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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11 Case No.**
MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a General Motors Corp., *et al.*	:	**09-50026 (REG)**
Debtors.	:	**(Jointly Administered)**
RADHA RAMAN MURTY NARUMANCHI,	:	
Plaintiff,	:	**Adversary No. 09-00501 (REG)**
vs.	:	
GENERAL MOTORS CORPORATION, et al.,	:	
Defendants.	:	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF GM DEFENDANTS' MOTION TO DISMISS

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STATUTES AND RULES

Defendants General Motors Corporation ("**GM**"), Kent Kresa and Frederick A. Henderson (collectively, the "**GM Defendants**") submit this memorandum in further support of their motion to dismiss Plaintiff Radha Raman Murty Narumanchi's ("**Narumanchi**" or "**Plaintiff**") Adversary Complaint ("**Complaint**" or "**Compl.**") pursuant to Fed. R. Civ. P. 8, 12(b)(6) and 23.1 (made applicable herein by Fed. R. Bankr. P. 7008, 7012 and 7023.1) (the "**Motion**") and reply to his opposition ("**Opposition" or "Opp.**").[1]

PRELIMINARY STATEMENT

1. In the Motion, the GM Defendants established that the Complaint is deficient in numerous respects; that Plaintiff lacks standing and fails to state a claim as a matter of law; and therefore that the Complaint must be dismissed.[2] Specifically, the GM Defendants established that: (i) the Complaint fails to satisfy the pleading requirements of Rule 8(a)(2); (ii) Narumanchi cannot, as a matter of law, assert direct fiduciary duty claims against the GM Defendants; (iii) although Narumanchi might have standing under Delaware law to assert a derivative claim on behalf of GM, he failed to comply with the demand requirements of Rule 23.1 and Delaware substantive law; (iv) even setting aside the foregoing deficiencies, he fails to state a claim against Messrs. Kresa and Henderson; (v) even if he could state a claim for breach of the duty of care, GM has adopted a provision in its Certificate of Incorporation that exculpates these directors from liability for money damages for breaches of the duty of care; and (vi) Narumanchi fails to state a claim for breach of contract under the 1995 Indenture.

[1] Capitalized terms not otherwise defined herein have the meaning ascribed to them in the Motion.

[2] Narumanchi's "demand and request in bold letters that there should be a jury trial," (Opp. ¶ 1.1) in no way precludes the dismissal of his Complaint on this Motion. Rule 12(b)(6) motions are routinely granted in cases with jury demands. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 326-27 (2007) ("[Even a] court's comparative assessment of plausible inferences [on a motion to dismiss], while constantly assuming the plaintiff's allegations to be true, we think it plain, does not impinge upon the Seventh Amendment right to jury trial.").

2. Plaintiff's opposition is most notable in two respects: it does not refute -- and in most instances, does not even address -- the central arguments, shortcomings in the pleadings and relevant case law raised in the Motion; and it repeatedly says that Narumanchi will amend his Complaint in utterly unexplained ways, after "discovery" to which, as a matter of law, he is not entitled.[3] Thus, the Complaint must be dismissed as a matter of law.

ARGUMENT

I. THE COMPLAINT FAILS TO COMPLY WITH RULE 8 AND MUST BE DISMISSED

3. In the Motion, the GM Defendants established that Narumanchi failed to satisfy even the minimal pleading requirements of Rule 8(a)(2) because his adversary complaint contains nothing more that "naked assertions devoid of further factual enhancement." *Ashcroft v. Iqbal*, 128 S. Ct. 1937, 1949 (2009). Narumanchi says nothing in his opposition brief in response to this point, nor does he even mention *Iqbal*. He does not attempt to justify his pleading under Rule 8(a)(2) precisely because he has nothing more than labels and conclusions to support his theories. Indeed, his only response comes in his pithy conclusion: "If there is a need to make some claims clear, it will be done after due discovery." (Opp. at 10) But this assertion serves only to underscore his fundamental disregard for (or misunderstanding of) the Supreme Court's teachings in *Iqbal* and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the other controlling authority that Narumanchi also does not even attempt to address.

[3] Plaintiff's rambling Opposition largely appears to be a preview of the arguments he intends to make in the District Court in connection with his appeal from the decision approving the 363 Sale. Suffice it to say, those arguments do not overcome, and indeed have no bearing on, the motion to dismiss this adversary proceeding. Likewise, Plaintiff devotes a considerable portion of his Opposition to the jurisdiction of this Court. His purpose is not clear: he chose to file his case in this Court; and it would be unusual for Plaintiff to choose his jurisdiction and forum, and then to question that very choice. The GM Defendants will address the jurisdictional issues raised by Narumanchi in their response to his "Motion to Determine the 'Core' and 'Non-Core' (Mandatory and/or Discretionary) Issues Involved in the Instant Adversary Complaint, as a Prelude to Request to U.S. District Court for SDNY to Withdraw the Reference from this Bankruptcy Court," filed on September 10, 2009 [Adv. Pro. Docket No. 23].

4. As the Supreme Court made clear in *Twombly*, to satisfy the pleading standard of Rule 8(a)(2), a complaint must plead "enough facts to state a claim to relief that is plausible on its face . . . . [L]abels . . . conclusions, and a formulaic recitation of the elements of a cause of action will not do." 550 U.S. at 570 (emphasis added). Simply put, Narumanchi is not entitled to file a bald and baseless complaint, and then cause the defendants to incur the burdens of a costly discovery fishing expedition undertaken by him in an effort to find a viable cause of action. *Id.* at 554-63. Thus, for the reasons set forth in the Motion, the Complaint should be dismissed because it fails to satisfy Rule 8(a)(2).

II. AS A MATTER OF LAW, THE GM DEFENDANTS DO NOT OWE DIRECT FIDUCIARY DUTIES TO NARUMANCHI

A. GM Owes No Fiduciary Duty To Narumanchi

5. Narumanchi concedes in his Opposition that Delaware law governs his fiduciary duty claims. (Opp. ¶ 5.1) In the Motion, the GM Defendants established that it is a fundamental precept of Delaware law that a corporation does not owe fiduciary duties to its shareholders, creditors, or bondholders. *See, e.g.*, *Alessi v. Berach*, 849 A.2d 939, 950 (Del. Ch. 2004). Narumanchi's "fiduciary duty" claims against GM therefore fail as a matter of law. Narumanchi nowhere even addresses this point and thus concedes it by his silence.

B. Narumanchi Does Not Have Standing To Assert Direct Claims For Breach Of Fiduciary Duty Against Directors

6. Similarly, the GM Defendants established in the Motion that Messrs. Kresa and Henderson did not owe fiduciary duties directly to Narumanchi (or to any other creditors or bondholders) under Delaware law; thus, those claims must be dismissed. Although Narumanchi cites *Gheewalla* for the proposition that directors of a Delaware corporation owe fiduciary duties to the corporation's creditors when it enters the "zone of insolvency" (Opp. ¶ 5.5, n.16), he clearly misstates (or misunderstands) the decision. It is settled Delaware law,

stated in that very decision, that "creditors of a Delaware corporation have no right, as a matter of law, to assert direct claims for breach of fiduciary duty against its directors," *N. Am. Catholic Educ. Programming Found. v. Gheewalla*, 930 A.2d 92, 99 (Del. 2007) (emphasis added). Thus, assuming *arguendo* that Narumanchi could establish that GM entered the "zone of insolvency" at some time, he might have standing to assert a derivative claim for alleged injury to the corporation -- but, as a matter of law, he cannot assert a direct claim. *Id.* at 103. Accordingly, the direct fiduciary duty claims against Messrs. Kresa and Henderson fail as a matter of law.

III. PLAINTIFF'S FAILURE TO PLEAD ANY FACTS SUFFICIENT TO SATISFY THE "DEMAND" REQUIREMENT MANDATES DISMISSAL OF THE CLAIMS AGAINST MESSRS. KRESA AND HENDERSON

7. Given that, at best, Narumanchi theoretically might have standing as a creditor to assert a derivative claim against the directors, he was required by both Rule 23.1 and Delaware substantive law to either make a demand on the GM Board to file suit or plead particularized facts establishing that demand was excused in order to establish such standing here. To be sure, Narumanchi's "generalized and conclusory allegations" that Messrs. Kresa and Henderson "mismanaged the firm . . . are classically derivative, in the sense that they involve injury to the corporation as an entity and any harm to the stockholders and creditors is purely derivative of the direct financial harm to the corporation." *Prod. Res. Group v. NCT Group, Inc.*, 863 A.2d 772, 776 (Del. Ch. 2004). Narumanchi, however, does not -- and could not -- plead that he made a demand on the GM Board. Nor does he (or could he) plead any particularized facts that would excuse demand under Delaware law by: (1) creating a reasonable doubt that a majority of the GM's directors are disinterested and independent; or (2) establishing that the Board failed to exercise proper business judgment with respect to the challenged transactions. Again, he completely ignores Rule 23.1, governing Delaware case law and the arguments in the

Motion. But ignoring them does not make them disappear. Narumanchi's derivative claims therefore fail.[4]

IV. THE COMPLAINT FAILS TO STATE A CLAIM

8. Putting aside the fatal pleading deficiencies under Rules 8(a)(2) and 23.1 and Delaware law, the GM Defendants also established in the Motion that Plaintiff failed to plead "facts" that, if true, would state a claim against Messrs. Kresa and Henderson.

9. First, Narumanchi: (i) totally ignores that Mr. Henderson was not even on the Board at the time of virtually all challenged conduct; (ii) totally ignores that two directors could not cause or be liable for action that only the full Board could direct; and (iii) does not state a claim for breach of the duty of care because he cannot overcome the presumption of the business judgment rule with respect to the challenged actions. There simply are no facts alleged in the Complaint (or referenced in the Opposition) showing that the individuals or the Board made any irrational decisions or failed to act on an "informed basis [and] in good faith." *See Golaine v. Edwards*, 1999 WL 1271882, at *10 (Del. Ch. Dec. 21, 1999).[5]

10. Second, Narumanchi does not state a claim for corporate "waste" because he does not, and cannot, plead facts showing "that the Delaware directors 'authorize[d] an exchange that [was] so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration.'" *See In re 3COM Corp.*,

[4] Any derivative claim against GM's directors is property of the bankruptcy estate. *See* 11 U.S.C. § 541(a). Thus, even if Narumanchi could satisfy the demand requirement by pleading facts sufficient to excuse same -- or if he made demand and purported to be dissatisfied with a rejection of same by the Board -- the Complaint would still have to be dismissed unless he thereafter successfully sought leave from this Court to bring such an action. *See Seinfeld v. Allen*, 167 F. Appx. 47, 49 (2d Cir. 2006) (where plaintiff made demand, "if the plaintiff is dissatisfied with the trustee's action or inaction on the claim, he must petition the bankruptcy court before proceeding derivatively" (citing *Mitchell Excavators, Inc. v. Mitchell*, 734 F.2d 129, 132 (2d Cir. 1984)).

[5] Under Delaware law, demand is not excused and the business judgment rule is not overcome even by pleading that a board "did nothing." The courts properly deem that an insufficient conclusion, where no facts were pled that the board did not meet, consider an issue, etc. *Levine v. Smith*, 1989 WL 150784, at *6, 7-8 (Del. Ch. May 21, 1990), *aff'd*, 591 A.2d 194 (Del. 1991).

1999 WL 1009210, at *4 (Del. Ch. Oct. 25, 1999). At best, Narumanchi speculates that "once the exact moment in the year 2006 that GM became insolvent is determined," he will be able to raise "issues such as whether GM had benefited from each and every expenditure, to wit: severance payments made to employees in billions of dollars between the 2nd quarter 2006 and until 6-1-2009, any stock options that were allowed to be cashed by employees, excessive remunerations paid to outside consultants, etc." (Opp. ¶ 5.5) Notably, he does not plead facts showing to whom alleged severance payments were made or in what amount; he does not plead facts showing which employees "cashed" options, or why those alleged actions were improper; and he does not plead facts showing what "excessive remunerations" were paid to which outside consultants or why those payments were "excessive." His speculative and conclusory assertions that "issues" may exist are plainly insufficient to state a claim for corporate waste.[6]

11. Finally, Narumanchi fails to state a claim for "deepening insolvency," as such a claim does not exist under Delaware law. *See* Motion ¶ 37. Narumanchi cites no authority to the contrary, again thereby conceding the point.

V. 8 DEL. C. § 102(B)(7) AND GM'S CERTIFICATE OF INCORPORATION REQUIRE DISMISSAL

12. Even if Narumanchi could state a claim for a breach of the duty of care, the GM Defendants also established in the Motion that his claim nonetheless should be dismissed because GM has adopted an exculpatory charter provision, in accordance with 8 Del. C. §

[6] Narumanchi's citation to *Production Resources* (Opp. ¶ 5.5) provides no support for his contention. In that case, the Delaware Court of Chancery concluded that a creditor had stated a "non-exculpated breach of fiduciary duty claim" when the complaint pled "unusual and particularized facts . . . suggestive of self-interest . . . and of bad faith" and that indicated "a suspicious pattern of dealing that raise[d] the legitimate concern that the [] board [was] not pursing the best interests of [the company's] creditors as a class with claims on a pool of insufficient assets, but engaging in preferential treatment of the company's primary creditor and de facto controlling stockholder (and perhaps of its top officers, who are also directors) without any legitimate basis for favoritism." *Prod. Res.*, 863 A.2d at 799-800. In stark contrast to the extreme set of "unusual and particularized facts" pled in *Production Resources*, Narumanchi's bald assertions in his Complaint come nowhere near stating such a claim.

102(b)(7), that relieves GM's directors of liability for money damages for such claims. In response, Narumanchi proclaims that "exculpatory provisions of corporate charge [sic] do not protect directors from fiduciary duty claims." (Opp. ¶ 5.5). He is wrong. And he cites nothing to support his meritless assertion. Where, as here, there are no facts showing self-dealing, self-interest or like bad faith, the very point of Section 102(b)(7), and charter provisions adopted under its authority, is precisely to exculpate and protect directors of a Delaware corporation from liability for money damages resulting from a breach of their duty of care. *See, e.g., Emerald Partners v. Berlin*, 787 A.2d 85, 90 (Del. 2001). As such, even if Narumanchi could state a claim for a breach of the duty of care, he could not recover money damages from Messrs. Kresa and Henderson: his duty of care claims therefore must be dismissed.

VI. PLAINTIFF FAILS TO STATE A CLAIM FOR BREACH OF CONTRACT AGAINST THE GM DEFENDANTS

13. The GM Defendants established in the Motion that Narumanchi's claim that GM breached the "equal and ratable" clause of the 1995 Indenture by "allowing the U.S. Treasury hold [sic] secured liens on the assets of the GM Corporation" (Compl. ¶ 3.4.4) is contradicted by the plain words of the U.S. Treasury Loan Agreement. *See In re Gen. Motors Corp.*, 407 B.R. 463, 517 (Bankr. S.D.N.Y. 2009) (Gerber, J.) ("[W]hen liens were granted in favor of the U.S. Treasury in December 2008, the U.S. Treasury was not granted a lien . . . that would trigger the equal and ratable clause."). Narumanchi does not even address, much less suggest facts that refute, this argument; thus, he fails to state a breach of contract claim.

14. In the Opposition, Narumanchi belatedly (and improperly) asserts that he "now finds (i.e. subsequent to his filing this adversarial complaint on 6-16-2009) that besides the two specific 11-15-1990 and the 12-7-1995 trust and indenture agreement(s), there were quite a number other [sic] indentures that were created by bankrupt and insolvent debtor GM, and some

properties obviously cover [sic] by those later indentures were also secured and leined, [sic] subsequent to the 12-7-1995 indenture (apparently this is/was besides the 12-31-2008 loan agreement between the United States Treasury and the Debtor that laid first liens on some properties and yet second lines on some other properties)." (Opp. ¶ 4.1) No such allegations appear in the Complaint. But even if Narumanchi had alleged these claims in the Complaint, his "naked assertions" are devoid of the requisite "factual enhancement." Narumanchi does not identify a single "other indenture," nor does he identify a single provision in any unidentified indenture that resulted in a lien on any particular piece of property that would implicate the 1995 Indenture, nor does he identify a single piece of property encumbered by such unidentified indentures. Instead, he asserts only that "this maze of transactions requires extensive discovery" (Opp. ¶ 4.1), once again ignoring the rule of *Ashcroft* and *Twombly* that a plaintiff must plead facts sufficient to state a claim before discovery can be obtained.[7] Thus, even if pled, these vague and conclusory claims are insufficient to state a claim for breach of contract, and must be dismissed.

[7] Similarly, Narumanchi's requests for discovery to "ascertain whether debtor GM was involved in creating fraudulent so-called 'synthetic leases' so that any liabilities (that are material to financial statements) are kept off the books" (Opp. ¶ 4.2) and to explore GM's corporate structure (Opp. ¶ 4.3) underscore the specious and vexatious nature of this adversary proceeding.

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed with prejudice.

Dated: New York, New York
September 23, 2009

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