaintiffs criticize *how* the directors oversaw vehicle safety.

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Consequently, even if plaintiffs'

[11] Plaintiffs cite the Delaware Supreme Court's decision in *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (Del. 1963), for the proposition that directors can be liable for recklessly ignoring obvious signs of employee wrongdoing or reposing confidence in obviously untrustworthy employees. (Pl. Br. 42) But plaintiffs do not argue, and the complaint does not allege, any such actions by GM's directors.

criticism were justified (which it is not), it is legally insufficient because it does n establish an "utter failure" to create a reporting system or to monitor its output.

For example, plaintiffs assert that "the Board did not mandate that serious defects, including those that could likely lead to fatalities and/or punitive damages, be reported either to the Board, or to GM's CEO or General Counsel." (Pl. Br. 56)[12]

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[12] Plaintiffs assert that the Valukas Report "concluded that the system put in place by the Board did not require that serious defects … be reported to the Board." (Pl. Br. 9) However, they do not source this assertion to any specific part of the Report, and the Report says no such thing. (GM has not made the Report publicly available and does not attach it here. However, NHTSA, to which GM was required to submit the Report, has posted it on its website and thus the full report was available to plaintiffs.) Plaintiffs also contend that "the Board did not monitor, in any way, GM's legal department or cases that were being handled by outside counsel." (*Id*. at 14) Not only do plaintiffs not allege with particularity any facts to support this assertion,

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[13] Plaintiffs do not allege that the directors learned at any point before the ignition switch recall in early 2014 that information about defects related to vehicle safety was not being reported to the board when warranted.

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[13] Plaintiffs argue that the legal department had "no mechanism to facilitate" communication higher up the ladder. (Pl. Br. 15) They do not support that assertion with particularized factual allegations.

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Plaintiffs' contention regarding the types of information they assert the directors should have reviewed reduces to the argument that "there were other metrics not considered by the board that might have produced better results." *In re Goldman Sachs Group S'holder Litig.*, 2011 WL 4826104, *16 (Del. Ch. Oct. 12, 2011) (rejecting the sufficiency of such a claim). REDACTED

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But "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). Plaintiffs contend that "[t]his Board had the wherewithal to do better." (Pl. Br. 5) The failure "to do better" does not constitute a well-pled claim for utter failure of oversight.[15]

Plaintiffs attempt to support their theory of director liability through two public statements made by GM directors in 2014. First, plaintiffs allege that GM CEO and director Mary Barra said "[s]omething went very wrong in our process in this instance, and terrible things happened." (Pl. Br. 48) This was not a statement

[15] Plaintiffs attempt to broaden their criticism by citing an article in The New York Times concluding that the board "took a mostly hands-off approach" to overseeing vehicle safety. (Pl. Br. 56) But the article relies significantly on this lawsuit to support its position and is therefore circular: Plaintiffs cannot rely on an article to underpin their complaint when the article relies on the lawsuit to support the very claims the complaint relies on. (Ex. 23, Bill Vlasic, *G.M.'s Board Is Seen As Slow In Reacting To Safety Crisis*, N.Y. Times, Sept. 7, 2014)

that GM had no process, and Barra did not say that anything "went very wrong" a result of the board's actions (or inaction). Rather, she said that GM had a process, but that the process did not work in this instance. Plaintiffs' reliance on this statement runs squarely into the Delaware decisions holding that a bad outcome is not evidence of director bad faith. *See Stone*, 911 A.2d at 373 (rejecting complaint that sought "to equate a bad outcome with bad faith"); *Goldman Sachs*, 2011 WL 4826104, at *4.

Second, plaintiffs point to a September 2014 article in The New York Times quoting the Chairman of GM's Board, Theodore Solso, as saying "we should have known earlier…. The way I look at it, G.M. has not been well run for a long period of time." (Pl. Br. 58) Plaintiffs characterize this as an admission of director misconduct. But two sentences later, the article reports that Solso "contended that the board and management were not lax about safety." (Ex. 23 at 4) Thus, Solso's statement plainly was not a concession that the directors were at fault. Rather, his statement that, based on what he knows now, the board "should have known earlier" is consistent with the policy that management escalate to the board necessary information about risks to GM. To interpret this after the fact desire to have had a reporting system work better as an admission that there was no reporting system at

all would strip the statement of its context. The statement provides no support f plaintiffs' claim that the directors acted in bad faith.

In support of their oversight liability claim, plaintiffs cite *In re Tower Air, Inc.*, 416 F.3d 229 (3d Cir. 2005) (discussed at Pl. Br. 55). This decision does not support plaintiffs' position. First, *Tower Air* was a direct suit brought by the trustee who assumed control over Tower Air when it filed for bankruptcy. *Id*. at 232. No demand futility question was presented, and the court expressly indicated that the lower court erred by citing decisions from derivative actions. *Id*. at 236 ("We recognize that the District Court (mistakenly) cited derivative suit pleading cases at times, especially in its first memorandum."). Second, the complaint in *Tower Air* had to satisfy only the lenient notice pleading standard of Federal Rule of Civil Procedure 8. Indeed, the court's basis for reversing the lower court's decision was that the decision erred "by imposing a heightened pleading standard." *Id*. at 237. By contrast, plaintiffs here concede that they must satisfy the heightened pleading standard governing allegations of demand futility. (Pl. Br. 36)

Finally, the allegations in *Tower Air* were entirely different than those here. There, the plaintiff alleged that the defendants failed to act "in the face of negative maintenance reports" about the company's airplanes. *Tower Air*, 416 F.3d at 239. In sharp contrast, here there is no allegation that GM's directors were aware of the

ignition switch defect or any unaddressed vehicle safety defects before the rec was issued; indeed, plaintiffs acknowledge that they were not. (Pl. Br. 13 ("The 2013 Audit Committee Report does not evidence that the key decision-makers at the Board or senior executive level knew that GM's products were killing or seriously injuring its customers."); Compl. ¶62 ("the Board of Directors was not informed of any problem posed by the Cobalt ignition switch until February 2014."))

Plaintiffs' reliance on *Rich v. Chong*, 66 A.3d 963 (Del. Ch. 2013), is similarly misplaced. (Pl. Br. 52-53) Unlike plaintiffs here, the plaintiff in *Rich* had made a demand on the board, and alleged that the directors should be deemed to have failed to investigate the demand because the company had cut off funding for the investigation and the directors charged with investigating had left the board. *Rich*, 66 A.3d at 979. The court agreed, and therefore did not consider whether demand was excused. *Id*. The court then proceeded to evaluate the defendants' motion to dismiss the plaintiff's *Caremark* claim "under the more lenient pleading standards of Rule 12(b)(6)." *Id*. at 979, 981-82. *Rich*'s analysis of whether the facts pled in that case were sufficient under a notice pleading standard does not apply to the different question posed here of whether demand is excused under the heightened pleading standard of Rule 23.1.

Rich is also inapposite because the facts alleged there bear no comparison those alleged here. Among other things, the company's board chairman allegedly improperly transferred $130 million to unaffiliated third-parties abroad, and the court concluded that it "strain[ed] credulity" to believe the other directors were unaware of the misappropriation. *Rich*, 66 A.3d at 984. By contrast, here plaintiffs do not allege that any of the directors were aware of the ignition switch defect.

B. The Complaint Does Not Allege Particularized Facts Sufficient To Establish A Substantial Likelihood Of Liability For Failure To Oversee GM's NHTSA Reporting.

Near the end of plaintiffs' brief, they devote two paragraphs to the assertion that "Defendants failed to uphold their duties to comply with legal and regulatory requirements" and "failed to have in place requisite policies and compliance procedures regarding legal and regulatory risk, as well as risk assessment and risk management." (Pl. Br. 58-59) Plaintiffs assert that these "failures" resulted in violations of the TREAD Act. (*Id*. at 59)

As an initial matter, plaintiffs have not pled with particularity that GM lacked policies and procedures to comply with its regulatory reporting requirements. In fact, they allege just the opposite. Plaintiffs' complaint alleges that GM did have a system through which it made required reports to NHTSA. (Def. Br. 41-42, citing allegations in the complaint) The complaint describes the database in

which GM collected information from many different sources, organized to correspond to 24 different vehicle systems. (Compl. ¶¶79, 82) These facts defeat a *Caremark* claim. *See, e.g.*, *David B. Shaev Profit Sharing Account v. Armstrong*, 2006 WL 391931, *5 (Del. Ch. Feb. 13, 2006) (dismissing a failure of oversight claim where the plaintiff conceded "that Citigroup had a wide range of compliance systems in place, and that [the directors] had no reason to believe that these systems were not functioning in a basic sense."), *aff'd*, 911 A.2d 802 (Del. 2006) (TABLE). The complaint also concedes that GM assigned a team "to prepare NHTSA-required reports" from this database and other sources. (*Id*. ¶82)

Second, plaintiffs have not pled with particularity that GM failed to fulfill its reporting obligations generally. Contrary to plaintiffs' argument, the consent order that GM signed with NHTSA does not support their assertion. Rather, it admits only a single reporting violation—that GM did not report the ignition switch defect to NHTSA within five working days of its discovery. (Def. Br. 44)[16] Other than this single reporting violation, plaintiffs allege no other reporting deficiencies or NHTSA sanctions.

[16] As explained in defendants' opening brief, the consent order admits a violation of specific provisions of the Safety Act, not the TREAD Act, as plaintiffs assert. (Def. Br. 43 & Ex. 1, ¶10; Pl. Br. 59)

Third, plaintiffs do not plead with particularity any wrongdoing by the directors. (Def. Br. 43-44) Plaintiffs cannot support an inference that the *directors* face a substantial likelihood of liability based on a regulatory violation by the *company*. *See Stone*, 911 A.2d at 370-73 (discussed at Def. Br. 44). The consent order does not assert that the directors were responsible for the single reporting violation it concerns. (Def. Br. 43) And plaintiffs do not assert that the directors knew that GM had failed to fulfill any other NHTSA reporting obligations.

Fourth, plaintiffs cite three paragraphs of the complaint that criticize how GM fulfilled its NHTSA-reporting requirements, none of which reflects director disloyalty or bad faith. (Pl. Br. 58-59) Plaintiffs first allege that GM's NHTSA reporting team "did not have sufficient resources." (Compl. ¶81) But plaintiffs do not allege that the directors had any role in, or were ever informed of, this alleged lack of resources. Courts do not assume that directors are involved in "nuts-and-bolts operational issues." *South v. Baker*, 62 A.3d 1, 16 (Del. Ch. 2012). Next, plaintiffs cite a NHTSA investigator's opinion that NHTSA's perception of GM was that it was "slow" to communicate and act. (Compl. ¶110) But plaintiffs again do not allege that the directors were aware of this, and do not contend that GM management's response to the investigator's opinion was deficient. (Def. Br. 42 n.15); *David B. Shaev Profit Sharing Account*, 2006 WL 391931, at *5 (dis-

missing a complaint that "include[d] no allegations that the board or audit committee or any other supervisory mechanism was ever presented with information pointing it towards" the problem). Finally, plaintiffs quote hearsay from a New York Times article critical of the way GM responded to inquiries from NHTSA regarding accidents in which a death occurred. (Compl. ¶114) But plaintiffs do not allege that NHTSA—as opposed to The New York Times—ever asserted that GM's responses were deficient, let alone that the directors knew this. As a result, these paragraphs of the complaint do not support a substantial likelihood of director liability.

C. The Complaint Does Not Allege With Particularity That The Directors Failed To Act In The Face Of A Known Duty To Act.

Plaintiffs contend at various places throughout their brief that the directors failed to act in the face of a known duty to do so. (Pl. Br. 37, 40, 47) Because plaintiffs do not contend that the directors consciously decided not to act, these claims are reviewed under the *Rales* standard. *See Stone*, 911 A.2d at 370 ("[w]here directors fail to act in the face of a known duty to act," they "demonstrat[e] a conscious disregard for their responsibilities" under *Rales*). As an initial matter, this claim fails because plaintiffs do not plead with particularity that any failure to act was connected to vehicle safety at all, much less to the ignition switch defect in particular. Although defendants explained in their opening brief that

plaintiffs had failed to establish this connection (Def. Br. 38), plaintiffs' brief dc not attempt to provide one, or even respond to the argument at all.

The claim also fails because the complaint lacks particularized allegations that the directors were aware of any issue that required action.

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[17] Plaintiffs also claim that the charter of the Finance and Risk Committee "recognized that the Company lacked risk oversight." (Compl. ¶153; Pl. Br. 23) The charter, which is in the record before the Court, says nothing of the sort. Rather it merely lays out the Committee's purpose, membership, responsibilities, and authority. (Ex. 14 at GM 1281-83)

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Conclusion

For the foregoing reasons, and for the reasons in defendants' opening brief, 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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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Ct. Ch. R. 171(d)(4) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2010.

2. This brief complies with the type-volume limitation of Ct. Ch. R. 171(f)(1) because it contains 7,465 words, which were counted by Microsoft Word 2010.

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