IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE GENERAL MOTORS	)	
COMPANY DERIVATIVE	)	Consolidated
LITIGATION	)	C.A. No. 9627-VCG

MEMORANDUM OPINION

Date Submitted: March 26, 2015
Date Decided: June 26, 2015

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GLASSCOCK, Vice Chancellor

The factual scenario underlying this matter is sadly familiar. An iconic American company produces a product or service that goes terribly awry, causing the company financial and reputational damage, and perhaps doing damage to society at large as well. A stockholder of the company wishes to sue derivatively on behalf of the company, to recoup its losses by holding directors liable under theories of breach of fiduciary duty. Because this potential lawsuit is a chose in action belonging to the corporation, whether to pursue it is within the business judgment of the board of directors. In order to bring the suit derivatively, under Court of Chancery Rule 23.1 the stockholder must plead facts demonstrating that a demand to bring the action was improperly refused, or, more typically, would be futile.

The requirement that plaintiffs demonstrate futility is—must be—rigorous.[1] The purpose of Rule 23.1 is to prevent frivolous usurpation of a core director function by a stockholder, with all the distraction and chaos that would portend. If a mere allegation of liability on the part of the directors were enough to demonstrate a disabling self interest, conclusory allegations of breach of director duty would eat the rule whole, in a single bite. There is, of course, a whiff of irony, even tautology, in a Court determining, at the pleading stage, whether it

[1] This requirement is rigorous, but by no means insurmountable when supported by the pleadings. The plaintiff is entitled to the presumption that well-pleaded allegations in the complaint are true, as well as to reasonable inferences in his favor therefrom.

would be futile to ask a director to decide, on behalf of her principal, to sue herself. This Court, and our Supreme Court, have endorsed different approaches to this problem in different situations;[2] all, however, distill to the following principle: To survive a challenge under Rule 23.1, the complaint must make sufficient non-conclusory allegations to raise a reasonable doubt in the mind of the Court that a majority of the directors can exercise its business judgment on behalf of the corporation, in light of the directors' alleged conflicted interests.

Here, the results of the corporate activity in question are particularly distressing. This case involves ignition switches engineered and used by America's largest automaker, General Motors ("GM"), some of which malfunctioned during use of the automobiles by consumers. This has led to monetary loss on the part of the corporation, via fines, damages and punitive damages from lawsuits; reputational damage; and most distressingly, personal injury and death to GM customers. GM has been and will be held liable for any wrongdoing in the engineering and deployment of these ignition switches. The Plaintiffs here, GM stockholders, wish to recoup some of the loss on behalf of the corporation itself, alleging that the directors breached their duty of loyalty by failing to oversee the operations of GM. They failed to make a demand that the company bring this action, therefore, they must show that such a demand would

[2] *See, e.g., Aronson v. Lewis*, 473 A.2d 805 (Del. 1984) *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); *Rales v. Blasband*, 634 A.2d 927 (Del. 1993).

have been futile, or face dismissal. The Plaintiffs have used section 220 to obtain corporate records to strengthen their pleadings; nonetheless, in my view, they have failed to raise a reasonable doubt that GM's directors acted in good faith or otherwise face a substantial likelihood of personal liability in connection with the faulty ignition switches. Accordingly, GM's motion to dismiss under Rule 23.1 must be granted. The facts and my analysis are below.

I. BACKGROUND FACTS[3]

In February 2014, GM issued its first of what would be 45 recalls over the next several months, covering a total of 28 million vehicles. Approximately 13 million vehicles were recalled due to issues with the ignition switch, including, among other model types, the Chevrolet Cobalt and Pontiac G5 of certain model years. Specifically, the Plaintiffs explain, this ignition switch defect involved "the inability of the ignition to keep a car powered on by slipping from the 'run' mode to the 'accessory' mode, generally due to a modest bump to the key fob."[4] This caused the vehicle's engine and electrical system to shut off, which disabled power steering and power brakes, and also caused the vehicle's airbag to not deploy in the

[3] For purposes of this Motion to Dismiss, I accept as true the well-pleaded factual allegations in the Second Amended Complaint ("Complaint"), which I do not aim to reproduce in its entirety here. The Plaintiffs made a demand under 8 *Del. C.* §220 (the "§ 220 Demand"), pursuant to which they received documents from relevant Board and committee meetings. Those documents are incorporated by reference into the Complaint. Unless otherwise stated, all facts are taken from the Complaint and the documents incorporated by reference therein.

[4] Second Am. Compl. ¶ 57.

event of a crash. The ignition switch defect has been implicated in a number of serious injuries and deaths.

The cost of recalls resulted in a total of approximately $1.5 billion charges against earnings through the first and second quarters of 2014. GM has also set up its Ignition Compensation Fund (the "Fund") to compensate victims of accidents caused by its vehicles' faulty ignition switches; at the time of the Complaint, the Fund had approved 23 death claims and 16 injury claims, and had received 1,130 total claims. The Fund has no cap on overall payments.

"Shortly after this recall was announced, GM also disclosed that information relating to the defect had been known to certain engineers and other employees within the company for a number of years."[5] As a result of the defects and recalls, GM is the subject of a number of products liability and personal injury lawsuits, class actions, two Congressional investigations, and a criminal investigation by the U.S. Department of Justice. GM paid $35 million to the government in fines, the maximum civil fine and the highest in history, for its violation of the National Traffic and Motor Vehicle Safety Act of 1996 (the "Safety Act").

The Plaintiffs seek to hold GM's board of directors (the "Board") personally liable in connection with these losses, not because the Board was complicit in the defect, but because it did not know about it until February 2014. Specifically, the

[5] Oral Arg. Tr. 6:1–5.

Plaintiffs allege that the Board lacked a process by which it would be advised of National Highway Traffic Safety Administration ("NHTSA") inquiries and the responses thereto. More generally, they argue that the Board lacked a mechanism by which it received information about safety risks and the risk of punitive damages in pending litigation.

The Plaintiffs allege that demand in this case would be futile because a majority of the Board is disabled from considering demand due to a substantial likelihood of personal liability in connection with their failure to oversee GM.

A. The Parties

1. Plaintiffs

The Plaintiffs are GM stockholders and have continuously maintained their ownership since November 2010, which the Plaintiffs define as the relevant period.

2. Current Director Defendants

Mary T. Barra has been the Company's Chief Executive Officer and a member of the Board since January 15, 2014. She was previously the Executive Director of Vehicle Manufacturing Engineering of Old GM until July 2009, Senior Vice President of Global Product Development at the Company from February 2011 to August 2013, and then Chief of Product Development. Prior to 2009,

Barra also "had management responsibilities in various engineering and staff positions at the Company."[6]

Theodore M. Solso, who has been a member of the Board since June 2012, is currently its non-executive chairman. He is also on the Audit Committee.

Stephen J. Girsky has been a member of the Board since July 2009. Girsky has been Vice Chairman of Corporate Strategy, Business Development, Global Product Planning, and Global Purchasing and Supply at GM since February 2011, and Vice Chairman of Corporate Strategy and Business Development since March 2010.

Patricia F. Russo has been a member of the Board since July 2009 and has served as its Lead Director since March 2010.

Thomas M. Schoewe has been a member of the Board since November 2011 and is the chairman of the Audit Committee.

Erroll B. Davis, Jr. has been a member of GM's board since July 2009 and was a member of "Old GM's" Board[7] from 2007 to 2009. He is a member of GM's Audit Committee.

Kathryn V. Marinello has been a member of GM's Board since July 2009. Marinello also served on Old GM's Board from 2007 to 2009. Marinello has served as a member of GM's Audit Committee since at least 2010.

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[6] Second Am. Compl. ¶ 19.

[7] GM's bankruptcy and reorganization is discussed *infra* at the text accompanying notes 9–10.

E. Neville Isdell has been a member of GM's Board since July 2009 and previously served on Old GM's Board from 2008 to 2009. Isdell is also a member of the Audit Committee.

Carole M. Stephenson has been a member of the Board since July 2009.

James J. Mulva has been a member of the Board since June 2012.

Admiral Michael G. Mullen has been a member of the Board since February 2013 and is a member of the Audit Committee.

Mullen, together with Mulva, Stephenson, Isdell, Marinello, Davis, Shoewe, Russo, Girsky, Solso, and Barra are the "Current Director Defendants."

3. Former Director Defendants

Daniel F. Akerson joined the Board in 2009. He was the Chairman and Chief Executive Officer from January 2011 until January 2014, and Chief Executive Officer from September 2010 to January 2014.

David Bonderman joined the Board in July 2009 and served as a director until June 10, 2014.

Robert D. Krebs joined the Board in July 2009 and resigned in June 2014. Krebs was a member of the Audit Committee.

Philip A. Laskawy joined the Board in July 2009 and served as a director until June 2013.

Cynthia A. Telles joined the Board in April 2010. She served as a director until June 2014.

Telles, Laskawy, Krebs, Bonderman, and Akerson are the "Former Director Defendants," which, along with the Current Director Defendants, comprise the "Director Defendants."[8]

4. Nominal Defendant

GM is a Delaware corporation with its primary place of business in Detroit, Michigan. GM designs, builds, and sells vehicles and automobile parts worldwide, with operations in over sixty countries.

On July 5, 2009, following bankruptcy proceedings, the United States Bankruptcy Court for the Southern District of New York issued a Sale Order and Injunction (the "Asset Sale"), approving the sale of substantially all of "Old GM's" assets prior to bankruptcy to a new government-sponsored company, which is the "GM" referred to in this Opinion. GM assumed Old GM's liability for warranty and products liability claims asserted by individuals who were injured after the Asset Sale.[9] "Old GM's board was reconstituted" and six of the twelve Current

[8] Although I have not described in detail their backgrounds here, the Plaintiffs note that the Director Defendants all have high-level experience in industries with similarly complex risk and regulatory environments, where they successfully implemented effective risk management systems. *See* Second Am. Compl. ¶¶ 221–40.

[9] *See id.* ¶ 15.

Director Defendants joined the Board in 2009.[10] GM emerged from bankruptcy on July 10, 2009, and launched an initial public offering on November 17, 2010.

B. Valukas Report

In April 2014, in the months after the first recalls, the Board retained a partner at the law firm Jenner & Block, Anton Valukas, to

> investigate the circumstances that led up to the recall of the Cobalt and other cars due to the flawed ignition switch . . . and return to Ms. Barra and the Board with the unvarnished truth about what happened, why it happened, and what GM should do to ensure that it never happens again. [Valukas' law firm] was also asked to focus on the knowledge of specific senior executives, as well as GM's Board.[11]

In his report (the "Valukas Report"), Valukas concluded that "no single committee of the Board was responsible for all vehicle safety-related issues," and that "*the Board of Directors was not informed of any problem posed by the Cobalt ignition switch until February 2014.*"[12] He also found that, as the Plaintiffs allege, "the system put in place by the Board did not require that serious defects detected by GM's legal department, its engineering department, consumer protection organization, or law enforcement agencies be reported to the Board."[13] Valukas concluded that the Board "did not discuss individual safety issues or individual recalls except in rare circumstances," though it did receive "a wide variety of

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[10] *Id.* ¶ 18.
[11] *Id.* ¶ 59. The Valukas Report is cited throughout the Complaint, including as a source for facts which I recount below. This section is meant only as a brief overview of that Report and its most pertinent findings.
[12] *Id.* ¶ 62 (emphasis added).
[13] *Id.* ¶ 62.

reports," and that the litigation reports to the Board did not mention ignition switch or airbag issues.[14]

The Valukas Report made note of reports to GM's in-house legal department, discussed in greater detail below, from which the Plaintiffs allege that, as early as October 2010, GM's management and legal departments had reason to know that a defect was causing serious accidents, but the information was not escalated to the Board.[15] More generally, the Plaintiffs contend, the Valukas Report describes GM's "phenomenon of avoiding responsibility," embodied in the so-called "GM salute," which involved "a crossing of the arms and pointing outwards towards others, indicating that the responsibility belongs to someone else, not me."[16]

Although they rely on its factual background and some of its conclusions in the Complaint, the Plaintiffs take issue with the engagement of Valukas given his, and his firm's, past relationship with GM.[17] They also criticize his report for what it does not mention—the former CRO and why his position was transferred to the

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[14] *Id.* ¶ 70.

[15] *See, e.g., id.* ¶ 124 (noting a case evaluation provided to in-house counsel which noted a "sensing anomaly" resulting in a "failure of the airbags to deploy" and indicating a risk of punitive damages); *id.* ¶ 129 (noting a second case evaluation report to the legal department regarding a sensing anomaly in July 2011 and again indicating a risk of punitive damages); *see infra* notes 59–62 and accompanying text.

[16] *Id.* ¶ 147. Barra also described a "GM nod," "when everyone nods in agreement to a proposed plan of action, but then leaves the room with no intention to follow through, and the nod is an empty gesture." *Id.* ¶ 148.

[17] *See id.* ¶ 65.

General Auditor, as well as the elimination of the Finance and Risk Committee.[18] The Plaintiffs also note criticism by Senator Richard Blumenthal of Connecticut, who observed that the Valukas Report "continues to leave critical questions unanswered" and "absolves upper management, denies deliberate wrongdoing, and dismisses corporate culpability."[19]

C. GM's Regulatory Environment

As noted above, GM is subject to the Safety Act, pursuant to which manufacturers of motor vehicles have a duty to notify NHTSA, purchasers, and dealers if the manufacturer learns that a vehicle contains a defect, which it decides in good faith to be related to vehicle safety.[20] The manufacturer must provide this notice within five working days after the determination that the defect is related to safety.[21]

In addition, GM is subject to the Transportation Recall Enhancement, Accountability and Documentation Act (the "TREAD Act"). The Plaintiffs note that the purpose of the TREAD Act "was to increase consumer safety through mandates assigned to NHTSA," and it was passed in 2000 in response to fatalities related to defects in Ford vehicles with Firestone tires.[22] Now incorporated into the

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[18] *See id.* ¶ 64.
[19] *Id.* ¶ 68. Senator Blumenthal also referred to the Valukas Report as "the best report money can buy." *Id.*
[20] *See id.* ¶ 44 (citing 49 U.S.C. § 30118(c)(1)).
[21] *See id.* (citing 49 C.F.R. § 573.6(b)).
[22] *Id.* ¶ 47.

Safety Act, the TREAD Act contains an "Early Warning" requirement, which allows "NHTSA to collect data, notice trends, and warn consumers of potential defects in vehicles."[23] Failure to comply with the TREAD Act reporting requirements may result in monetary or criminal penalties.[24]

D. The Board's Risk Oversight in 2010–2011

The Plaintiffs allege that the relevant time is from November 2010, "the date Plaintiffs assert the Board's bad faith actions commenced" to present.[25] Throughout this time, they allege, the Board "violated its fiduciary duties to stockholders by 'sticking its head in the sand.'"[26] A brief overview of the Plaintiffs' allegations during this time period follows.

The Board created the Finance and Risk Committee on August 3, 2010. The Finance and Risk Committee was composed of defendant directors Bonderman, Girsky, Krebs, Laskawy, and Russo as of April 21, 2011. Marinello and Shoewe joined later. Through its Charter, the Committee was required to "review internal systems of formal and informal communication across business units and control functions to encourage the prompt and coherent flow of risk-related information and, as needed, escalation of information to management (and to the Committee

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[23] *Id.* ¶ 49 (citing 49 U.S.C. § 30166(m)).
[24] *See id.* ¶¶ 50–52.
[25] *Id.* ¶ 10.
[26] *Id.* ¶ 9.

and Board as appropriate)."[27] The Committee was also responsible for cash flow and working capital management, employee benefits plans, foreign exchange and interest rate product use, insurance issues, tax planning, and strategic investments.

The Board created the position of Chief Risk Officer (the "CRO") in October of 2010. The CRO "was to be responsible for identifying the Company's risks and stress testing key risk scenarios," and had the "responsibility of coordinating the Company's risk management and mitigation strategies," reporting to the Finance and Risk Committee.[28] The CRO was assisted in these functions by the General Auditor. In November 2010, GM appointed Grant Fitz as CRO.

In an October 2010 meeting, Fitz sought to "facilitate discussion on the Board risk oversight process, as well as how best to structure a risk management program for General Motors."[29] In the section entitled "Next Steps Going Forward," the Committee was informed that, "[w]hile some improvement has occurred, GM has not had a consistent and structured approach that actively manages important risks and drives timely action."[30] This statement appeared

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[27] *Id.* ¶ 153. The Charter acknowledged there were potential gaps in reporting that needed review to ensure the reporting lines were "appropriate given the Company's size and scope of operations." *Id.* ¶ 154.

[28] *Id.* ¶ 155.

[29] *Id.* ¶ 159 (emphasis omitted). Plaintiffs took this to mean that the Board had not yet discussed how to structure its own risk management program as of October 2010 and they criticize the length of time to which "Next Steps Going Forward" was devoted on the meeting agenda. *See id.; id.* ¶ 160.

[30] Transmittal Aff. of Robert L. Burns in Supp. of Mem. in Supp. of Defs.' Mot. to Dismiss ("Burns Aff.") Ex. 14 at GM220_000001295–96 (cited in Second Am. Compl. ¶ 164).

under the heading "Background on GM's Risk Management Initiative and Business Rationale,"[31] though the Plaintiffs contend this was a warning to the Board.[32] The presentation also informed the Board that "[p]riority risks *will* be reported directly to the Board or the most relevant Board Committee."[33]

The next Finance and Risk Committee meeting was held in December 2010, at which time Fitz indicated that the "General Plan for Rolling Out Risk Management" was "to start simple," though he identified a plan for the quarter, the following year, and the following three years.[34] Fitz designated two individuals to be in charge of reporting quality risk, defined as "[m]ajor or chronic product

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[31] *See id.* at GM220_000001296

[32] Second Am. Compl. ¶¶ 63, 164.

[33] Burns Aff. Ex. 14 at GM220_000001298 (cited in Second Am. Compl. ¶ 165) (emphasis added). The Plaintiffs attempt to characterize this statement as an additional warning, separating the quotation to replace "will" with their own "must," suggesting that Fitz made a recommendation that was ignored. *See* Second Am. Compl. ¶ 165 ("Fitz also recommended that a 'Priority Risk' (and a safety issue would obviously qualify as such) must be 'reported directly to the Board or the most relevant Board Committee.' The Board ignored this recommendation, never mandating that vehicle safety investigations and punitive damages warnings be reported to either the Board or any committee thereof." (citation omitted)). Even on a motion to dismiss, where I accept all of the non-moving party's facts as true and draw all *reasonable* inferences in their favor, I need not accept a characterization of a document that is clearly contrary to the face of the document; that would be an unreasonable inference. *See, e.g., White v. Panic*, 783 A.2d 543, 549 (Del. 2001) ("At the motion to dismiss stage of the litigation, [p]laintiffs are entitled to all reasonable factual inferences that logically flow from the particularized facts alleged, but conclusory allegations are not considered as expressly pleaded facts or factual inferences. Of course, we need not blindly accept as true all allegations, nor must [we] draw all inferences from them in plaintiffs' favor unless they are reasonable inferences." (internal quotation marks and footnotes omitted); *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1026 (Del. Ch. 2012) ("Having premised their recitation of the facts squarely on that document and incorporated it, the plaintiffs cannot fairly, even at the pleading stage, try to have the court draw inferences in their favor that contradict that document, unless they *plead* non-conclusory facts contradicting it."). The plain language is a description of risk reporting as it was expected to operate going forward, not (as in the Plaintiffs' view) an exhortation, demand, or plea for the *Board* to act.

[34] Burns Aff. Ex. 3 at GM220_000001570 (cited in Second Am. Compl. ¶ 167).

problems [which] result in a large product recall and warranted expenses and significant negative publicity."[35] Barra was identified as the "executive owner" of "culture change risk."[36]

In a March 2011 Finance and Risk Committee meeting, Fitz told the Committee that the current focus was to "develop action plans for the Top 25 Risks" and to "begin to work to identify the unknown risks."[37] In a May 2011 Finance and Risk Committee meeting, Fitz stated risk management was "moving to identify the unknown risks that could impact the Company," and the risk owners of the Top 25 risks were still in the process of developing plans to address those previously identified risks.[38] The Plaintiffs contend, "[t]here remained no sense of urgency,"[39] despite the fact that, [a]t this juncture, in the Spring of 2011, the Board [through the Audit Committee] knew that management 'did not have the knowledge and/or skill sets to perform risk assessments and to develop risk mitigation strategies.'"[40]

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[35] Second Am. Compl. ¶ 167. The Plaintiffs assert, "It was unclear how either of these [two] employees would be aware on a timely basis of 'major event and chronic quality issues.'" *See id.* The Plaintiffs contend, "Fitz indicated that the risk owners should be persons who work in the risk area 'every day,' and he specified 'quality' as one such area." *Id.* ¶ 168.

[36] *Id.* ¶ 167.

[37] *Id.* ¶ 168.

[38] *Id.* ¶ 171.

[39] *Id.*

[40] *Id.*¶ 172. The Plaintiffs are quoting from an April 2011 presentation to the Audit Committee in which GM Audit Services reported that "[i]n performing root cause analysis for audit issues, including repeats, GM [Audit Services] determined that management did not have the knowledge and/or skill sets to perform risk assessments and to develop risk mitigation strategies." Burns Aff. Ex. 20 at GM220_000002554 (quoted in Second Am. Compl. ¶¶ 170, 172). That document

Plaintiffs contend that throughout all of these meetings, the Board and the Finance and Risk Committee took no affirmative steps to insure that they were receiving important safety risk or reporting information, despite what they characterize as Fitz's "repeated warnings" that the Company lacked a "consistent and structured approach that actively manages important risk and drives timely action."[41]

E. Board Oversight of Risk Management after Fall 2011

1. Reassignment of Risk Oversight Responsibilities

The Plaintiffs contend that "after receiving alarming reports about failures in the risk management system [that is, after receiving the reports recounted above], the only swift action the Board took was to eliminate the CRO job as a discrete position."[42] In November 2011, approximately a year after Fitz was appointed CRO, the Board transferred the CRO's responsibilities to the General Auditor, Brian Thelen, who had served as General Auditor since August. The General Auditor was, before November, tasked with assisting the CRO.[43] Thelen retained all of his prior responsibilities as General Auditor as well as taking on the position

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also indicates that this was among "potential risks that [GM Audit Services] has identified or gathered information about since the last Audit Committee meeting. Activities are coordinated with the Chief Risk Officer to determine how to best evaluate these risks going forward." *Id.*

[41] *See, e.g., id.* ¶ 63.

[42] *Id.* ¶ 174.

[43] *See id.* ¶ 155.

of CRO,[44] which the Plaintiffs contend may have resulted in a conflict of interest, due to the General Auditor's responsibility of objectively reviewing risk management, which "called for him to audit himself."[45] There was no separate CRO again until several months after the recalls.

In August 2012, approximately two years after its creation, the Board eliminated the Finance and Risk Committee. Risk management oversight was subsequently transferred to the Audit Committee. The Plaintiffs contend that GM knew and had previously determined that putting risk management responsibility on the Audit Committee did not represent best practices, and would be an ineffective oversight mechanism.[46]

The Plaintiffs point to certain responsibilities listed in the Finance and Risk Committee Charter that were not included in the Audit Committee's new Charter:

- Review with management the categories of risk the Company faces, including any risk concentrations and risk interrelationships, as well as the likelihood of occurrence, the potential impact of those risks and mitigating measures;

- Review with management the design of the Company's risk management functions, including potential coverage gaps and reporting lines of authority, to assess whether they are appropriate given the Company's size and scope of operations;

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[44] The record reflects that Thelen was referred to as the General Auditor and the Chief Risk Officer. *See* Burns Aff. Ex. 7 at GM220_000003459 (listing Thelen as "General Auditor and Chief Risk Officer); *id.* at GM220_000003462 (indicating that "Brian Thelen, Chief Risk Officer of the Company, provided an update" to the Audit Committee).
[45] Second Am. Compl. ¶ 155.
[46] *See id.* ¶ 181.

- Review internal systems of formal and informal[] communication across business units and control functions to encourage the prompt and coherent flow of risk-related information and, as needed, escalation of information to management (and to the Committee and Board as appropriate).[47]

Thus, the Plaintiffs contend, these responsibilities were never transferred.[48] The record, however, shows that Thelen, in his capacity as CRO, presented risk management topics to the Audit Committee, which included, for example, discussion of the process for identifying top risks; discussion of whether the Board, another committee, or the Audit Committee would take up certain risks; discussion of certain risk management activities in specific business units, including stress tests; and a discussion of "a project of cross leveraging many of the risk activities that are already occurring in the Company," which entailed the risk management team "identify[ing] and catalog[ing] current risk assessments, assess[ing] gaps and overlap in coverage," among other things, with a goal of "increas[ing] efficiency and effectiveness" of risk management.[49]

2. Board Oversight post-Risk Reassignment

The Plaintiffs allege that the elimination of the Finance and Risk Committee "facilitated an environment and culture that discouraged individuals from raising

[47] *Id.* ¶ 185.
[48] *See id.* ¶ 186.
[49] Burns Aff. Ex. 7 at GM220_000003462.

safety concerns and reporting them to senior management."[50] To this point, they note that, "in materials that assessed GM's risks as of 2013, the Board was warned as follows":

> GM may not have a high performance culture, grounded in strong ethical behavior, that provides accurate performance feedback and ratings to employees, promotes accountability, innovation, adaptability and appropriate risk taking and regards customers and diversity as key business imperatives.[51]

Ultimately, in June 2014, the Board approved amendments to GM's bylaws creating the Operating Risk Committee, a stand-alone risk committee.

F. Company-Level Processes and Activity

1. Vehicle Safety and NHTSA Reporting

GM maintains a TREAD database, and has done so since the inception of the TREAD Act in 2000, in which the Company stores data required to be reported to NHTSA. The database drew from a variety of sources, including service requests, technical assistance repair orders from dealers, surveys, field reports, and a system maintained by the legal department that tracks relevant complaints filed in court, but "did not, however, contain GM's Problem Resolution and Tracking System . . . or Service Bulletins."[52] The database was organized to track and report data in categories covering 24 different vehicle systems. The database included a

[50] Second Am. Compl. ¶ 182.
[51] *Id.* ¶ 187.
[52] *Id.* ¶ 82.

description of action taken to fix a given problem, but did not give a detailed description of the problem with a particular part.[53]

The Valukas Report concluded that "until 2014, the TREAD Reporting team did not have sufficient resources to obtain any of the advanced data mining software programs available in the industry to better identify and understand potential defects."[54] Specifically, by the end of 2013, notice of the ignition switch problem had reached GM's Executive Field Action Decision Committee, but "once there, more questions were raised about root cause, and the decision-makers were hamstrung by a lack of accurate data about what vehicles were affected and how many people may have been impacted by the defect."[55]

The Plaintiffs point to problems with these systems, which were apparent prior to the ignition switch issues. For example, the Plaintiffs point to a July 23, 2013 email from a NHTSA director to Carmen Benavides, GM's Director of Product Investigations, Safety Regulations & Certification, Field Performance. The email stated that "[t]he general perception is that GM is slow to communicate, slow to act, and, at times, requires additional effort . . . that we do not feel is necessary with some of your peers," providing six specific examples of such

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[53] *See id.* ¶ 79. The Plaintiffs point out that if an investigator discovered a defect, he had to obtain additional information outside the TREAD database. *See id.* ¶ 80.
[54] *Id.*¶ 81.
[55] *Id.* ¶ 146.

delay.[56] Benavides shared the email with others, including certain members of management, who "indicated a 'need to address this immediately.'"[57]

2. Legal Department

GM maintains a large in-house legal department which regularly reviews product liability cases brought against the Company. Any settlement for a products liability action between $100,000 and $1.5 million required the approval a department committee known as the "Roundtable," which met weekly. Any settlement between $1.5 million and $5 million required the approval of the Settlement Review Committee, which met monthly. Any larger settlement had to be approved by GM's General Counsel, then Michael Millikin.

Millikin testified that he did not know of the ignition switch defect until February 2014, and he had not been aware of any litigation involving fatal accidents linked to that defect. The Plaintiffs point to a number of earlier warnings that should have been, but apparently were not, elevated to the General Counsel and the Board, as briefly set forth below.[58]

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[56] *Id.* ¶ 109.

[57] *Id.* ¶ 110. The Plaintiffs also point to October 2011 emails informing Barra, then-Senior Vice President for Global Product Development that NHTSA was "a step closer to concluding that [GM] should have recalled 384,000 Saturn Ions in 2010 as part of a larger recall that covered one million Chevrolets and Pontiacs for a steering problem." *Id.* ¶ 106. The Plaintiffs contend, "There is no indication that Barra took any steps after receiving this email." *Id.* ¶ 107.

[58] The Plaintiffs also point to a May 2011 meeting of the Finance and Risk Committee, at which Millikin was present, in which "coordinating over-all company risk management process" with the General Counsel was a topic of discussion. *See id.* ¶ 121.

As noted above, GM's legal department received reports from outside counsel at King & Spalding in early 2010 and then again in mid-2011 regarding litigation where a "sensory anomaly" led to a failure of the airbags to deploy; the firm noted the potential in that litigation for punitive damages.[59]

The first of these cases was discussed during a GM legal Roundtable, but there was no report to the General Counsel or to the Board. By the time of the July 2011 warning, the Plaintiffs allege, the legal department had determined that the issue needed to be addressed, but the Board was not alerted to the problem, in the absence of a clear mechanism for such reports, and any issue was conveyed only to low-level investigators. Plaintiffs contend that the Board failed to create a policy or procedure for reporting outside counsel warnings of punitive damages to the Board or General Counsel.

In an April 2012 report, the law firm Eckert Seamans, serving as outside counsel, drew a connection between the ignition switch issue and the non-deployment of airbags. Eckert Seamans also warned of the possibility of punitive damages because of the accident's connection with other non-deploying airbags in the 2005-2007 Cobalt. Eckert Seamans submitted another very similar report based on a different accident in August 2012.

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[59] *See supra* note 15; Second Am. Compl. ¶¶ 124, 129.

In June 2012, Erin Shipp, an expert for plaintiffs in a products liability case against GM, opined that GM's "improper design resulted in a vehicle that was defective in a manner that caused the airbags to not deploy in a crash that [GM] has determine[d] should have had an airbag deployment," because "the airbag system is . . . not active in the accessory position."[60] In both of these cases, notice of the warnings and reports did not escalate to the Board, and Plaintiffs contend that the Board did not require such an escalation. In July 2012, GM's outside counsel advised the legal department that GM would lose this case, and that as the Cobalt issues remained unresolved, punitive damage exposure would increase.

In April 2013, another plaintiffs' expert in a fatality case, Mark Hood, determined that the ignition switch had been changed in 2006. In May 2013, King and Spalding concluded that "a jury would almost 'certainly' find that the ignition switch was unreasonably dangerous."[61] This case settled for the maximum $5 million that GM could pay without approval by the General Counsel; thus, neither Millikin nor the Board learned of this report.

As Valukas concluded,

> the story of the Cobalt is one in which GM personnel failed to raise significant issues to key decision-makers. Senior attorneys did not elevate the issue within the legal chain of command to the General

[60] *Id.* ¶¶ 137–38.
[61] *Id.* ¶ 144.

> Counsel even after receiving the . . . evaluation in the summer of 2013 that warned of the risk of punitive damages.[62]

The Plaintiffs contend that the "Board *prevented* [Board-level reporting] from happening by failing to put into place common procedures and policies for the escalation of issues involving serious defects, large investigations, and punitive damages."[63]

G. The 2014 Recalls and NHTSA Consent Order

On February 7, 2014, GM notified NHTSA that it had found a defect related to motor vehicle safety in model years 2005-2007 Chevrolet Cobalt and model year 2007 Pontiac G5. The report stated that the condition involved the vehicles' ignition switch, which would move from the "run" position to the "accessory" position, especially if the vehicle or ignition switch receives some impact, resulting in a loss of power, which could, in turn, cause the airbag not to deploy. On February 25, 2014, GM notified NHTSA that an additional 748,024 vehicles contained the same defect. On March 28, 2014, GM submitted a third defect notice, indicating that the same ignition switch defect may be present in some additional 823,788 vehicles that were recalled.

On May 16, 2014, GM entered into a Consent Order with NHTSA, in which "GM admit[ted] that it violated the Safety Act by failing to provide notice to NHTSA of the safety-related defect that is the subject of the Recall No. 14V-047

[62] *Id.* ¶ 151.
[63] *Id.* (emphasis added).

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)."[64]

GM also agreed to pay a civil penalty of $35 million, which NHTSA announced as "the single highest civil penalty amount ever paid as a result of a NHTSA investigation of violations stemming from a recall."[65] NHTSA noted that one reason for the large fine was that

> [b]oth in 2007 and again in 2010, NHTSA reviewed data related to the non-deployment of airbags in certain Chevy Cobalt models but each time, determined that it lacked the data necessary to open a formal investigation. . . . GM failed to advise NHTSA of this defect at the time of [these] earlier reviews.[66]

Additionally, the Plaintiffs allege, GM was fined an additional $7,000 per day for each day between April 4, 2014 and the date on which GM provided the Valukas Report to NHTSA, because GM failed to respond to one of NHTSA's Special Orders by an April 3 due date.[67]

Finally, NHTSA required GM to provide a comprehensive written plan regarding completion of the ignition switch recall; to provide NHTSA with quarterly written reports, in addition to biweekly reports of its progress on the recall, for six months following the Consent Order, and to meet with NHTSA on a

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[64] *Id.* ¶ 90.
[65] *Id.* ¶ 92.
[66] *Id.* ¶ 94.
[67] *See id.* ¶ 95. The Plaintiffs do not allege the total amount of this daily fine.

monthly basis for one year to discuss the implementation of the recommendations in the Valukas Report.

H. Aftermath

GM established a procedure "for its employees to report expeditiously concerns regarding actual or potential safety defects, or non-compliance with Federal Motor Vehicle Safety Standards."[68] The Plaintiffs allege that "[t]he fact that the Company was required by NHTSA to establish this procedure indicates that GM and the Board did not have [such] a procedure in place."[69]

The Plaintiffs also cite to a number of public comments condemning GM; for example, Acting NHTSA Administrator David Friedman posited that "GM's decision-making, structure, process and corporate culture stood in the way of safety."[70]

Media reports also shed light upon GM's failure to report the defect earlier. For example, *The New York Times* reported on July 15, 2014 that when NHTSA asked GM to explain the circumstances surrounding certain crashes to help identify potential defects, "[GM] repeatedly found a way not to answer the simple question from regulators of what led to a crash. In at least three cases of fatal crashes . . .

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[68] *Id.* ¶ 98.
[69] *Id.*
[70] *Id.* ¶ 116. *See also id.* ¶¶ 99, 188, 191, 193.

GM said it had not assessed the cause," or "GM opts not to respond."[71] The report noted, "These responses came even though [GM] had for years been aware of sudden power loss in the models involved in the accidents."[72]

On September 7, 2014, *The New York Times* released an investigative report which stated that the Board of the new GM that emerged from bankruptcy was expected to be more watchful, "[b]ut on the issue of vehicle safety, the [B]oard until recently took a mostly hands-off approach, rarely even discussing the topic beyond periodic reviews of product quality with company executives."[73] Solso admitted that the Board "should have known earlier . . . The way I look at it, GM has not been well run for a long period of time."[74]

II. STANDARD OF REVIEW

When a plaintiff seeks derivatively to pursue litigation arising from board action, without having made demand as required by Court of Chancery Rule 23.1, the plaintiff must allege with particularity facts that raise a reasonable doubt either that the directors are disinterested and independent or that the challenged action was otherwise the product of a valid exercise of business judgment.[75] Where board inaction is the subject of such derivative litigation, the plaintiff must plead

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[71] *Id.* ¶ 114.
[72] *Id.*
[73] *Id.* ¶ 111.
[74] *Id.* ¶ 112.
[75] *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984) *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

particularized facts raising a reasonable doubt that, at the time the complaint was filed, the board could have properly exercised independent and disinterested business judgment in responding to a demand.[76]

III. ANALYSIS

The Plaintiffs here challenge both specific actions by the Board, and inaction by way of failure of oversight. The challenged Board actions involve the transfer of risk management from Fitz, the former CRO, to Thelen, then acting as General Auditor, and from the Finance and Risk Committee to the Audit Committee. As for the alleged failures of oversight, the Plaintiffs allege that the Board utterly failed to implement a reporting system which would have apprised them specifically of serious injuries and deaths resulting from safety defects, as well as lawsuits that potentially involved punitive damages. They also allege, seemingly in the alternative, a conscious failure to monitor the existing systems.[77]

The context of this case is unsettling: GM produced defective products, the defect became apparent to certain employees, and the Company failed to initiate a recall until after several consumers had already been seriously injured or killed.

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[76] *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993).

[77] *See, e.g.*, Second Am. Compl. ¶ 208 ("As alleged herein, the Director Defendants failed to adopt such a system and/or to the extent they claim they had implemented such system or controls, consciously failed to monitor or oversee its operations, thus disabling themselves from being informed of risks or problems requiring their attention."); *id.* ¶ 246 ("To the extent that GM did have reporting procedures and processes, the Director Defendants, whether they sat on the GM before or after its Bankruptcy, further had the fiduciary obligations to monitor and oversee these reporting procedures.").

This suit, however, is *not* about holding GM liable to these consumers. By and through this derivative action, the Plaintiffs seek to hold the directors *personally liable* to GM *itself* for breaches of their fiduciary duties in bad faith. The Plaintiffs conflate concededly *bad outcomes* from the point of view of the Company with *bad faith* on the part of the Board. The Plaintiffs' claims, and the exacting standards that apply to them, are discussed below.

A. Challenged Board Actions

Under our Supreme Court's decision in *Aronson v. Lewis*,[78] a plaintiff wishing to pursue derivatively claims against directors for actions the directors have taken must plead, with particularity, facts that raise a reasonable doubt that (1) the directors are disinterested and independent or (2) the challenged transaction was otherwise the product of a valid exercise of business judgment.[79]

The Plaintiffs make no attempt to satisfy *Aronson's* first prong.[80] Instead, they argue that two specific Board decisions are actionable and meet the second part of the *Aronson* test for demand futility: the decisions to transfer risk oversight from the CRO and the Finance and Risk Committee to the General Auditor and the Audit Committee. The Plaintiffs recognize that, given GM's exculpatory clause,

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[78] 473 A.2d 805 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).
[79] *Id.* at 814.
[80] *See* Pls.' Opp'n to Defs.' Mot. to Dismiss at 44.

they must show that these challenged actions were not a valid exercise of business judgment, because they were taken in bad faith, and thus, demand is excused.[81]

Under the Delaware model of corporate law, a board of directors is entitled to a presumption that it is acting in good faith and in the interest of the company. Decisions such as those challenged here, regarding the duties of officers and board committees, are a quintessential matter of business judgment that are soundly within a board's discretion. That such a decision turns out, in hindsight, to have been ill-advised is not of itself sufficient to raise a reasonable doubt that a decision was made in good faith. Bad faith is the absence of a good faith pursuit of the interests of the company, in violation of the directors' duty of loyalty. Our case law provides a list, not necessarily exhaustive, of director actions constituting bad faith:

> where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.[82]

Importantly, to demonstrate bad faith, "a plaintiff must also plead particularized facts that demonstrate that the directors acted with scienter, *i.e.,* that they had 'actual or constructive knowledge' that their conduct was legally improper."[83]

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[81] *See id.*
[82] *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (Del. 2006).
[83] *Wood v. Baum*, 953 A.2d 136, 141 (Del. 2008) (footnote omitted).

Accordingly, "[a] plaintiff can . . . plead bad faith by alleging with particularity that a director *knowingly* violated a fiduciary duty or failed to act in violation of a *known* duty to act, demonstrating a *conscious* disregard for her duties."[84]

In an attempt to show bad faith here, the Plaintiffs allege that the transfer of risk management responsibilities was made despite an already poorly-functioning risk management system, creating an even worse system. The Plaintiffs also allege that the Audit Committee was overburdened with issues relating to GM's bankruptcy, and thus, the decision to transfer more responsibility could not have been made in good faith. The Plaintiffs also allege that the transfer of responsibilities was incomplete: that the Audit Committee Charter did not adopt the entirety of the Finance and Risk Committee's responsibilities.

Importantly, as will be discussed in greater detail below, there is no sufficiently pled allegation that the Board was aware that its risk management system was not functioning as it should—*i.e.,* there were no "red flags" or other bases from which I can infer knowledge on the part of the Board that its system was inadequate. Thus, the decision to make changes to that system—a type of decision that is squarely within the realm of director decision-making—cannot be said to be in bad faith, made with conscious disregard of the Board's duties to GM.

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[84] *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 125 (Del. Ch. 2009).

As to the contentions that the General Auditor was overburdened and that the Audit Committee did not assume the full risk oversight assigned to the Finance and Risk Committee, I find that the documents incorporated by reference into the Complaint do not support such inferences. These documents show that the General Auditor continued to make presentations, first to the Finance and Risk Committee,[85] then to its successor, the Audit Committee,[86] in line with the CRO's past practices. The Plaintiffs' allegations that a transfer of duties to the General Auditor was self-evidently improper are merely conclusory.[87]

It may be that this transfer of responsibility was not a good decision—though I make no such conclusion on the record before me—but that fact alone would not demonstrate bad faith, a conscious disregard of the Board's duties.

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[85] One such presentation, for example, reviewed the Risk Management Program with the Finance and Risk Committee on November 14, 2011. The slides from that presentation show that Thelen reported that "[s]ignificant progress has been made to establish appropriate infrastructure for risk management" and that, among the "[m]ilestones [a]chieved" was that a "[r]isk [m]anagement [i]nfrastructure [was] [i]mplemented." Burns Aff. Ex. 4 at GM220_000002621–22. A March 19, 2012 presentation to the Finance and Risk Committee shows a review of the "2011 Top Risks," including assessments, actions, and indicators for specific risks. *See* Burns Aff. Ex. 6 at GM220_000000019–41.

[86] There are few documents incorporated into the Complaint for the time period after which the Finance and Risk Committee was eliminated, but it is unreasonable to infer, from those documents, that the Audit Committee did not take up the risk management functions previously in the hands of the Finance and Risk Committee. *See, e.g.,* Burns Aff. Ex. 7 at GM220_000003462 ("Brian Thelen, Chief Risk Officer of the Company, provided an update regarding risk management . . . . Mr. Thelen discussed the process for identifying the top materials risks to the Company and said that approximately 10 of these risks will be discussed by the Board or other Board committees with the remaining 20 to be discussed by the [Audit] Committee."). I note that this document, though not this page, is cited in the Complaint. *See* Second Am. Compl. ¶ 187; *see also supra* note 49.

[87] The Complaint does not allege that, but for the reassignment of duties from the CRO to the General Auditor, any of the damages allegedly incurred by GM as a result of the directors fiduciary breaches would have been avoided.

These decisions were, simply put, business decisions by the Board regarding its officers and committees and there is a lack of particularized pleading showing bad faith that would upset that presumption.[88]

B. Challenged Board Inaction

As noted above, when a plaintiff wishes to purse a derivative claim against a board for failure of its oversight function, the plaintiff must meet the test set forth in *Rales v. Blasband*.[89] Under *Rales*, a plaintiff must plead, with particularity, factual allegations creating a reasonable doubt that, "as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand. If the derivative plaintiff satisfies this burden, then demand will be excused as futile."[90] Here, the Plaintiffs attempt to meet this standard by alleging that there were eleven directors at the time the Complaint was filed and that "at least Barra, Girsky, Davis, Isdell, Marinello, Mullen, and Schoewe[, that is, a majority of the Board,] as a result of their responsibilities as Board members and as members of Board committees, faced a substantial likelihood of personal liability as to the conduct alleged in the

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[88] The Plaintiffs do not attempt to supply a reason for the Board's actions inimical to the best interest of GM; they simply refer to the actions as "inexplicable." Pls.' Opp'n to Defs.' Mot. to Dismiss at 48.
[89] 634 A.2d 927 (Del. 1993).
[90] *Id.* at 934.

Complaint which was sufficient to compromise their ability to consider a demand impartially."[91]

A substantial likelihood of personal liability as a basis for pleading interestedness, such that demand is excused under Rule 23.1, is a rigorous standard, particularly in cases such as this where the Company has exculpated breaches of the duty of care.[92] In that situation, "a serious threat of liability may only be found to exist if the plaintiff pleads a non-exculpated claim against the directors based on particularized facts."[93] Further, the likelihood of liability must be substantial—a "mere threat" is insufficient.[94]

The "substantial likelihood of personal liability" in this case is based upon the theory first set forth in this Court's decision in *In re Caremark International Inc. Derivative Litigation*,[95] that is, the Board's bad faith in failing to oversee the Company. More specifically, the Plaintiffs allege that GM lacked a reporting process by which serious defects would be reported to the General Counsel or to the Board, which resulted in the Board being unaware of defects that caused

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[91] Pls.' Opp'n to Defs.' Mot. to Dismiss at 41.
[92] *DiRienzo v. Lichtenstein*, 2013 WL 5503034, at *28 (Del. Ch. Sept. 30, 2013).
[93] *Id.* (emphasis omitted).
[94] *See Rales*, 634 A.2d at 936; *Khanna v. McMinn*, 2006 WL 1388744, at *18 (Del. Ch. May 9, 2006). As this Court has previously noted, the purpose for requiring a *substantial* likelihood of liability, as opposed to a mere threat, is that the demand requirement would otherwise be "rendered toothless." If the mere allegation of liability would itself demonstrate demand futility, Rule 23.1 would be ineffective as a check on derivative actions. *See, e.g., In re Goldman Sachs Grp., Inc. S'holder Litig.*, 2011 WL 4826104, at *18 (Del. Ch. Oct. 12, 2011).
[95] 698 A.2d 959 (Del. Ch. 1996).

serious injuries or fatalities, as well as potential punitive damages awards in lawsuits. They also contend that the Board failed to implement a system by which it could ensure that regulators received full, accurate, and timely information.[96]

Director liability under the *Caremark* theory arises 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. In either case, imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations. Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith.[97]

A *Caremark* claim has been recognized as "possibly the most difficult theory in corporation law on which a plaintiff might hope to win a judgment."[98] With these standards in mind, I turn to the Plaintiffs' allegations, which, in my understanding, involve claims both that the Board failed to implement a reporting system and that it failed to oversee existing reporting systems.

1. The Board did not Utterly Fail to Implement a Reporting System

The Complaint does not allege a total lack of *any* reporting system at GM; rather, the Plaintiffs allege the reporting system should have transmitted certain pieces of information, namely, specific safety issues and reports from outside

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[96] *See e.g.,* Pls.' Opp'n to Defs.' Mot. to Dismiss at 44; Oral Arg. Tr. 32:10–22; 91:21–24.
[97] *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (footnotes omitted).
[98] *Caremark,* 698 A.2d at 967.

counsel regarding potential punitive damages. In other words, GM *had* a system for reporting risk to the Board, but in the Plaintiffs' view it should have been a better system.

Contentions that the Board did not receive specific types of information do not establish that the Board utterly failed "to attempt to assure a reasonable information and reporting system exists,"[99] particularly in the case at hand where the Complaint not only fails to plead with particularity that GM lacked procedures to comply with its NHTSA reporting requirements, but actually concedes the existence of information and reporting systems. For example, the Plaintiffs plead that, since the implementation of the TREAD Act, "GM has maintained a TREAD database (known as 'TREAD') in which the Company stored the data required to report quarterly to NHTSA under the TREAD Act. The information in the TREAD database was available to investigators and the limited team which managed the database."[100] They allege, however, that "TREAD, like many of the reporting processes at GM, was deficient,"[101] before going on to explain the details of the TREAD system and specific categories they found to be lacking; for example, "[i]gnition switch defect was not one of the reported categories, and, therefore, any trend in safety issues arising from ignition switches could not be

[99] *Id.* at 971.
[100] Second Am. Compl. ¶ 77.
[101] *Id.* ¶ 78

directly tracked by the database."[102] Importantly, the Plaintiffs do not allege that the Board had knowledge that this system was inadequate or that the Board consciously remained uninformed on this issue.[103]

The Plaintiffs' allegation that GM failed to have a system by which reports from outside counsel indicating a likelihood of punitive damages would be reviewed by the Board is similarly unavailing. The Plaintiffs note that the General Counsel was required to approve settlements only if the figure was above $5 million; otherwise, the settlement could be approved by the in-house legal team, leaving the General Counsel, and the Board, uninformed. This amounts to an allegation that, in hindsight, additional metrics, beyond monetary amounts of settlements, should (in the Plaintiffs' view) have been used to inform when the General Counsel should be notified. Merely pleading that the General Counsel was not informed of certain litigation risks does not rise to the level of pleading with particularity facts demonstrating that the Board utterly failed to implement a system by which it would be informed of risks. It shows, perhaps, an overly bureaucratic system of "information silos,"[104] but not a conscious disregard of

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[102] *Id.* ¶ 79.

[103] *See, e.g., David B. Shaev Profit Sharing Account v. Armstrong*, 2006 WL 391931, at *5 (Del. Ch. Feb. 13, 2006) ("The plaintiff concedes that the defendants knew nothing about the challenged transactions, and had erected a full set of supervisory mechanisms to oversee the company. . . . The plaintiff conceded at oral argument that Citigroup had a wide range of compliance systems in place, and that they had no reason to believe that these systems were not functioning in a basic sense."), *aff'd,* 911 A.2d 802 (Del. 2006).

[104] *See id.*¶ 245.

fiduciary duties by the Board. In other words, the Plaintiffs complain that GM could have, should have, had a *better* reporting system, but not that it had *no* such system.

Stated more generally, in criticizing the Board's risk oversight and its delegation thereof, throughout the Complaint, the Plaintiffs concede that the Board was exercising *some* oversight, albeit not to the Plaintiffs' hindsight-driven satisfaction.[105] The documents incorporated by reference into the Complaint further show that the Finance and Risk Committee, and then its successor, the Audit Committee, reviewed GM's risk management structure regularly;[106] that the Finance and Risk Committee, then the Audit Committee reviewed the Company's "Top 25 Risks," which included "quality" (defined as "[m]ajor or chronic product

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[105] *See, e.g., id.* ¶ 83 ("The GM Board was not only aware of its regulatory requirements, *it regularly received correspondence summarized from customers informing it of minutia of quality defects*." (emphasis added) (citation omitted)); *id.* ¶ 194 ("Instead of being concerned with setting up appropriate risk management procedures, GM's Board was busy reviewing individual customer complaint letters, warranty-costs, safety recalls for other manufacture[r]s, and customer satisfaction surveys. The Board packets included quality review presentations which were concerned with the warranty costs per vehicle. The report also looked at how GM compared to other car companies in terms of customer satisfaction. Again at the January 11-12, 2012 Board meeting, the Board reviewed customer complaint correspondence. This was a repeated item discussed at the Board meetings." (citations omitted)). Elsewhere, the Complaint concedes various instances in which the Board exercised its oversight function. *See, e.g., id.* ¶ 84 ("The GM Board also followed developments on 'Safety Regulations.'"); *id.* ¶ 120 (indicating that the Finance and Risk Committee discussed and decided in its October 4, 2010 and March 14, 2011 meetings that GM "should have a chief risk infrastructure system"); *id.* ¶ 121 ("Millikin sat through a presentation by Fitz at the May 16, 2011 Finance Risk Committee meeting regarding 'coordinating over-all company risk management process' with the General Counsel. Discussed at this meeting under 'Major Initiatives' was 'Differentiating GM's management of product liability lawsuits recall campaigns and safety engineering to insurers in light of Toyota's recent difficulties . . . .'" (citation omitted)).

[106] *See* Burns Aff. Ex. 3; Burns Aff. Ex. 4; Burns Aff. Ex. 5; Burns Aff. Ex. 7; Burns Aff. Ex. 14; Burns Aff. Ex. 18.

problems result[ing] in a large product recall")[107] in several of the meetings for which documents were produced in response to the Plaintiffs' § 220 Demand;[108] and that the Board was given presentations on safety and quality issues.[109] In short, the very documents the Plaintiffs cite demonstrate that the Board and its committees were receiving reports relating to the quality of GM vehicles.[110] That is short of pleading that the Board "utterly failed to implement any reporting or information system or controls," sufficient to raise a reasonable doubt of the directors' good faith.[111]

2. The Board did not Consciously Fail to Monitor

To reiterate, the standard for director oversight liability under *Caremark* is that: "(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."[112] The second basis for liability—a conscious failure to monitor—has been held to require pleading with particularity that there were so-called "red flags" that put the

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[107] *See* Burns Aff. Ex. 3 at GM220_000001580.
[108] *See, e.g.*, Burns Aff. Ex. 2; Burns Aff. Ex. 3; Burns Aff. Ex. 6; Burns Aff. Ex. 7
[109] Burns Aff. Ex. 17; Burns Aff. Ex. 8; Burns Aff. Ex. 9; Burns Aff. Ex. 11.
[110] I note that quality, as it relates to motor vehicles, necessarily invokes safety issues as well.
[111] *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006).
[112] *Id.*

directors on notice of problems with their systems, but which were consciously disregarded.[113]

Here, I find that the Plaintiffs have not pleaded with particularity the existence of "red flags" that the Board consciously ignored.[114] Recognizing that "red flags" are a proxy for pleading knowledge, I note more generally that the Plaintiffs have failed to plead, on any other basis, knowledge that GM's existing systems were inadequate.[115] When pressed at oral argument, Plaintiffs' counsel

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[113] *See id.* at 373 ("In the absence of red flags, good faith in the context of oversight must be measured by the directors' actions to assure a reasonable information and reporting system exists and not by second-guessing after the occurrence of employee conduct that results in an unintended adverse outcome." (internal quotation marks omitted)).

[114] The Complaint is entirely devoid of pleadings as to the existence of "red flags." I note that the Plaintiffs assert a failure to monitor as an alternative to its assertion of a failure to adopt a system entirely. *See, e.g.,* Second Am. Compl. ¶ 208 ("As alleged herein, the Director Defendants failed to adopt such a system and/or to the extent they claim they had implemented such system or controls, consciously failed to monitor or oversee its operations, thus disabling themselves from being informed of risks or problems requiring their attention."); *id.* ¶ 246 ("To the extent that GM did have reporting procedures and processes, the Director Defendants, whether they sat on the GM before or after its Bankruptcy, further had the fiduciary obligations to monitor and oversee these reporting procedures .") As this Court has recently noted, "The right to plead alternative claims, as Court of Chancery Rule 8(e)(2) permits, 'does not obviate the need to provide factual support for each theory.'" *Fortis Advisors LLC v. Dialog Semiconductor PLC*, 2015 WL 401371, at *5 (Del. Ch. Jan. 30, 2015) (quoting *BAE Sys. Info. & Elec. Sys. Integration, Inc. v. Lockheed Martin Corp.,* 2009 WL 264088, at *8 (Del. Ch. Feb. 3, 2009)).

[115] At Oral Argument, Plaintiffs' counsel argued that the Board failed in its oversight function in not knowing about GM's NHTSA reporting system. *See* Oral Arg. Tr. 76:1–5 ("MR. SAFIRSTEIN: There was nothing, not one document, Your Honor, that showed that any member of the board was aware that anybody at General Motors was reporting anything to the United States Government on an accurate or timely basis."); *id.* at 76:6–78:11. It appears that this argument was not raised in the Complaint or briefing. But to the extent it has not been waived, it is not clear to me how a lack of knowledge as to a reporting system would constitute conscious failure to monitor on the part of the Board in the absence of pleading red flags that would have shown that the unknown system was failing. One of the documents cited in the Complaint, meeting materials for a November 2011 Finance and Risk Committee meeting, includes a chart showing "Summary of NHTSA Information Request Responses (1995-2009)" indicating whether the responses were on time or late. Burns Aff. Ex. 5 at GM220_000000867. Although

did not posit that there was a discernible motive for the Board to disregard its oversight obligation, as such, but rather, that the *culture* at GM provides the stand-in from which I can infer the Board was consciously failing to act in the Company's interest. The Plaintiffs contend that this culture is embodied in the "GM salute" or what Barra called the "GM nod, when everyone nods in agreement to a proposed plan of action but then leaves the room with no intention to follow through, and the nod is an empty gesture."[116] Though she was referring to management, the Plaintiffs argue that the culture was "institutionalized and pervasive," such that it is reasonable to assume this was a Board problem as well.[117] Even assuming that the existence of such a "corporate culture" permeating a board could be sufficient to raise a reasonable doubt as to that board's good faith, the documents cited fall short of implying such a "Board culture" here.

By way of example, the Plaintiffs point to documents from a March 19, 2012 meeting of the Finance and Risk Committee, in which "[q]uality incidents resulting in customer death/injury" is listed among "Key Events that Trigger Risk

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there is nothing in the record more recent that would cover the relevant timeframe as the Plaintiffs have defined it, there is also no allegation or evidence that NHTSA informed GM of violations prior to 2014; stated otherwise, there is no evidence of "red flags" that would have informed the Board that the reporting system it supposedly did not know about was not functioning. There is a critical difference between showing that a board was not receiving information—the most that is pled here—and pleading that a board was consciously disregarding "red flags" that its information systems were failing.

[116] Second Am. Compl. ¶ 148.

[117] *Id.* ¶ 147.

Exposure,"[118] and emphasize that "[t]here is no inquiry, shockingly, here or anywhere else from the [Board] as to why deaths are occurring, and there is no indication that there is any followup that the [B]oard wants with regard to how this risk would be addressed."[119] The next page of that presentation, however, lists "Risk Mitigation Actions," designating individuals responsible for each such action, as well as due dates in some instances, and goes on to list "Key Risk Indicators," and notes, under "Required Action by Management/Board," "[n]one."[120] The Plaintiffs also point to the next pages of that presentation where "Culture Change" was discussed. The document, on its face, however, clearly relates to the general business culture of the company and does not indicate that the presentation was concerned with *director* culture.[121] Finally, the Plaintiffs ask me to consider a document from May 16, 2011, in which the General Auditor reported the "[r]isk that individuals responsible for business operations do not have the knowledge and/or skill sets to perform an effective risk assessment and to develop risk mitigation strategies."[122] In reviewing that page of the document, however, I cannot ignore that this is indicated as a "potential risk[] that [GM Audit Services] *has identified or gathered information about since the last Audit Committee*

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[118] Burns Aff. Ex. 6 at GM220_000000038.
[119] Oral Arg. Tr. 65:15–19.
[120] Burns Aff. Ex. 6 at GM220_000000039.
[121] *See id.* at GM220000000040 ("Key Risk Indicators" are "Company Business Performance Metrics" and "Attrition Rates.").
[122] Burns Aff. Ex. 20 at GM220_000002554.

meeting. Activities are coordinated with the Chief Risk Officer to determine how to best evaluate these risks going forward."[123] From its face, this document tells me that GM's auditors had identified a new risk and, as the preceding page indicates, the auditors were "working with the Chief Risk Officer and other staff functions, such as Human Resources, to develop an approach to update roles and responsibilities within the Company and to train management to implement risk assessment and mitigation strategies within their areas of responsibility."[124]

Finally, all of the Plaintiffs' pleaded facts, even when considered together, still do not imply bad faith. The facts pled may be sufficient to raise a reasonable doubt that the Board's oversight of risk was free of negligence; for example, in failing to review the progress of the auditors and the CRO, after they had represented they were addressing certain topics, such as the "[r]isk that individuals responsible for business operations do not have the knowledge and/or skill sets to perform an effective risk assessment and to develop risk mitigation strategies," which GM Audit Services identified as an "[e]merging [r]isk" with follow-up "[a]ctivities coordinated with the [CRO]."[125] But even *gross negligence* in this regard would imply no threat of director liability from which I may conclude demand would be futile. Simply put, there is a dearth of well pled facts from

[123] *Id.* (emphasis added).
[124] *Id.* at GM220_000002543.
[125] *Id.* at GM220_000002554.

which I can reasonably infer that the Board was *consciously* acting in a manner inimical to GM and was advancing instead some other interest, or was otherwise violating its duty of loyalty by acting in bad faith.

C. Concluding Thoughts

Pleadings, even specific pleadings, indicating that directors did a poor job of overseeing risk in a poorly-managed corporation do not imply director bad faith.[126] This case presents a classic example of the difference between allegations of a breach of the duty of care (involving gross negligence) as opposed to the duty of loyalty (involving allegations of a bad-faith conscious disregard of fiduciary duties). The conduct at issue here, as pled, falls short of an utter failure to attempt to establish information or reporting systems, a conscious failure to monitor existing systems, or conduct otherwise taken in bad faith. Accordingly, I find that there is not a substantial likelihood of personal liability on the part of a majority of the Board, excusing demand, and the Motion to Dismiss should be granted for failure to comply with Rule 23.1.

IV. CONCLUSION

For the foregoing reasons, the Defendants' Motion to Dismiss is granted. An appropriate order accompanies this Memorandum Opinion.

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[126] This description refers to the General Motors and its directors described in the Complaint, and not, necessarily, to the real world GM.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE GENERAL MOTORS COMPANY DERIVATIVE LITIGATION	)))	Consolidated C.A. No. 9627-VCG

ORDER

AND NOW, this 26th day of June, 2015,

The Court having considered the Defendants' Motion to Dismiss, and for the reasons set forth in the Memorandum Opinion dated June 26, 2015, IT IS HEREBY ORDERED that the Motion to Dismiss is GRANTED.

SO ORDERED:

/s/ Sam Glasscock III

Vice Chancellor