IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE GENERAL MOTORS COMPANY, PAUL NASH, *et al.*, derivatively on behalf of Nominal Defendant GENERAL MOTORS CORPORATION, a Delaware corporation, Plaintiffs Below, Appellants, v. MARY T. BARRA, *et al.*, Defendants Below, Appellees, and GENERAL MOTORS COMPANY, Nominal Defendant Below, Appellee.	No. 392, 2015 Court Below: Court of Chancery of the State of Delaware, C.A. No. 9627-VCG PUBLIC VERSION NOVEMBER 16, 2015

APPELLANTS' REPLY BRIEF

Dated: November 2, 2015

OF COUNSEL:

ABBEY SPANIER, LLP
Nancy Kaboolian
212 East 39th Street
New York, New York 10016

HARWOOD FEFFER LLP
Robert I. Harwood
Daniella Quitt
Samuel K. Rosen
488 Madison Avenue
New York, New York 10022

SMITH, KATZENSTEIN & JENKINS LLP
David A. Jenkins (DE No. 932)
1000 West Street, Suite 1501
P.O. Box 410
Wilmington, Delaware 19899
Telephone: 302-652-8400
djenkins@skjlaw.com

BIGGS AND BATTAGLIA
Robert D. Goldberg (DE No. 631)
N. Orange Street
P.O. Box 1489
Wilmington, Delaware 19899
Tel: (302) 655-9677
Goldberg@batlaw.com

Attorneys for Plaintiffs Below-Appellants

KANTROWITZ, GOLDHAMER &
GRAIFMAN, P.C.
Gary S. Graifman
Reginald H. Rutishauser
747 Chestnut Ridge Road, Suite 200
Chestnut Ridge, New York 10977

MORGAN & MORGAN, P.C.
Peter Safirstein
Domenico Minerva
Elizabeth Metcalf
28 West 44th Street, Suite 2001
New York, New York 10036

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Miscellaneous

PRELIMINARY STATEMENT

Although Defendants utterly failed to have in place at GM a reporting system that would have brought to the Board's attention information about the tragic loss of life caused by the ignition switch defect, the Board seeks to absolve itself from liability by citing selected portions of this Court's decision in *Stone v. Ritter*, 911 A.2d 362 (Del. 2006). But citing talismanic language such as "equat[ing] a bad outcome with bad faith" (*id.* at 373) must coincide with board conduct consistent with that of the board in *Stone*. GM's Board fails to measure up to that standard, and demand on its members is therefore excused.

Ignoring the particularized allegations of the Complaint, Defendants would have this Court excuse demand on a Board that, five years after it was given a clean slate by taking over for the old GM after it emerged from bankruptcy, had no more of a risk management structure than "issues would be 'escalated to the Executive Committee members on the Board *as needed*.'" Answering Br. at 14 (emphasis added; citation omitted). This is what Defendants contend grants them *Stone*'s mantle of protection, notwithstanding their having been advised during four years of the relevant period by the Company's Chief Risk Officer of continuing risk reporting deficiencies. GM never reached a point where the Board had in place a functioning reporting system.

The Complaint makes clear that Plaintiffs do not contend that only *in retrospect* did it become apparent that the Board had breached its fiduciary duty of good faith, and therefore its duty of loyalty. The Board's contemporaneous failure, knowingly and consciously, to have in place a reporting system is the fiduciary breach on which the Complaint is based. Defendants contend that because the Board learned of the ignition switch problem in February 2014, this exonerates them from liability. Answering Br. at 27. That contention stands the ruling in *Stone* on its head: the failure of the Board to learn of this critical problem until February 2014, shows the lack of a reporting system at GM.

Plaintiffs respectfully submit the Court of Chancery erred in holding "there is no sufficiently pled allegation that the Board was aware that its risk management system was not functioning as it should . . . . Thus the decision to make changes to that system . . . cannot be said to be in bad faith, made with conscious disregard of the Board's duties to GM." Pl. Ex. A, Op. at 31. As detailed below, Plaintiffs do *not* rest on the argument posited by the Vice Chancellor, that:

> 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."

Id. at 36 (citation omitted).

Instead, the gravamen of the Complaint is that because, *inter alia*, no reasonable information and reporting system existed, which the Board knew from

the Chief Risk Officer, the Board members *could not* receive information as to safety risk and compliance with federal regulations and therefore had rendered themselves unable to exercise their oversight responsibilities.

Defendants argue that "[b]oards of large complex companies cannot anticipate every piece of information that, in retrospect after something has gone wrong, they would have wanted to see beforehand." Answering Br. at 3. Plaintiffs are not suggesting that Defendants need to be informed of "every piece of information" about GM. Plaintiffs are not arguing, for example, that the Board had to have been involved in deciding what shade of blue a car should be painted. Plaintiffs do allege, however, that boards of large complex companies such as GM must have *in place* risk management reporting mechanisms that will inform them of significant risks to the company. Plaintiffs are not talking about paint color; they are talking about putting defective cars on the road, failing to comply with federal regulations and putting peoples' lives at risk.

Plaintiffs allege in detail that Defendants failed to have in place mechanisms that would have ensured that the Board would receive adequate information in core areas of risk management including that GM: (1) was manufacturing and selling millions of automobiles with defective ignition switches, causing the death of scores of unwary drivers and passengers in GM cars; (2) failed to comply with the National Highway Traffic Safety Administration ("NHTSA") reporting

requirement; and (3) was therefore subject to avoidable lawsuits, including those that GM's own outside counsel recognized risked imposition of punitive damages.

Had there been any risk management mechanisms in place, GM would not be the subject of several products liability, personal injury, wrongful death, and consumer class actions; two Congressional investigations as to whether GM violated the TREAD Act (and regulations promulgated thereunder); and a criminal investigation by the U.S. Department of Justice. Importantly, perhaps over a hundred lives would have been saved. Stated another way, "as needed" or "as warranted" was no system at all and the GM Board's indolence in failing to create a monitoring system which could escalate serious defects and ensure the timely reporting of safety defects to NHTSA as required by law, was evidence of a stunning lack of good faith on the part of the Board. *See* Answering Br. at 3.

As stated below and in our opening brief, the Court of Chancery erroneously ruled that Plaintiffs did not allege particularized facts establishing a reasonable doubt that the directors fulfilled their duty of loyalty. The Complaint sufficiently pleads that the Board members face a substantial likelihood of personal liability excusing demand and, therefore, the Court of Chancery's decision should be reversed.

ARGUMENT

I. The GM Board Knew Its Reporting System Was Inadequate And Acted In Bad Faith

Defendants' answering brief admits by silence that GM's Board "utterly failed to implement any reporting system or controls" (*Stone*, 911 A.2d at 370). Even though Defendants boast a litany of conduct purporting to implement board oversight of GM's management and operations, the Board never finalized a risk reporting system that would bring to its attention the catastrophic toll loosed on the nation's highways by GM's defective ignition switch and subsequent shameful delay in recalling the affected vehicles.

Defendants cite Board conduct that supposedly insulates the Board from liability for GM's transgressions. But what their brief instead confirms is that risk management reporting at GM was never more than a work in progress from the time GM exited bankruptcy on July 5, 2009. It was not until over a year later (August 3, 2010) that the Board even created the Finance and Risk Committee (Answering Br. at 7) and created the position of Chief Risk Officer two months thereafter. *Id.* Notwithstanding numerous meetings with the Chief Risk Officer and being advised over a multi-year period of risk reporting deficiencies, the Board permitted such deficiencies to last at least through 2014.

At no time was an actual, in-place plan for reporting risk to the Board established and the Chief Risk Officer never represented to the Board that one had

been established. Nor did Board members themselves finalize such a system. The Board was instead updated "on progress made regarding risk management initiatives." *Id.* at 8. This is a far cry from the board in *Stone*, which (as discussed in greater detail below) "dedicated considerable resources to the [banking] compliance program and put into place numerous procedures and systems to attempt to ensure compliance." 911 A.2d at 371. The GM Board provided a new variation on Zeno's paradox: if you are constantly getting half-way to a destination, you will never get there. The Board's incremental, haphazard efforts to achieve a reporting system never achieved the destination of ultimately reaching a working system. And casualties resulted.

Defendants' admissions about the failure to adopt a reporting system validate the allegations of the Complaint describing that failure. First, Defendants are wrong in claiming that there are no allegations in the Complaint or Board documents that support the assertion that the Chief Risk Officer often notified the Board of GM's lack of a needed information-gathering or risk mitigation structure for a company of its size. Answering Br. at 10, fn.3. For example, at Paragraph 158 of the Complaint (A075), Plaintiffs allege:

> When Fitz [the then Chief Risk Officer] began to advise the Board, *risk management was in disarray*. Fitz even had to explain to the Board what its oversight duties were, and which board committee had

> responsibility for what. This was one year after the new Board had already been in place. GM 1276-90[1](emphasis added).

And at Paragraph 164 of the Complaint (A078), Plaintiffs allege:

> Fitz also warned the Board: "GM has not had a consistent and structured approach that actively manages important risks and drives timely action." (GM 1296.) In his warning, Fitz stated that:
>
> > *Improvements are needed* in the areas of process integration, risk reporting, and culture, along with supporting infrastructure to make risk management a "way of doing business" in GM and deliver the value it promises. *Id.* (emphasis added).

These are but two instances where Plaintiffs have pled with requisite particularity that the Board was advised GM lacked adequate risk management reporting procedures. Yet, this was a Board, the majority of whom were told, subsequent to GM's exit from bankruptcy, that "[m]otor vehicles are one of the most regulated products in the United States." GM 498 ¶ 42; A037-8. And the Board never registered urgency, or even a purposeful attempt, to finalize a working reporting system that would enable exercise of its oversight responsibilities. Based on the documents produced pursuant to Section 220, the Board reviewed material from the Chief Risk Officer (Answering Br. at 10-14), but never received assurance that an adequate reporting system was ever put in place. As a result, the Board was flying blind and relying on management to provide information on an "as needed" basis. Answering Br. at 14. But there are no documents produced

---

[1] "GM ___" refers to documents produced in response to Plaintiffs' Section 220 Demands.

demonstrating that this Board determined what information "needed" to be escalated and who was to make that determination. This is a far cry from "written policies and procedures designed to ensure [regulatory] compliance" by the AmSouth board in *Stone*. 911 A.2d at 372.

The Complaint alleges numerous other instances of the Board being advised that no reporting procedures had been established. For example:

> 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." (GM 1298.) 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. Paragraph 165; A078.
>
> In the next Committee meeting, in December 2010, Fitz indicated that he needed to "*start simple*." (GM 1570.) His goal for 2011 was to put risk teams in place and "*stress test*" for key risks. (*Id.*) Paragraph 167; A079 (emphasis added).
>
> In March 2011, Fitz told the Finance and Risk 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." (GM 2281.) 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. (GM 2285.) The Board never followed through to see that this was done. Paragraph 168; A080 (emphasis added).
>
> . . . , in Spring 2011...
>
> > GMAS *determined that management did not have the knowledge and/or skill sets to perform risk assessments and to develop risk mitigation strategies. (GM 2554.)* Paragraph 170; A081.

In May 2011, another meeting of the Finance and Risk Committee was held. *Fitz stated that risk management "is now moving to identify the unknown risks that could impact the Company." (GM 2617.) In addition, the risk owners for the Top 25 risks were still in the process of "developing" plans to address the risks identified months before. (Id.) There remained no sense of urgency. (See VR at 4, 7, 9, 211.)* Paragraph 171 (emphasis added); *id.*

No Board documents were produced in response to Plaintiffs' Section 220 Demands for the period May 2011 to the Fall of 2011. GM advised Plaintiffs that during that critical period "we did not identify any Board materials from the time period relating to automotive, quality, safety, warranty or recalls." Paragraph 173; A082.

Despite the fact that "Quality Risk" was supposed to be discussed at the January 2012 Public Policy Committee meeting, a meeting which Defendants Davis, Isdell, Girsky, Marinello, Telles, and Anderson attended, no such discussion was held, according to the heavily redacted meeting minutes. *Davis expressed concern that the committee "might not see all the risks" but was assured that the Company would come back with a proposal for a risk list. (GM 14.)* This concern, along with the later March 2012 warnings in Board presentations about events that had the potential to do harm to the Company, put the Board on notice that affirmative action was needed, especially in an environment as heavily regulated as auto manufacturing. Paragraph 177; A084 (emphasis added).

Instead, the January 2012 meeting was spent discussing emerging market risks in Brazil, China, India, and Russia - - countries that could provide increased sales for GM. (GM 17.) The Board was more concerned with the Company's financial health than dealing with quality or safety issues back home. Paragraph 178; *id.*

A March 2012 Finance and Risk Committee presentation for the March 19, 2012 meeting warns, without any explanation, the Finance and Risk Committee that "events occur that could result in damage to GM's quality reputation." (GM 38.) This statement should have alerted the Committee that it should inquire further, especially given Davis' concern a few months earlier about adequate notification . . . . Paragraph 179; A084-85.

By March 2013, 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. (GM 3574.) Paragraph 187 (emphasis added); A089.

With the failure of the Board to adopt, over an almost four-year period after GM exited bankruptcy, a reporting procedure for the Board to oversee risk management, the Board never assured itself that GM's continually evolving, unknown risk management process had ever been finalized. By failing to ensure creation of such fixed and completed reporting procedures, the Board utterly failed to implement a reporting system that even approximates the reporting procedures in *Stone* pursuant to which the defendant board there was absolved of liability.

A significant issue to be determined by this Court is whether the knowledge on the part of the Board of the absence of a functioning risk management system, combined with the Board's refusal to institute a system other than the "as needed" one touted by defendants herein, sufficiently pleads a lack of good faith and the breach of the duty of loyalty. As stated in, *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law* ("*Loyalty's Core Demands*"), 98 Geo. L.J.

629 (2010), by Leo E. Strine, Jr., Lawrence A. Hamermesh, R. Franklin Balotti and Jeffrey M. Gorris.

> [One] related context in which the board could face liability for failure to monitor involved a claim regarding what Chancellor Allen [in *Caremark*] called the board's "unconsidered inaction." Put more concretely, this arises when improper conduct of officers or employees of the corporation, such as a violation of positive law, exposed the corporation to liability and other harm, and when a plaintiff alleged that the board's failure to monitor corporate operations had failed to prevent misconduct. Chancellor Allen famously addressed that context by holding that directors had a duty to "assure that a corporate information gathering and reporting system [] exists which represents a good faith attempt to provide senior management and the Board with information respecting material acts, events or conditions within the corporation, including compliance with applicable statutes and regulations."

Loyalty's Core Demand, at 686-87.

Plaintiffs' allegations demonstrate that the GM Board utterly failed to monitor whether the Company was complying with its legal obligations to timely identify and report safety issues to NHTSA. The deadly design defect at issue here languished *for years* without being reported. The Board's *ad hoc* method of receiving information as to deadly defects left it in the dark. The Board's behavior, in accepting an "as needed" reporting system when the Company's product is a deadly instrumentality is precisely the type of state of mind which demonstrates a lack of "honesty of purpose" and an utter absence of "genuine care for the fiduciaries' constituents." *Loyalty's Core Demand*, at 655.

In *Stone*, this Court found "lack of good faith" to be "a necessary condition to liability." *Id.* at 369, citing *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996). *Stone* articulated *Caremark*'s requirements for director oversight to avoid liability as follows:

> We hold that *Caremark* articulates the necessary conditions predicate for director oversight liability: (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.

911 A.2d at 370 (citations omitted) (emphasis added).

The vast chasm between the persistent passivity of the GM Board in ignoring warnings about inadequate reporting procedures and the good faith activism of the AmSouth board in *Stone* not only underscores the Board's lack of good faith, but calls into question why Defendants are so reliant on that decision, except to cherry-pick catch phrases from it. Consider the facts that led this Court to affirm that the AmSouth board had an adequate reporting system relating to bank compliance regulations. Those facts are reflected in a report by an *independent* consultant AmSouth was required to engage as a result of a governmental cease and desist order. KPMG Forensic Services performed that

role. This provides another difference between GM's Board and AmSouth's. Plaintiffs here allege a lack of independence by Mr. Valukas as he is a member of the firm of Jenner & Block, which had and continued to represent GM. *See, e.g.*, Complaint ¶ 65; A045.

The AmSouth board was exonerated because plaintiffs there did not allege either *Caremark* condition predicate for director oversight liability. As this Court explained:

> The KPMG Report evaluated the various components of AmSouth's longstanding BSA/AML compliance program. The KPMG Report reflects that *AmSouth's Board dedicated considerable resources to the BSA/AML compliance program and put into place numerous procedures and systems to attempt to ensure compliance.* According to KPMG, the program's various components exhibited between a low and high degree of compliance with applicable laws and regulations.
>
> The KPMG Board describes the numerous AmSouth employees, departments and committees established by the Board to oversee AmSouth's compliance with the BSA and to report violations to management and the Board.

Further:

> The KPMG Report reflects that the directors not only discharged their oversight responsibility to establish an information and reporting system, but *also proved that the system was designed to permit the directors to periodically monitor* AmSouth's compliance with BSA and AML regulations.
>
> * * *
>
> The KPMG Report shows that *AmSouth's Board at various times enacted written policies and procedures* designed to ensure compliance with the BSA and AML regulations. For example, the

> Board adopted an amended bank-wide "BSA/AML Policy" on July 17, 2003 – four months before AMSouth became aware that it was the target of a government investigation.

Id. at 371-72 (emphasis added).

Here, Plaintiffs allege that the Board's years' long dithering was an utter failure to implement any reporting or information system or controls. As a result of this failure, people died. And while it may be inadequate under Delaware law to simply state that a bad outcome equates to bad faith, it cannot be denied that a bad outcome can certainly be the result of bad faith, which is what happened here.

The hands-on approach of the AmSouth board, in sharp distinction to the GM Board's abstention from taking the lead on risk oversight procedures removes from Defendants *Stone*'s shield. As this Court concluded:

> 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.

Id. at 373 (emphasis added).

Defendants' actions here fall well short of the mark laid down by this Court in *Stone*. Defendants' knowing failure, as alleged with particularity in the Complaint, to assure a reasonable information and reporting system, manifest contemporary bad faith, and excuses demand on the GM Board for its failure to exercise oversight responsibilities.

The Court of Chancery dismissed the Complaint, finding there to be no substantial likelihood of personal liability on the part of a majority of the Board that would have excused demand. Dismissal was erroneous because the particularized facts alleged and the inferences flowing therefrom establish a reasonable doubt as to such a substantial likelihood.

A. The Audit Committee Defendants Were Charged With But Failed To Oversee GM's NHTSA Reporting

There is nothing in the record to substantiate Defendants' continued assertion in their answering brief that the Board was monitoring GM's NHTSA reporting after 2009. Answering Br. at 13-14, 27-28. It is this issue that the Vice Chancellor honed in on after oral argument on the motion to dismiss. A299. Both in response to the Vice Chancellor's inquiry and in their answering brief, Defendants fail to provide any support for their position that the Board had any involvement or knowledge of GM's NHTSA reporting from 2010 to the present.

Defendants' answering brief (like their earlier letter to the Vice Chancellor) refers to *March 2010* Board materials for pre-2009 events. Answering Br. at 13, citing A326 (Summary of NHTSA Information Request Responses for *1995-2009*; and 27.) Footnote 4 of the answering brief states that "defendants provided to Vice Chancellor the same information here" and cites only to "A300-03" which is a letter from Defendants' counsel to the Vice Chancellor citing the same Summary

of NHTSA Information Request Responses (A326-327). It has nothing to do with the period relevant to this derivative action.

In the March 13, 2015 letter to the Court, Defendants state:

> There is nothing in the record reflecting that NHTSA had determined GM failed to timely report any safety defects or sanctioned GM for failing to initiate any required safety recalls for the period 2010 through 2013. Accordingly, there was no adverse NHTSA compliance information for management to have reported to the board and no reason for the board to believe GM was not complying fully with its obligations. A302.

This statement was inaccurate in light of the May 2014 Consent Decree in which GM, among other things, admitted that it failed to provide NHTSA of safety-related defects in a timely fashion.[2] The contents of the May 2014 Consent Decree is specifically alleged in the Complaint. A054-56.

Both in their letter to the Court of Chancery (at A343) and their Complaint, Plaintiffs alleged the circumstances that led to the NHTSA fine (untimely reporting) and the fact that the Board failed to take decisive action *even after* the announcement of the recall in February 7, 2014, resulting in additional fines of

---

[2] Notwithstanding this Court's denial of Plaintiffs' motion to supplement the record to include GM's entry into a deferred prosecution agreement with the United States Attorney's Office of the Southern District of New York (the "DPA"), Plaintiffs request the Court take judicial notice of the DPA to the extent that it (at paragraph 13) prevents Defendants from taking positions contrary to the agreement or accompanying statement of facts. As a result, Defendants are precluded from continuing to maintain the timeliness of GM's NHTSA reporting. As Defendants had not yet filed their Answering Brief at the time the Motion to Supplement was fully briefed, this issue was not before the Court at the time it denied the Motion to Supplement. Nevertheless, judicial notice would be appropriate here. *See Johnson v. State*, 55 A.3d 839 (Del. 2012) (taking judicial notice of criminal matter); *Dabney v. State*, 12 A.3d 1101, 1104 (Del. 2009)("Under D.R.E 201, judges may take judicial notice of facts that 'cannot reasonably be questioned.'").

$7,000 per day. A054-A056. The Complaint alleges that ". . ., even with the firestorm surrounding the recall at full blast and NHTSA demanding accountability by GM, the Board still did not assure that the regulators would receive timely information leading to unprecedented fines." These allegations were ignored by the court below and Defendants.

Defendants mistakenly take solace in the fact that "[t]he complaint does not allege that the board received any information before 2014 suggesting that GM's NHTSA reporting systems were not reporting properly . . . ." Answering Br. at 13-14. That the Board, by its own admission, did not receive any information prior to 2014 is exactly the point. They did not have information because there was no mechanism for issues with regulatory (or legal) oversight to make its way to the Board during the relevant period. *See also* Answering Br. at 27. Neither Defendants nor the Court of Chancery mention that it was the Audit Committee who (together with the inside directors comprise a majority of the Board) were charged with "GM's compliance with legal and regulatory requirements." Complaint ¶ 200; A094. There is no precedent from this Court for the proposition that a director satisfies his or her fiduciary responsibilities if matters are brought to their attention on an "as needed" or "as warranted" basis. *See* Answering Br. at 3, 9, 14, 21, and 22. *Stone v. Ritter*, *supra*, provides no safety net for Defendants here.

Defendants' statement that the Complaint does not allege "that NHTSA had sanctioned GM for failing to comply with its reporting requirement" is untrue and Defendants are not in a position to say otherwise. *Compare* Answering Br. at 14 with Complaint ¶¶ 90-100; A054-57.

B. The Board Failed To Adopt A Mechanism To Bring Potential Punitive Damages To Its Attention

Defendants concede that there was no mechanism in place to ensure that "significant" information about the risks of punitive damages was elevated to the Board. Defendants also admit that the GM *ad hoc* "as needed" or "as warranted" policy never brought to the Board level any of the repeated dire warnings by GM's attorneys as to why punitive damages were likely. Answering Br. at 3, 9, 14, 21, and 22. Defendants instead argue that it would be "impractical" for the Board to know about every punitive damage claim asserted in the wherefore clause of a complaint. Answering Br. at 28. This is not what Plaintiffs are arguing.

Instead, the Complaint details how the legal department was aware of the risk and potential damage to the Company of the ignition switch defect because GM's outside counsel repeatedly warned the legal department that the Company was at risk of punitive damages.[3] It was not simply victims' lawyers alleging

---

[3] GM's outside counsel, King & Spalding ("K&S"), prepared a case evaluation for GM's in-house counsel in the Fall of 2010 concerning an accident involving a Cobalt they believed "could provide fertile ground for laying the foundation for an award for punitive damages,

punitive damages, it was GM's lawyers recognizing a real risk of them being imposed. This is the type of "significant additional information" that should have been "elevated" to the Board if it had a proper mechanism in place consistent with the precedent of this Court. *See* Answering Br. at 3.

The Complaint alleges that GM's legal department (but not the Board) had a procedure for assessing lawsuits pending against the Company. For example, the Complaint alleges that (1) any settlement for a products liability action between $100,000 and $1.5 million required department committee approval; (2) any settlement between $1.5 million and $5 million required approval of the Settlement Review Committee; and (3) larger settlements needed the approval of the General Counsel. The Complaint alleges that even though the legal department was aware of the significant risks and potential damages to the Company, this information never made it to the Board. Complaint ¶¶ 117-51; A062-73. Plaintiffs were providing details of company procedures not the Board's. The Court of Chancery found that "Plaintiffs complain that GM "could have, should have, had a *better* reporting system, but not that it had *no* such reporting system." Pl. Ex. A at 38; emphasis in original. This mischaracterizes the Complaint which argued that the

---

resulting in a significantly larger verdict." Complaint ¶¶ 124-25; A064. A second litigation-based punitive damages' warning was issued by K&S in July 2011. Complaint ¶ 130; A066.

Another GM outside counsel, Eckert Seamans, performed an analysis, dated April 18, 2012, of a December 2009 Cobalt accident, making the connection between the ignition switch issue and the non-deployment of the Cobalt's airbags and reported to GM that litigating the action "would put GM at risk for imposition of punitive damages." *Id.*; A067-68, ¶¶ 134-35.

Board had no procedures and that nothing in the legal department's procedures would elevate it to the board-level except by happenstance.[4] The fact that no one even deemed that such information was "warranted" to be elevated to the Board should have been an inference that went in Plaintiffs' favor, not Defendants' favor. It demonstrates the lack of any procedures consistent with this Court's precedents.

CONCLUSION

For all of the foregoing reasons, and those set forth in the Opening Brief, Plaintiffs request that this Court reverse the decision of the Court of Chancery in its entirety.

Dated: November 2, 2015

SMITH KATZENSTEIN & JENKINS LLP

/s/ David A. Jenkins
David A. Jenkins (DE No. 932)
1000 West Street, P.O. Box 410
Wilmington, Delaware 19899
Tel: (302) 652-8400
djenkins@skjkaw.com

BIGGS AND BATTAGLIA

/s/ Robert D. Goldberg
Robert D. Goldberg (DE # 631)
921 N. Orange Street, P.O. Box 1489
Wilmington, Delaware 19899
Tel: (302) 655-9677
Goldberg@batlaw.com
Attorneys for Plaintiffs Below-Appellants

[4] Even if the settlement required approval by the General Counsel (who was the only person in the Legal Department who attended Board meetings), there is no requirement that he would provide such information to the Board. Again, it would only be by happenstance.

CERTIFICATE OF SERVICE

I certify that on November 16, 2015, I caused copies of the **PUBLIC VERSION OF APPELLANTS' REPLY BRIEF** to be served on the following via e-filing:

Robert D. Goldberg, Esquire
BIGGS AND BATTAGLIA
921 North Orange Street
P.O. Box 1489
Wilmington, DE 19899

Lisa A. Schmidt, Esquire
Robert L. Burns, Esquire
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, DE 19801

William M. Lafferty, Esquire
Susan Wood Waesco, Esquire
Lauren K. Neal, Esquire
MORRIS NICHOLS ARSHT & TUNNELL LLP
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899

Seth D. Rigrodsky, Esquire
Brian D. Long, Esquire
RIGRODSKY & LONG, P.A.
2 Righter Parkway, Suite 120
Wilmington, DE 19803

/s/ David A. Jenkins
David A. Jenkins (ID No. 932)