HEARING DATE AND TIME: September 30, 2009 at 10:30 a.m. (Eastern Time)
OBJECTION DEADLINE: August 21, 2009 at 4:00 p.m. (Eastern Time)

Harvey R. Miller
Stephen Karotkin
Joseph H. Smolinsky
Irwin H. Warren
Erin J. Law
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

Attorneys for Debtors, Debtors in Possession and Frederick A. Henderson

Robert D. Joffe
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorneys for Kent Kresa

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 (Murty), RADHA BHAVATARINI DEVI NARUMANCHI (Devi),	:	
Plaintiffs,	:	**Adversary No. 09-00501 (REG)**
vs.	:	
GENERAL MOTORS CORPORATION, *et al.*,	:	
Defendants.	:	

NOTICE OF THE GM DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

PLEASE TAKE NOTICE that upon the annexed Motion, dated July 16, 2009 (the "**Motion**"), Defendants General Motors Corp. (n/k/a Motors Liquidation Company), Kent Kresa and Frederick A. Henderson (collectively, the "**GM Defendants**"), will move for an order, pursuant to Fed. R. Civ. P. 8, 12(b)(6) and 23.1 (as incorporated by Federal Rules of Bankruptcy Procedure 7008, 7012 and 7023.1), seeking a dismissal of the Complaint, as more fully set forth in the Motion. A hearing will be held before the Honorable Robert E. Gerber, United States Bankruptcy Judge, in Room 621 of the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, New York, New York 10004, on **September 30, 2009 at 10:30 a.m. (Eastern Time)**, or as soon thereafter as counsel may be heard.

PLEASE TAKE FURTHER NOTICE that any responses or objections to the Motion must be in writing, shall conform to the Federal Rules of Bankruptcy Procedure and the Local Rules of the Bankruptcy Court, and shall be filed with the Bankruptcy Court (a) electronically in accordance with General Order M-242 (which can be found at www.nysb.uscourts.gov) by registered users of the Bankruptcy Court's filing system, and (b) by all other parties in interest, on a 3.5 inch disk, preferably in Portable Document Format (PDF), WordPerfect, or any other Windows-based word processing format (with a hard copy delivered directly to Chambers), in accordance with General Order M-182 (which can be found at www.nysb.uscourts.gov), and served in accordance with General Order M-242, and on (i) Weil, Gotshal & Manges LLP, attorneys for the Debtors, 767 Fifth Avenue, New York, New York 10153 (Attn: Harvey R. Miller, Esq., Stephen Karotkin, Esq., Joseph H. Smolinsky, Esq., and Irwin H. Warren); (ii) General Motors Company, 300 Renaissance Center, Detroit, Michigan 48265 (Attn: Lawrence S.

Buonomo, Esq.); (iii) Cadwalader, Wickersham & Taft LLP, attorneys for the United States Department of the Treasury, One World Financial Center, New York, New York 10281 (Attn: John J. Rapisardi, Esq. and Peter M. Friedman, Esq.); (iv) the United States Department of the Treasury, 1500 Pennsylvania Avenue NW, Room 2312, Washington, D.C. 20220 (Attn: Matthew Feldman, Esq.); (v) the Office of the United States Trustee for the Southern District of New York (Attn: Diana G. Adams, Esq.), 33 Whitehall Street, 21st Floor, New York, New York 10004; (vi) the U.S. Attorney's Office, S.D.N.Y., 86 Chambers Street, Third Floor, New York, New York 10007 (Attn: David S. Jones, Esq. and Matthew L. Schwartz, Esq.); (vii) Gibson, Dunn & Crutcher LLP., Attorneys For Wilmington Trust Company, 200 Park Avenue, New York, Ny 10166 (Attn: David M. Feldman, Esq. and Matthew J. Williams, Esq.); (iix) Kramer Levin Naftalis & Frankel LLP, Attorneys for The Official Unsecured Creditors Committee, 1177 Avenue Of The Americas, New York, Ny 10036 (Attn: Thomas Moers Mayer, Kenneth H. Eckstein & Gordon Z. Novod); (ix) the Debtors, c/o Motors Liquidation Company, 300 Renaissance Center, Detroit, Michigan 48265 (Attn: Ted Stenger); (x) Vedder Price, P.C., attorneys for Export Development Canada, 1633 Broadway, 47th Floor, New York, New York 10019 (Attn: Michael J. Edelman, Esq. and Michael L. Schein, Esq.), so as to be received no later than **August 21, 2009, at 4:00 p.m. (Eastern Time)** (the "**Objection Deadline**").

If no objections are timely filed and served with respect to the Motion, the Debtors may, on or after the Objection Deadline, submit to the Bankruptcy Court an

order dismissing the Complaint, which order may be entered with no further notice or opportunity to be heard or offered to any party.

Dated: New York, New York
July 16, 2009

/s/ Stephen Karotkin

Harvey R. Miller
Stephen Karotkin
Joseph H. Smolinsky
Irwin H. Warren
Erin J. Law
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Attorneys for Debtors,
Debtors in Possession,
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Erin J. Law
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

Attorneys for Debtors, Debtors in
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Robert D. Joffe
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorneys for Kent Kresa

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 (Murty), RADHA BHAVATARINI DEVI NARUMANCHI (Devi),	:	
Plaintiffs,	:	**Adversary No. 09-00501 (REG)**
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THE GM DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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STATUTES

1. Defendants General Motors Corporation ("**GM**"), Kent Kresa and Frederick A. Henderson (collectively, the "**GM Defendants**") submit this motion to dismiss the Adversary Proceeding Complaint ("**Complaint**" or "**Compl.**") pursuant to Fed. R. Civ. P. 8, 12(b)(6) and 23.1 (as incorporated by Federal Rules of Bankruptcy Procedure 7008, 7012 and 7023.1). The **Complaint** ignores both pleading requirements that the Supreme Court has established in its recent decisions, and dispositive substantive law mandating dismissal.

PRELIMINARY STATEMENT

2. Over the years, **GM** has issued unsecured notes, bonds and debentures. Plaintiffs here (proceeding *pro se*) allege that they own unsecured senior debentures (due July 15, 2033), issued pursuant to a 1995 indenture ("**1995 Indenture**"). Plaintiffs assert that **GM** has breached the terms of that indenture by "enter[ing] into at least two security interests agreements with the U.S. Treasury Department." (**Compl. ¶** 3.2.1.) Plaintiffs also purport to seek damages for alleged breaches of the fiduciary duty of care purportedly owed to them since 2006, when, they allege, **GM** entered the "zone of insolvency." The **Complaint** should be dismissed on numerous grounds.

3. First, the **Complaint** fails to satisfy Rule 8. It is full of conclusory assertions, characterizations and invective, but bereft of the requisite "factual content" that could allow this Court "to draw the reasonable inference that … [each, or any] defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009); *Bell Atl. Corp. v Twombly*, 550 U.S. 544, 555-57 (2007). The **Complaint** is barely comprehensible and certainly fails to coherently set forth the facts alleged, claims asserted or relief sought as to each defendant.

4. Most obviously, despite challenging Board or corporate actions going back to 2006, plaintiffs do not (and could not) plead facts showing that (i) Mr. Henderson even was a director until March 29, 2009, or (ii) Messrs. Henderson and Kresa ever constituted a majority of, or otherwise could or did act on behalf of, the full Board authorizing *any* transaction. Plaintiffs complain about consultants and severance payments, but do not identify to whom or when or in what amounts. Similarly, although asserting that **GM** has been insolvent since 2006, based on year-end losses, they fail to plead the requisite facts to support a plausible inference that **GM** had "either (1) 'a deficiency of assets below liabilities *with no reasonable prospect that the business can be successfully continued in the face thereof*,' or (2) 'an inability to meet maturing obligations as they fall due in the ordinary course of business.'" *Prod. Res. Group v. NCT Group*, 863 A.2d 772, 782 (Del. Ch. 2004) (emphasis added) (citation omitted). Point I, *infra.*

5. Second, plaintiffs assert that defendants breached fiduciary duties of care supposedly owing to them as debentureholders. But under governing Delaware law, a corporation does not owe any fiduciary duty to creditors, including debentureholders. Nor do plaintiffs have standing to assert direct claims for breach of fiduciary duty against Messrs. Kresa and Henderson. As a matter of law, a creditor has no direct claim for breach of fiduciary duty against directors. Even when a corporation is insolvent, directors owe fiduciary duties only to the entity itself, not debentureholders or creditors in general. Thus, any claim for breach of duty belongs to **GM** and may only be asserted derivatively, if at all. Point II, *infra.*

6. Moreover, as a matter of substantive Delaware law, plaintiffs do not have standing to prosecute derivative claims unless they either first make demand on the **GM** Board to take the requested action or else plead particularized facts sufficient to excuse demand (*e.g.*, a

majority of the Board being self-interested). The demand requirement recognizes that decisions regarding a corporation's business (including the decision whether to pursue litigation) are protected by the business judgment rule. The failure to make demand here mandates dismissal. That plaintiffs purport to be debentureholders alleging insolvency is of no consequence: "[T]he business judgment rule protects directors of solvent, barely solvent, and insolvent corporations;" and "the creditors of an insolvent firm have no greater right to challenge a disinterested, good faith business decision than the stockholders of a solvent firm." *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 195 n.75 (Del. Ch. 2006). Point III, *infra*.

7. Putting aside failure to satisfy Rule 8 and lack of standing, three additional grounds require dismissal. First, plaintiffs fail to plead facts sufficient to state a claim for breach of fiduciary duty or waste. Plaintiffs allege that Messrs. Kresa and Henderson breached their duties by entering into various transactions (*e.g.*, authorizing the U.S. Treasury Loan Agreement ("**LSA**"), severance payments and issuance of dividends). But putting aside the dispositive fact that these two individuals were not a majority of the Board, when stripped of their pejorative mischaracterizations, plaintiffs have done nothing more than challenge Board decisions with which plaintiffs disagree. And as long as directors act in good faith and with due care, their decisions are protected by the business judgment rule and cannot be so second-guessed. Thus, in the absence of any pleading here of facts demonstrating how any of the challenged transactions were beyond the scope of what a rational board could do, the fiduciary duty claims (and waste claims based on the exact same allegations) must be dismissed. Point IV, *infra*. Second, to the extent plaintiff seeks to assert "deepening the insolvency," there is no such claim as a matter of Delaware law. Point V, *infra*. Finally, plaintiffs' breach of contract claims also fail. Even a cursory review of the **1995 Indenture** and the **LSA** reflects that plaintiffs' contentions lack

merit. This Court has already so held, in denying the Parker objection to the 363 Sale. Point VI, *infra*.

STATEMENT OF FACTS[1]

A. The Parties

8. Plaintiffs. Plaintiffs, *pro se*, allege that they have owned **GM** debentures since 2005 pursuant to the **1995 Indenture**. (**Compl.** ¶ 1.2.)[2]

9. Defendants. **GM** is a Delaware corporation. On June 1, 2009, **GM** and certain of its affiliates filed for protection under chapter 11 of title 11 of the United States Bankruptcy Code (the "**Bankruptcy Code**").

10. Plaintiffs have named two former **GM** directors as defendants: Kent Kresa and Frederick A. Henderson. (*Id.* ¶¶ 2.7-2.8.) Mr. Kresa was a director of **GM** from October 6, 2003 and served as a member of **GM**'s Audit and Investment Funds Committees. (**Exh.** C.) Mr. Kresa also served as Chairman of the Board from March 29, 2009 until he and Mr. Henderson resigned from the Board at the time of the closing of the 363 sale. (**Exhs.** D, E.)

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[1] Exhibits ("**Exh.** or "**Exhs.**") are attached to the accompanying Affidavit of Irwin H. Warren, dated July 16, 2009. For the Court's convenience, the **LSA** and the **1995 Indenture**, in pertinent part, are attached thereto as Exhibits A and B. This Court may properly review these documents on this motion to dismiss. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2509 (2007) (on a motion to dismiss, courts may consider "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice"). A court should not accept pleadings "'that are contradicted either by statements in the complaint itself or by documents upon which its pleadings rely, or by facts of which the court may take judicial notice.'" *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 433, 447 n.40 (S.D.N.Y. 2005) (citations omitted).

[2] Plaintiff Radha Ramana Murty Narumanchi has a long history of *pro se* litigation. In one action, the Second Circuit cautioned him that: "relitigating matters that have gone to final judgment, relitigating matters that might have been raised in prior actions, or *bringing otherwise frivolous actions* can result in personal liability for monetary or other sanctions." *Narumanchi* v. *Adanti*, 101 F.3d 108 (2d Cir. 2006) (emphasis added).

Plaintiffs do not (and cannot) allege that Mr. Kresa was anything other than an independent, non-officer director of **GM**; and, absent contrary fact allegations, Delaware law presumes that directors are outside, non-employee, non-management directors. *See Grobow v. Perot*, 539 A.2d 180, 184 n.1 (Del. 1988). Plaintiffs plead nothing as to Mr. Henderson's tenure -- but it is a public record fact that he only became a director on March 29, 2009. (**Exh.** F.) Moreover, plaintiffs do not (and could not) allege that Messrs. Kresa and Henderson ever comprised a majority of the **GM** Board prior to the 363 sale.

11. Plaintiffs also named as defendants (i) Wilmington Trust Company, a Delaware corporation that is the underwriter trustee (**Compl. ¶¶** 2.1, 3.2); and (ii) five government officials (Timothy Geithner, Secretary of the Treasury; and four members of the "Auto Task Force." (**Compl. ¶¶** 2.2, 2.3, 2.4, 2.5, 2.6.)

B. The Claims Against The GM Defendants

12. Plaintiffs allege that "it is obvious that some time during the year 2006," **GM** "entered into the zone of 'insolvency'" and "reached a point of no return as a 'going concern.'" To support these conclusory allegations, plaintiffs merely point to **GM**'s net losses from 2005 through 2008 (**Compl. ¶** 3.1.1) (though admitting that published financial statements are "not determinative of insolvency" (**Compl.** n.3)). According to plaintiffs, **GM** and Messrs. Kresa and Henderson breached their fiduciary duties to plaintiffs and "failed . . . to protect the true and real best interests of the unsecured bondholders" (**Compl. ¶** 3.1.2) by: (1) pledging **GM**'s "'crown jewels' . . . to the U.S. Treasury" and entering into the **LSA**; (2) dissipating the cash and assets of the corporation and incurring additional liabilities; (3) paying severance payments to former employees; (4) paying dividends to stockholders; and (5) paying consultants

and experts "dozens of millions of dollars." (**Compl. ¶** 3.1.3.) It also appears that plaintiffs assert claims for (i) "deepening the insolvency" of **GM**, (ii) waste and (iio) breach of contract.

C. Failure To Make Demand Or Plead Demand Futility

13. Plaintiffs do not (for they cannot) plead that they made demand on the Board prior to commencing this litigation. Nor do they allege (much less plead the requisite particularized facts showing) that demand would be futile. Such failures are fatal.

D. The Covenant Contained In The 1995 Indenture

Section 4.06 of the **1995 Indenture** provides that:

> [GM] will not, nor will it permit any Manufacturing Subsidiary to, issue or assume any Debt secured by a Mortgage upon any Principal Domestic Manufacturing Property of [GM] or any Manufacturing Subsidiary or upon any shares of stock or indebtedness of any Manufacturing Subsidiary . . . without in any such case effectively providing concurrently with the issuance or assumption of any such Debt that the Securities . . . shall be secured equally and ratably with such debt.

(**Exh.** B.) But the terms of the **LSA** establish that such loans are *not* secured by liens on any such assets. Section 4.01, granting liens and security interests to the Lender, contains an exclusion:

> provided that, notwithstanding anything to the contrary contained herein or in any other Loan Document, the term "**Collateral**" and each other term used in the definition thereof *shall not include, and the Borrower is not pledging or granting a security interest* in, any Property to the extent that such Property constitutes "**Excluded Collateral.**"

(**Exh.** A) (emphasis added). The definition of "Excluded Collateral" expressly lists:

> (v) any Property, including any debt or Equity Interest and any manufacturing plant or facility which is located within the continental United States, to the extent that the grant of a security interest therein to secure the Obligations will result in a lien, or an obligation to grant a lien, in such Property to secure any other obligation.

(*Id.*) Accordingly, plaintiffs' allegation that **GM** breached the terms of the indenture by "allowing the U.S. Treasury [sic] hold secured liens on the assets of the **GM** Corporation" (**Compl. ¶¶** 3.4.4, 3.2.1), is demonstrably incorrect, as this Court has recognized.[3]

ARGUMENT

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

14. Rule 8(a)(2) requires that plaintiff provide "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Buchwald v. Renco Group, Inc. (In re Magnesium Corp. of Am.)*, 399 B.R. 722, 741 (Bankr. S.D.N.Y. 2009) (Gerber, J.) (quoting *Twombly*, 550 U.S. at 555). The factual allegations "must be enough to raise a right to relief 'above the speculative level.'" *Twombly*, 550 U.S. at 555. Thus, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. The Supreme Court recently emphasized that a complaint must contain more than "naked assertions devoid of further factual enhancement." *Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citation omitted).

15. The **Complaint** here fails to satisfy these standards. Plaintiffs simply list a series of conclusory characterizations and legal conclusions without pleading facts. Perhaps

[3] *See In re General Motors Corp.*, 2009 Bankr. LEXIS 1687, at *132-134 (Bankr. S.D.N.Y. July 5, 2009) (hereinafter "**July 5, 2009 Order**"). *See also* July 1, 2009 Tr. at 267-70 (**Exh.** G); July 2, 2009 Tr. (Part I) at 42-43 (**Exh.** H) (statement by Irwin Warren); July 2, 2009 Letter from Stephen Karotkin to Honorable Robert E. Gerber (**Exh.** I) (explaining provisions of the **LSA**); **Exh.** I at 76-81 (colloquy during Parker closing argument). Notwithstanding same, Mr. Narumanchi claimed credit for the argument. July 2, 2009 Tr. (Part II) (**Exh.** J) at 55.

the most glaring examples are the claims against Mr. Henderson, who did not join **GM**'s Board until March 29, 2009 -- rendering utterly untenable any contention that he could be liable for breach of a duty of care based on transactions that were all approved before that date. But plaintiffs' other allegations are similarly self-serving conclusions, devoid of factual content. Plaintiffs assert that the **GM Defendants** committed "gross negligence" and breached their supposed fiduciary duties of care by, *inter alia*: (1) pledging **GM**'s "crown jewels" through the **LSA**; (2) "dissipating the precious cash and assets of the corporation . . . and incurring additional liabilities"; (3) "giving away" severance payments to former employees; (4) paying dividends to stockholders; and (5) engaging and paying consultants. (**Compl. ¶¶** 3.1.3, 3.4.3, 3.4.5, 3.4.6.) But the **Complaint** fails to plead any facts showing that the Board was uninformed or acted irrationally in deciding to so act.

16. Plaintiffs also allege in conclusory fashion that **GM** entered the "zone of insolvency" in 2006, but provide no facts sufficient to support that contention. Although they purport to provide **GM**'s net losses as reflected in financial statements, they correctly concede that the information is "not determinative of insolvency." (**Compl.** n.3.) And they completely fail to plead the necessary *facts* showing that **GM** lacked *a reasonable prospect that the business could be successfully continued*, or was unable during that period of time to meet maturing obligations. *See Prod. Res. Group v. NCT Group*, 863 A.2d 772, 782 (Del. Ch. 2004). Thus, plaintiffs have failed to sufficiently allege that **GM** has been insolvent since 2006.

17. The **Complaint** should thus be dismissed for failing to satisfy Rule 8(a)(2).

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

18. Plaintiffs contend that they are owed fiduciary duties by each **GM** Defendant. Such direct claims fail, as a matter of law.

A. A Corporation Owes No Fiduciary Duty To Debentureholders

19. Plaintiffs allege that **GM** breached supposed fiduciary duties by engaging in the challenged transactions. (**Compl. ¶** 3.1.3.) But as a matter of law, although fiduciary duties may be owed by directors and officers *to* the corporation and its shareholders (or at times, the entirety of the corporation's constituents), a corporation itself does not owe such duties to shareholders, creditors or bondholders, including debentureholders.[4] *Alessi v. Berach*, 849 A.2d 939, 950 (Del. Ch. 2004) (claim against corporation for breaches of fiduciary duties is not a "valid legal theory"); *Arnold v. Soc'y. for Sav. Bancorp, Inc.*, 678 A.2d 533, 539 (Del. 1996) (refusing to hold corporation liable for breach of fiduciary duty). Rather, a corporation's relationship with bondholders is purely contractual. *Katz v. Oak Indus. Inc.* 508 A.2d 873, 879 (Del. Ch. 1986) (denying preliminary injunction and rejecting bondholder's fiduciary duty claim: "[u]nder our law -- and the law generally -- the relationship between a corporation and the holders of its debt securities, even convertible debt securities, is contractual in nature."). Accordingly, such claim against **GM** must be dismissed.

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

20. As the Delaware Supreme Court held, in ruling that no fiduciary duties are owed to convertible debentureholders, "a convertible debenture represents a contractual

[4] As **GM** is a Delaware corporation, the rights and obligations of **GM** and its officers and directors to shareholders or other constituents are governed by Delaware law under the "internal affairs" doctrine. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 106 (1991).

entitlement to the repayment of a debt and does not represent an equitable interest in the issuing corporation necessary for the imposition of a trust relationship with concomitant fiduciary duties." *Simons v. Cogan*, 549 A.2d 300, 303 (Del. 1988). It is well-settled Delaware law that "[w]hile shareholders rely on directors acting as fiduciaries to protect their interests, creditors are afforded protection through contractual agreements, fraud and fraudulent conveyance law, implied covenants of good faith and fair dealing, bankruptcy law, general commercial law and other sources of creditor rights." *N. Am. Catholic Educ. Programming Found. v. Gheewalla*, 930 A.2d. 92, 99 (Del. 2007). Here, no fraud or other such wrongdoing is pled as to Messrs. Kresa or Henderson.

21. Nor do allegations of insolvency or "zone of insolvency" give rise to a direct claim for breach of fiduciary duty. "[C]reditors of a Delaware corporation that is either insolvent or in the zone of insolvency have *no right, as a matter of law, to assert direct claims for breach of fiduciary duty against its directors*." *Id.* at 103 (emphasis added). Recognition of a "right for creditors to bring direct fiduciary claims against . . . directors would create a conflict between . . . directors' duty to maximize the value of the insolvent corporation for the benefit of all those having an interest in it" and the "direct fiduciary duty to individual creditors." *Id.* Rather, directors of an insolvent corporation owe fiduciary duties "to the corporation and to all of its interested constituencies, including creditors and shareholders." *In re RSL COM Primecall, Inc.*, 2003 Bankr. LEXIS 1635, at *24-25 (Bankr. S.D.N.Y. Dec. 11, 2003); *see also Geyer v. Ingersoll Publ'ns Co.*, 621 A.2d 784 (Del. Ch. 1992). Thus, a director's duties shift to the *entire* "community of interests" of those involved in a corporation -- not simply creditors -- when the corporation is "in the vicinity of insolvency." *RSL*, 2003 Bankr. LEXIS 1635, at *25 (emphasis added). But the director's duties remain to the corporation itself and not to any specific group or

set of beneficiaries, including creditors. *Prod. Res. Group*, 863 A.2d at 792. Indeed, directors of an insolvent corporation "are not obligated, as a matter of law, to liquidate their corporations for the benefit of unsecured creditors, but, *can pursue risky restructuring plans in good faith attempts to regain solvency*." (Emphasis added). *In re Sec. Assets Capital*, 390 B.R. 636, 642 (Bankr. D. Minn. 2009) (citing *RSL*, 2003 Bankr. LEXIS at *11).

22. Such approach also is consistent with, and essential to, promoting the goals of the **Bankruptcy Code** and chapter 11 itself: directors of a corporation in bankruptcy can take steps to restructure the corporation to benefit not just creditors, but all stakeholders. *See*, *e.g.* -- in addition to this Court's decision approving the 363 sale here -- *In re Global Serv. Group*, 316 B.R. 451, 460 (Bankr. S.D.N.Y. 2004) ("[C]hapter 11 is based on the accepted notion that a business is worth more to everyone alive than dead") (citations omitted); *In re WorldCom, Inc.*, 2003 WL 23861928, at *51 (Bankr. S.D.N.Y. Oct. 31, 2003); *In re Trans World Airlines, Inc.*, 2001 WL 1820326, at *14 (Bankr. D. Del. Apr. 2, 2001).

23. Moreover, plaintiffs' allegations, which assert, at best, corporate management decisions with which plaintiffs profess to disagree, are not direct claims for relief at all: rather, they at most could be derivative claims on behalf of the company itself. As observed in *Production Resources Group* v. *NCT Group, Inc.*, "generalized and conclusory allegations" that directors "have 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." 863 A.2d at 776 (rejecting plaintiff's contention that insolvency transformed classic derivative claims for breach of fiduciary duty of care into direct claims not encompassed by the corporation's exculpatory charter provision); *see also Gheewalla*, 930 A.2d at 95, 103 (rejecting so-called "direct" claim

for breach of fiduciary duty by creditors of an insolvent corporation based on directors' alleged failure to preserve assets and refusal to sell licensing agreements, but noting that such plaintiffs "may nonetheless protect their interest by bringing derivative claims"). Accordingly, plaintiffs' direct claims for breach of fiduciary duty against Messrs. Kresa and Henderson fail as a matter of law.

III. PLAINTIFFS' FAILURE TO SATISFY THE "DEMAND" REQUIREMENT MANDATES DISMISSAL OF THE CLAIMS AGAINST MESSRS. KRESA AND HENDERSON

A. As Plaintiffs' Claims For Breach Of Fiduciary Duty Are Derivative, They Must Make Demand On The GM Board Or Plead Particularized Facts Establishing That Demand Was Excused

24. A derivative action is a suit "to enforce a corporate cause of action against officers, directors, and third parties.'" *Kamen*, 500 U.S. at 95 (quoting *Ross v. Bernhard*, 396 U.S. 531, 534 (1970)). Although named as a defendant, the corporation "is the real party in interest." *Ross*, 396 U.S. at 538; *Grimes v. Donald*, 673 A.2d 1207, 1215 (Del. 1996) (the claim "belongs to the corporation"). To have standing "to initiate a derivative suit to enforce unasserted rights of the corporation without the board's approval," plaintiff must: (1) make demand that the board cause the corporation to pursue the claim and allege that "the board wrongfully refused the plaintiff's pre-suit demand to initiate the suit" or (2) allege that "demand would be a futile gesture and is therefore excused." *White v. Panic*, 783 A.2d 543, 550 (Del. 2001).

25. The directors manage a corporation's business and affairs, including determinations of whether to sue. Accordingly, plaintiffs cannot assert derivative claims unless they satisfy the demand requirement. The demand requirement "clearly is a matter of 'substance' not 'procedure.'" *Kamen*, 500 U.S. at 96-97. It "is not a 'mere formalit[y] of

litigation,' but rather an important 'stricture[] of substantive law." *Levine v. Smith*, 591 A.2d 194, 207, 210 (Del. 1991). The requirement reflects the universally recognized "basic principle of corporate governance that the decisions of a corporation -- including the decision to initiate litigation -- should be made by the board of directors." *Kamen*, 500 U.S. at 101; *White*, 783 A.2d at 550 n.18.

26. The concept of demand that applies to shareholders seeking to assert derivative claims on behalf of a solvent corporation (*see, e.g.*, *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984); *Grobow*, 539 A.2d at 187), applies to plaintiffs asserting derivative claims on behalf of an insolvent corporation. To have standing to pursue derivative claims in the bankruptcy context, plaintiffs still must show that demand was wrongfully refused. *See In re The Gibson Group, Inc.*, 66 F.3d 1436, 1438 (6th Cir. 1995) (creditor may petition the court to acquire derivative standing if, *inter alia*, it has made a demand on the debtor-in-possession and the demand has been refused). *See also In re Racing Servs., Inc.*, 540 F.3d 892, 900 (8th Cir. 2008) (putative derivative plaintiff must show that "it petitioned the trustee to bring [the creditor's proposed] claims and the trustee refused"); *Fogel v. Zell*, 221 F.3d 955, 965 (7th Cir. 2000) ("If a trustee unjustifiably refuses a *demand* to bring an action to enforce a colorable claim of a creditor, the creditor may obtain the permission of the bankruptcy court to bring the action in place of, and in the name of, the trustee") (emphasis added).

B. The Two-Prong Aronson Test

27. To excuse demand, plaintiff must plead facts satisfying "heightened pleading standards" and "stringent requirements of factual particularity" (*White*, 783 A.2d at 553 n.34; *Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000)), that, if true, would excuse demand. Where a decision by a board of directors is challenged, the question of whether demand is

excused is governed by the *Aronson* test, pursuant to which "particularized facts" must be alleged that, if true, would create "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.'" *White*, 783 A.2d at 551; *Brehm*, 746 A.2d at 253 & n.13 (both citing *Aronson*, 473 A.2d at 814).

28. Moreover, as a matter of *substantive* law, facts showing compliance with (or excusal from) the demand requirement must be pled with particularity. *Spiegel v. Buntrock*, 571 A.2d 767, 774 (Del. 1990). "[H]eightened pleading standards" mandate that complaints "must comply with stringent requirements of factual particularity that differ substantially from the permissive notice pleadings" ordinarily permitted. *Brehm*, 746 A.2d 244 at 254. A plaintiff's burden on a motion to dismiss for failure to make demand therefore is "more onerous than that required to withstand" motions to dismiss in ordinary cases. *White v. Panic*, 793 A.2d 356, 363 (Del. Ch. 2000) (citing *Levine*, 591 A.2d at 207).

> The key principle upon which this area of our jurisprudence is based is that the directors are entitled to a presumption that they were faithful to their fiduciary duties. In the context of presuit demand, the burden is upon the plaintiff in a derivative action to overcome that presumption. The Court must determine whether a plaintiff has alleged particularized facts creating a reasonable doubt of a director's independence to rebut the presumption at the pleading stage.

Beam v. Stewart, 845 A.2d 1040, 1048-49 (Del. 2004) (footnotes omitted). *See also Fink v. Komansky*, 2004 WL 2813166, at *3 (S.D.N.Y. Dec. 8, 2004) (discussing this "exception to the traditional and less stringent requirement of notice pleadings" and dismissing action where plaintiffs failed to plead particularized facts creating a reasonable doubt that a majority of the board was disinterested, so as to excuse demand).

29. Plaintiffs' claims here must be dismissed for failure to make pre-suit demand or to plead particularized facts (indeed, *any* facts) establishing demand futility. *See, e.g.*, *Fink v. Weill*, 2005 U.S. Dist. LEXIS 20659, at *9 (S.D.N.Y. Sept. 15, 2005) (applying Delaware law) ("Where a shareholder brings a derivative lawsuit on behalf of the corporation against the directors based on their actions or failure to act, there is a threshold question of standing as to whether the shareholder has exhausted intracorporate remedies, namely whether the shareholder has made a demand on the board of directors."); *In re Trump Hotels S'holder Derivative Litig.*, 2000 U.S. Dist. LEXIS 13550, at *17 (S.D.N.Y. Sept. 21, 2000).

C. Plaintiffs Here Fail To Plead Facts Creating A Reasonable Doubt That A Majority Of GM's Directors Are Disinterested And Independent

30. To meet the first prong of the *Aronson* test, the disqualifying "interest" or lack of independence must afflict a *majority* of the directors. *Brehm*, 746 A.2d at 255, 257. A director is considered "interested" where he or she will receive a personal financial benefit from a transaction that is not equally shared by the other residual beneficiaries of the company's increased value. *See Beam*, 845 A.2d at 1049 n.21. Here, plaintiffs do not plead any (much less particularized) facts that create a reasonable doubt that any **GM** director (much less a majority of its Board) is "interested" or not "independent," in connection with assessing demand regarding the challenged transactions.

D. Plaintiffs Fail To Plead Facts Establishing That The Board Failed To Exercise Valid Business Judgment

31. Plaintiffs also fail to plead facts sufficient to create a reasonable doubt that the board conduct was not a valid exercise of business judgment: they thus fail to meet their burden under the second prong of *Aronson.* The business judgment rule is such a "powerful presumption in favor of actions taken by the directors . . . that a decision made by a loyal and

informed board will not be overturned by the courts unless it cannot be 'attributed to *any rational business purpose*.'" *In re Encore Computer Corp. S'holders Litig.*, 2000 WL 823373, at *5 (Del. Ch. June 16, 2000) (citation omitted) (emphasis added); *see also Gagliardi v. TriFoods Int'l Inc.*, 683 A.2d 1049, 1052 (Del. Ch. 1996). The rule "serves to promote the role of the board, and not the court, as the ultimate manager of the business and affairs of the corporation." *In re CompuCom Sys., Inc. Stockholders Litig*., 2005 WL 2481325, at *5 (Del. Ch. Sept. 29, 2005). "The burden is on the party challenging the decision to establish facts rebutting the presumption." *Id.*

32. To meet this prong: "'plaintiffs must allege particularized facts that raise doubt about whether the challenged transaction is entitled to the protection of the business judgment rule.'" *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 824 (Del. Ch. 2005) (citation omitted). That is, "'plaintiffs must plead particularized facts sufficient to raise (1) a reason to doubt that the action was taken honestly and in good faith or (2) a reason to doubt that the board was adequately informed in making the decision.'" *Id.* Generally, "absent a showing of bad faith, or an abuse of business discretion, the debtor's business judgment will not be altered." *In re Old Carco, LLC (f/k/a Chrysler LLC),* 2009 Bankr. LEXIS 1382, at *6 (Bankr. S.D.N.Y. June 19, 2009).

33. In particular, plaintiff must allege more than the label that directors were "simpl[y] negligent." *Aronson*, 473 A.2d at 805. A plaintiff must plead particularized facts establishing that the board acted with gross negligence in failing to consider "*material* facts that are *reasonably available*." *Brehm*, 746 A.2d at 259. For instance,"[t]o state a claim for gross negligence, a complaint might allege, by way of example, that a board" acted "without retaining experienced advisors, and after holding a single meeting at which management made a cursory

presentation." *Trenwick*, 906 A.2d at 193-94. But no such facts are alleged here, and nor could there be. To the contrary, even plaintiffs admit the Board engaged "consultants and experts of all stripes, hues, and colors." (**Compl. ¶** 3.4.6.) Moreover, "[i]t has never been the law in the United States that directors are not afforded significant discretion as to whether an insolvent company can 'work out' its problems or should file a bankruptcy petition." *RSL*, 2003 Bankr. LEXIS 1635, at *28-29. In short, plaintiffs have not pled facts sufficient to overcome the business judgment rule: they merely allege that they disagree with the Board. This is insufficient.

IV. THE COMPLAINT FAILS TO STATE A CLAIM

A. The Board's Decisions Are Protected By The Business Judgment Rule

34. Apart from failing to plead demand futility, and for the reasons the pleadings fail under Rule 8, the claims must be dismissed under Rule 12(b)(6): plaintiffs fail to plead facts that, if true, would state a claim for breach of fiduciary duty. On a motion to dismiss, the Court accepts "all factual allegations as true and draw[s] all reasonable inferences in favor of the plaintiff." *ECA & Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 196 (2d Cir. 2009). But while factual allegations must be accepted as true, courts are not required to assume the veracity of "bald assertions" or legal conclusions contained in a complaint, or to draw unreasonable inferences. *Twombly*, 550 U.S. at 555-56. Dismissal is required where a claim rests on allegations that fail "to raise a right to relief above the speculative level." *ATSI Comm'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (quoting *Twombly*, 550 U.S. at 555). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice" to withstand a motion to dismiss. *Iqbal*, 129 S. Ct. at 1949.

35. Here, the **Complaint** alleges boilerplate. (**Compl.** ¶ 3.1.3.) As demonstrated above, plaintiffs have failed to plead any facts -- much less particularized ones -- showing that the board made any irrational decisions, or did not act on an "informed basis [and] in good faith." *Golaine v. Edwards*, 1999 WL 1271882, at *10 (Del. Ch. Dec. 21, 1999). Accordingly, the fiduciary duty claims should be dismissed under Rule 12(b)(6).

B. Plaintiffs Fail To State A Claim For Waste

36. The **Complaint** appears to allege waste of assets, based on the same acts underlying the fiduciary duty claim. (**Compl.** ¶¶ 3.1.3, 3.4.3-3.4.6.) "The standard for a waste claim is high and the test is "extreme . . . [and] very rarely satisfied . . .'" *In re 3COM Corp.*, 1999 WL 1009210, at *4 (Del. Ch. Oct. 25, 1999). For a "plaintiff must allege facts to establish 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.'" *Id. Accord Saxe v. Brady*, 184 A.2d 602, 610 (Del. Ch. 1962). The allegations here plainly fail this test.

C. Claims For "Deepening Insolvency" Fail As A Matter Of Law

37. Plaintiffs assert a claim against **GM** for "deepening the insolvency," which they attribute to **GM** entering into the **LSA**. (**Compl.** ¶ 3.1.3(ii.) As a matter of law, Delaware does not recognize a claim for "deepening the insolvency."

> If the board of an insolvent corporation, acting with due diligence and good faith, pursues a business strategy that it believes will increase the corporation's value, but that also involves the incurrence of additional debt, it does not become a guarantor of that strategy's success. That the strategy results in continued insolvency and an even more insolvent entity does not in itself give rise to a cause of action. Rather, in such a scenario the directors are protected by the business judgment rule. To conclude otherwise would fundamentally transform Delaware law.

Trenwick, 906 A.2d at 205. This Court has so held. *In re Magnesium Corp. of Am.*, 399 B.R. 722, 760 n.128 (Bankr. S.D.N.Y. 2009) (Gerber, J.) ("Deepening insolvency is not recognized as a separate cause of action under the law of Delaware.").

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

38. Finally, assuming, *arguendo*, that the **Complaint** had pled specific facts establishing a breach of the duty of care -- which it does not -- dismissal nevertheless would be required based on 8 Del. C. § 102(b)(7) and **GM**'s Certificate of Incorporation, Article 7, which expressly exculpates directors from monetary liability for such claims:

> No director shall be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a Director, except for liability (i) for any breach of the Director's duty of loyalty to the Corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under Section 174, or any successor provision thereto, of the Delaware General Corporation Law, or (iv) for any transaction from which the Director derived an improper personal benefit.

Exh. K. *See In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 752 (Del. Ch. Aug. 9, 2005), *aff'd*, 906 A.2d 27 (Del. 2006). *See also In re BHC Commc'ns, Inc. S'holder Litig.*, 789 A.2d 1, 9-10 (Del. Ch. 2001) (taking judicial notice of exculpatory charter provision and dismissing claims for breach of duty of care); *Malpiede v. Townson*, 780 A.2d 1075, 1093-94 (Del. 2001) (affirming dismissal under Section 102(b)(7) charter provision); *In re Lukens S'holders Litig.*, 757 A.2d 720, 734 (Del. Ch. 1999) ("[t]he function of the § 102(b)(7) provision is to render duty of care claims not cognizable"), *aff'd sub nom. Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000). That plaintiffs purport to be debentureholders -- or creditors -- is of no moment. *Prod. Res. Group*, 863 A.2d at 793 ("Although § 102(b)(7) itself does not mention creditors

specifically, its plain terms apply to all claims belonging to the corporation itself, regardless of whether those claims are asserted derivatively by stockholders or by creditors.").

VI. PLAINTIFFS FAIL TO STATE A CLAIM FOR BREACH OF CONTRACT AGAINST THE GM DEFENDANTS

39. Finally, plaintiffs contend that GM breached the 1995 Indenture by "allowing the U.S. Treasury hold [sic] secured liens on the assets of the GM Corporation." (**Compl. ¶¶** 3.2.1., 3.4.4.) Plaintiffs' contention is flatly wrong, as this Court recognized in its Order on the 363 Sale. *See* **July 5, 2009 Order** at 82-83 and *supra* pages 6-7 and n. 3.

CONCLUSION

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

Dated: July 16, 2009

/s/ Stephen Karotkin
Harvey R. Miller
Stephen Karotkin
Joseph H. Smolinsky
Irwin H. Warren
Erin J. Law
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Counsel for Debtors, Debtors in Possession and Frederick A. Henderson

/s/ Robert D. Joffe
Robert D. Joffe (RJ-6825)
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Counsel for Kent Kresa