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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SECURITIES AND EXCHANGE COMMISSION,
100 F St., NE
Washington, D.C. 20549-4030

Plaintiff,

v.

Civil Action No.

GENERAL MOTORS CORPORATION,
300 Renaissance Center
Detroit, Michigan 48265-3000

Defendant.

Case: 1:09-cv-00119
Assigned To : Friedman, Paul L.
Assign. Date : 1/22/2009
Description: General Civil

COMPLAINT
[Federal Securities Law Violations]

Plaintiff Securities and Exchange Commission ("Commission") alleges the following against Defendant General Motors Corporation ("GM" or "Defendant"):

NATURE OF THE ACTION

1. This case concerns reporting, books and records, and internal controls violations of federal securities laws by GM. First, in its 2002 Form 10-K filed with the Commission, GM included material misstatements or omissions concerning disclosure with respect to two critical accounting estimates: pension discount rate selection and expected return on pension assets. GM also failed to disclose material information about the timing of its projected cash contributions to its pension plans to avoid variable rate premiums, and the impact such projected contributions might have on its liquidity and capital resources. In addition, GM misstated its financial statements in its 2000 Form 10-K by improperly accounting for a $97 million transaction involving the sale and re-purchase of precious metals inventory. GM also misstated its financial statements in its Form 10-Q

for the period ended September 30, 2001 and in its 2001 Form 10-K by improperly recognizing a $100 million signing bonus it received from a railroad company. Additionally, GM improperly accounted for two types of derivatives – a Canadian dollar mirror hedge strategy and "normal purchase normal sale" arrangements of commodities – in its 2004 Form 10-K. Finally, GM maintained inadequate internal controls in each of the areas described above, and also maintained inaccurate books and records in connection with the Canadian dollar mirror hedge transactions.

2. By virtue of the acts and omissions described herein, GM violated Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Securities Exchange Act of 1934, [15 U.S.C. §§ 78m(a), 78m(b)(2)(A) and 78m(b)(2)(B)], and Rules 12b-20, 13a-1 and 13a-13 thereunder [17 C.F.R. §§ 240.12b-20, 240.13a-1 and 240.13a-13].

JURISDICTION AND VENUE

3. This Court has jurisdiction over this matter pursuant to Sections 21(d)(1), 21(e), and 27 of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78u(d)(1), 78u(e), and 78aa].

4. Venue is appropriate in this District pursuant to Section 27 of the Exchange Act [15 U.S.C. § 78aa].

DEFENDANT

5. GM is a Delaware corporation with its headquarters and principal place of business located in Detroit, Michigan. GM's common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and trades on the New York Stock Exchange. On a regular basis, GM files periodical and other reports with the Commission in the District of Columbia.

FACTUAL ALLEGATIONS

I. GM PENSION ACCOUNTING

A. Background - Economic Environment

6. During the early 2000s, GM's U.S. pension plans were the largest of any United States company, both in terms of pension assets and pension liabilities.

7. At the end of 2001, GM's U. S. pension plans' projected liabilities exceeded the assets, resulting in the plans being underfunded by approximately $10 billion on an accounting basis.

8. During 2002, falling stock market prices decreased the value of GM's invested pension assets, which increased GM's underfunded amount. At the same time, falling interest rates increased the estimated present value of GM's projected pension liabilities, which further increased the projected funding deficit on an accounting basis. Falling stock market prices and declining interest rates also increased the amount that GM was required to contribute to its pension plans under separate regulatory criteria distinct from the accounting rules.

B. Background – Discount Rate

9. In 2002, GM's projected pension liabilities to its employees stretched over 60 years and totaled approximately $200 billion on an undiscounted basis. The applicable accounting principles required GM each year to develop an estimate of the present value of this stream of projected payments by calculating a discount rate, which is the interest rate used to adjust for the time value of money. Under the accounting rules, "[t]he objective of selecting assumed discount rates is to measure the single amount that, if invested at the measurement date in a portfolio of high-quality debt instruments, would provide the necessary future cash flows to pay the benefit obligation when due." Statement 106 of the Financial Accounting Standards Board ("FASB"), at ¶ 186. (This objective is referred to herein as "duration matching.") The timing and amount of projected

payments varies from company to company based upon the specifics of its pension plans and the demographics of the company's pension plan participants and, thus, can lead to different discount rates for different companies. As a directional matter, lower interest rates increase the present value of projected payments, and higher interest rates decrease the present value of projected payments. The discount rate is determined each year on a particular day called the measurement date which, for GM, was December 31st.

10. The accounting standards required companies to select the "best estimate" that met the duration matching objective, but did not specify the particular method that companies had to use to meet that objective. The accounting standards also permitted companies to use estimates, averages, or computational shortcuts in setting the discount rate as long as the results were reasonably expected not to be materially different from the results of a detailed application. Finally, companies had to use a method consistently from period to period, unless a change was necessary to arrive at a more appropriate rate. FASB Statement 87, at ¶ ¶ 10, 14; FASB Staff Implementation Guidance, A Guide to Implementation of Statement 87 on Employers' Accounting for Pensions: Questions and Answers, No. 57.

11. Within GM, each year, the New York Treasurer's Office (the "NYTO") developed the recommendation for GM's discount rate. Historically, the NYTO considered a variety of interest rate indicators and, to the extent the indicators diverged, exercised its judgment to select a rate among those indicators.

12. Since the mid-1990s, the NYTO considered a yield curve model developed by Salomon Smith Barney (the "SSB Curve"), which was created from a universe of hundreds of high-quality corporate bonds and was specifically designed to meet the duration-matching objective of the accounting literature. In developing a rate from the SSB Curve, the NYTO matched GM's projected

future pension payments for each year with the corresponding bond yield for that year and discounted the payments to compute a discount rate. In most years, the NYTO obtained a version of the SSB Curve that used only the top 50% highest-yielding corporate bonds, which the NYTO referred to as the SSB High-Yield (or Above Median) Curve.

13. Beginning in 2001, GM also obtained from its outside actuarial firm ("Actuarial Firm") another discount rate model utilizing a different methodology but that applied available interest rates for each year in which GM had projected payments and then computed a discount rate (the "AF Model"). Models like the AF model or the SSB Curve that match available interest rates to projected payments year by year are referred to herein as "duration matching" models. The AF Model was designed to use the single highest yielding non-callable bond from its universe of bonds at each year of maturity, and utilized approximately 25 to 30 bonds.

14. Since 1997, GM also considered rates from a AA index published by Moody's Investors Service (the "Moody's index"). In internal documents in 1998 and 1999, GM referred to the use of the Moody's index as a "sense check only." The Moody's index provided a single rate and thus was not a duration matching model. The index was created from a universe of approximately 100 long-term, high-quality corporate bonds from which a smaller number of bonds, sometimes fewer than 20, were selected for inclusion in the index. Although a Moody's research report noted that the index was used by a number of companies in 2002 to set pension discount rates for accounting purposes, Moody's did not hold the index out as being appropriate to use in setting pension discount rates for accounting purposes.

15. Historically, the NYTO also considered, as an additional sense check, survey data showing the discount rates that other companies planned to use. Each year, GM participated in these surveys, which typically began to circulate in late November to early December. The survey data

did not necessarily represent the discount rate companies would actually use at year-end because, among other reasons, market rates could change between the time of the survey and the end of the year. Although some of the surveyed companies indicated that their rates were final by early January, the surveys did not provide any demographic information about the survey participants, or indicate which company expected to use a particular discount rate, or what method a company used to select a particular rate. While the NYTO sometimes obtained general information on survey participants, such as that some of them were large companies in the Fortune 100, it knew that some of the companies were not large. As a result, the NYTO could not assess whether particular rates indicated by the survey data related to companies demographically similar to GM or whether the method used by a particular company would be appropriate for GM based upon its particular facts and circumstances.

16. GM's discount rate impacts its financial statements in at least two ways. First, the discount rate directly affects the point-in-time measurement of the pension liability, which is estimated annually on the measurement date. If the discount rate is increased, then the estimated pension liability is lower; similarly, if the discount rate is decreased, then the estimated pension liability is higher. The estimated liability then impacts the reported pension funded status, which is the estimated present value of GM's pension liability minus the market value of its pension assets on the measurement date. Second, a higher discount rate on the measurement date leads to lower pension expense in the following year, and a lower discount rate leads to higher pension expense. In this way, the selected discount rate can directly affect the income statement.

C. Background – Expected Return on Assets

17. Under the applicable accounting guidance, the expected long-term rate of return ("expected return") must be selected to reflect the average rate of earnings expected on pension

assets. While the accounting guidance does not specify a particular method to estimate this rate, it requires that appropriate consideration be given to both the rates being earned on existing assets and the expected future rates of return. As with the discount rate, the applicable accounting principles required a company to select its "best estimate" of expected return.

18. At the end of 2001, GM used a 10% expected return assumption. In its 2001 Form 10-K, GM stated that this "assumption is derived from a detailed study conducted by GM's actuaries and GM's asset management group and was based on long-term historical data." GM's Form 10-K further stated that, "[a]lthough in 2000 and 2001 asset returns have been below GM's long-term asset return assumption, in any 10 year period over the last 15 years, GM achieved pension asset returns of 10% per annum or greater."

19. GM's expected return assumption impacted its financial statements in the following year, irrespective of actual returns for that year. As a general matter, increasing the expected return assumption at the end of the year leads to lower pension expense in the following year, and decreasing the expected return assumption leads to higher pension expense in the following year. Actual returns that were higher or lower than the expected return were considered to be actuarial gains or losses, and were combined with other actuarial gains and losses and amortized over time. In this way, the expected return can directly affect the income statement.

D. <u>Background – Variable Rate Premium Payments</u>

20. GM was required to comply with the regulations of the Pension Benefit Guaranty Corporation ("PBGC"), which required GM either to contribute certain amounts to its pension plans or to make a payment known as a variable rate premium ("VRP") payment. GM had a policy of contributing sufficient amounts to its pension plans to avoid any VRP payments, and GM had avoided such payments since 1994. For GM, VRP payments could have amounted to approximately

$100 million in a particular year. To avoid these VRP payments, GM's contributions to the plans could be several billion dollars a year. The projected timing and amount of these contributions varied, which could create significant cash flow challenges for GM.

E. GM's Pension Call With Analysts and Media in August 2002

21. In the first part of 2002, declining asset returns and interest rates increased investor and analyst concerns about public companies that had large pension plans. In August 2002, based on an "overwhelming" response from the analyst community, GM's senior financial management decided to have a conference call with analysts and the media dedicated solely to pension issues and how those issues would affect GM at year-end and in coming years ("August pension call").

22. Senior GM management intended the August pension call to be of a "tutorial nature" to educate and inform the analyst and investor community on the most important aspects of GM's pension accounting and funding issues, and hoped it would show that GM's pension situation at year-end was a "significant yet manageable challenge." GM's treasurer, who conducted the call at the CFO's request, wanted to "bring disclosure to a whole new level," and to "answer every question." GM's CFO believed that investors and analysts needed to understand what the risks were.

23. The written presentation, which was available on the internet, stated that the discount rate was set at the end of the year, but did not provide details about how GM selected its rate. During the call, however, an analyst asked:

> Now, what factors do you use that have an impact on your discount rate? Because it came down, what, two years ago by 50 basis points or something like that?

GM's treasurer responded with a layman's description of the SSB Curve:

> That's right. Some 7.75 to 7.25. What we do, Mike, is this --We use the highest quality bonds, but we kind of duration match the cash flows, so we actually take our stream of cash flows and we look [at] what's being paid out in year one, what's being

> paid out in year two, year five, year seven, in year ten, and then take the corresponding bond rate and discount the cash flows by that amount, and you get a weighted average discount rate by the actual cash flows duration-matched.

GM did not mention any other factors or interest rate indicators that impacted the discount rate.

24. With respect to GM's expected return, GM's treasurer informed participants that one of the "takeaways" from the call was that, "[w]hile annual returns have been volatile, in any 10-year period over the last 15 years GM has achieved pension asset returns of 10% [per year] or greater." The treasurer indicated that based on this historical record, GM's expected return "has certainly served us well." However, he added that GM could not simply extrapolate from historical data, but would have to consider many market factors in considering expected returns in the future. He stated that because GM had not yet undertaken that analysis, he could not give any indication about any changes to the rate and that GM would reassess the rate at the end of the year; he added that given the "high level of interest ... we'll certainly keep you posted."

25. The written presentation also set forth three scenarios, based upon different expected asset returns over the next five years, which showed GM's required contributions to its pension plans to avoid VRP payments. Depending on the scenario, the presentation showed that GM would have to make contributions with a present value of $6 billion, $9 billion, or $12 billion between 2003 and 2007. GM's treasurer emphasized that, although the required contributions were significant, they were manageable because GM had timing flexibility because only one-third of the contributions was due in 2004 and two-thirds was due in 2005 – 2007.

26. Analysts from major brokerage firms and members of the financial media participated in the call, and reported on the information GM provided. GM considered the August pension call to be a "major breakthrough" in pension disclosure and understanding. In the following months, the

NYTO referred back to the written presentation used on the call, as well as the transcript of the call, which included participants' questions and GM's answers.

27. Shortly after the August pension call, interest rates and asset returns deteriorated even further, creating more significant pension challenges.

F. Selection of 2002 Discount Rate

28. Over the course of 2002, GM updated its 2003 budget and capital planning assumptions, including its discount rate, which changed from 7.25% to 7.0% and later to 6.75% as interest rates declined.

29. In mid-December 2002, the NYTO notified the CFO, Controller, former treasurer, and chief accounting officer that the difficult interest rate environment GM was facing could put the 6.75% assumption at risk, which could have a "considerable impact" on GM's financials both in terms of increased pension expense and the present value of GM's pension liabilities. The NYTO noted that the SSB High-Yield Curve and the Moody's Index had been relatively close together through October 2002, but the divergence increased in November and December 2002. The NYTO made a limited, but unsuccessful, attempt to determine the cause of the divergence. The NYTO noted that GM had in the past placed more emphasis on the SSB Curve and High-Yield Curve rather than the Moody's index, but that these curves would not currently support the 6.75% rate. After discussions with other companies, the NYTO noted that there appeared to be increasing use of the Moody's index by other companies, and that this might be a basis for GM to place more reliance on it.

30. Additionally, during mid-December 2002, although the rate from the SSB High Yield Curve would not support a 6.75% rate, and there was no current rate available from the AF Model, GM submitted its own prospective discount rate of 6.75%, which was consistent with the rate from

the Moody's Index, to be used in the multiple company surveys. GM later used these same survey results as a "sense check" and as support for its rate.

31. In early January 2003, the NYTO sent an email to the CFO indicating that 6.75% was the desired discount rate, but that there was concern about developing the appropriate support for that rate, and that there "was considerable work ahead to support" such a rate. The NYTO did not have accounting expertise in selecting pension assumptions.

32. On January 7, 2003, the NYTO presented to the Audit Firm its recommendation for a 6.75% discount rate, citing the Moody's index as the primary indicator supporting the recommendation because "most companies rely on [it]." The presentation also stated that other auto companies were likely using a rate of 6.75%. The document also showed that, as of December 31, 2002, the Moody's index generated a rate of 6.63%, the SSB High-Yield Curve generated 6.0%, and the AF Model generated 6.18%. The presentation referred to volatility in the bond markets, noted that the survey data indicated most companies were using 6.75%, and advised that the wide use of 6.75% made it the primary factor in deciding to use the rate indicated by the Moody's index. GM employees believed that the AF model was incomplete at the time of the January 7, 2003 meeting and informed the Audit Firm that it did not give it significant consideration, although the written presentation did not note that the model was incomplete or that there was a basis for rejecting the model's result.

33. At the meeting the Audit Firm informed GM that it would begin its audit work on GM's discount rate recommendation, but that the result obtained from a duration matching model was preferable to using the rate obtained from the Moody's index, and that a follow up meeting would be necessary. The Audit Firm also indicated that it preferred a rate of 6.50% to 6.75%, although GM had not provided duration matching support for a 6.50% rate.

34. The NYTO believed that industry practice supported the use of the Moody's index, notwithstanding the lower rates from the duration matching models, and on January 8 so informed the CFO. The next morning, January 9, before GM had received audit confirmation of its recommendation, and before the NYTO had completed work on the AF model, GM's CFO announced at an annual auto show event that GM had changed its 2002 year-end discount rate to 6.75% from its previous year-end rate of 7.25%. He stated that the 6.75% discount rate was realistic and in line with the rates that other companies were using, according to the survey data.

35. Later in the day of January 9, the Audit Firm -- which had not yet opined on the acceptability of GM's discount rate and had raised a concern about the appropriateness of GM's use of the Moody's index -- met with GM and, at the Audit Firm's insistence, GM's outside actuarial firm, to discuss its discount rate selection. At the end of the January 9 meeting, GM's CAO indicated that GM would disclose in its Form 10-K the sensitivity, or impact on its financial statements, of using a rate 25 basis points higher or lower than 6.75%.

36. Although GM had provided no additional support for its discount rate to the Audit Firm, on January 12, 2003, GM's controller informed the CFO, the CAO, the NYTO, and the public relations staff that the Audit Firm was "now resigned to our use of 6.75%...." The controller added that the Audit Firm believed a rate of "6.50% was a 'better' choice given GM's demographics and prior practices and ha[s] moved on to helping us draft our MD&A and other disclosures...which show the sensitivity of our pension liability and [2003 expense]...[to a 25 basis point change]." The controller stated that the Audit Firm partner accepts the disclosure of GM's sensitivity to a 25 basis point change as a "reasonable although imperfect solution or compromise to his concerns."

G. GM's Incomplete or Misleading Statements in Its 2002 Form 10-K

37. On March 13, 2003, GM filed its 2002 Form 10-K with the Commission. The report disclosed GM's 6.75% discount rate, but did not discuss the particular indicator GM had relied upon to select its discount rate. The report disclosed that GM "sets the discount rate assumption annually for each of its retirement-related benefit plans at their respective measurement dates to reflect the yield of high quality fixed-income debt instruments." The report included a table that disclosed the financial sensitivity to an increase or decrease of 25 basis points, which showed that a change in the discount rate of 25 basis points would impact GM's 2003 pre-tax pension expense by $120 million, its 2002 projected pension obligation by approximately $1.8 billion, and its 2002 equity by $1.1 billion. Based upon GM's selection of a 6.75% discount rate, the Form 10-K reported a pension deficit of $19.3 billion.

38. GM's disclosures were misleading. Even though GM stated during the August pension call that it used a duration matched approach, GM failed to disclose its decision to use a non-duration matched approach, namely, the Moody's Index, which was materially higher than the rate from the SSB High-Yield Curve; nor did GM explain the circumstances which led to its decision. GM's disclosure of a +/- 25 basis point change was misleading because it suggested that its 6.75% discount rate was in the middle of two reasonably likely outcomes, but GM took the rate, which after rounding up, was at the highest end of the indicators that GM considered.

H. GM's 2002/2003 Internal Accounting Controls Concerning Its Discount Rate Selection Were Deficient

39. GM failed to maintain a system of internal control that provided reasonable assurance that transactions would be recorded as necessary to permit preparation of financial statements in compliance with GAAP.

40. Further, GM did not maintain adequate written guidelines prescribing policies and procedures for employees to apply consistently in selecting discount rates each year. Such policies and procedures would be expected to identify objectives and approaches consistent with the applicable accounting literature, to require documentation of how those objectives were achieved and how the approaches were implemented, and to require reasoned support for any exceptions, inconsistencies, or changes in the application of judgment from one year to the next.

41. Additionally, GM did not provide adequate training to employees primarily charged with making recommendations for these rates.

42. Finally, GM's process for reviewing and adopting rate recommendations lacked the control environment necessary to provide reasonable assurance that the recommendations were developed in a reasoned and unbiased manner.

I. <u>Subsequent Developments</u>

43. In the first half of 2003, interest rates continued to decrease, which further exacerbated GM's pension underfunded status, but also enabled GM to utilize historically low borrowing rates to raise money to fund its pension plans. In June 2003, GM undertook a bond offering with the intent to contribute the proceeds (approximately $13.5 billion) to its pension plans. The bond offering prospectus, which incorporated GM's 2002 Form 10-K, did not disclose as of the date of the offering the range or amount of the interest rate indicators that GM historically considered in selecting its discount rate.

44. In setting its year-end 2003 discount rate, the indicators to which GM had applied its judgment were more closely aligned than in the prior year. GM selected a year-end 2003 discount rate of 6.0%.

45. At the end of 2004, GM selected a pension discount rate by considering the same indicators it had used at year-end 2002 and 2003. However, the Audit Firm raised concerns about some of the indicators that GM considered and recommended to GM's Audit Committee that prospectively GM should "cease evaluating multiple indicators" and suggested that it "rely solely" on the SSB High-Yield Curve.

46. GM management selected, and included in its 2004 Form 10-K, a discount rate 25 basis points higher than the rate calculated by the use of the SSB High-Yield Curve. The Audit Firm determined that the difference between the rate GM selected and the SSB High-Yield Curve was not material.

47. Subsequently, in its 2005 Form 10-K, GM restated its 2005 quarterly results to correct the 2004 discount rate because GM acknowledged that the rate originally had been determined by "referencing certain indicators, which, in view of evolving guidance, did not provide the best estimate to satisfy the pension liability." The corrected discount rate was determined by using the SSB High-Yield Curve.

J. GM's Selection of Its 2003 Expected Return Assumption

48. Since at least the mid-1980s, GM's expected return assumption had never been higher than its most recent 10 year average return, and often it was lower.

49. In its 2001 Form 10-K and during the August pension call, GM referred to its rolling 10 year historical average return of 10% or better as support for the reasonableness of its 10% expected return assumption.

50. In the second half of 2002, GM anticipated that its 10 year historical average return likely would be lower than 10% as of December 31, 2002.

51. In light of declining asset return expectations at the time, many analysts expected companies to lower their expected return assumptions. Because analysts were concerned about the impact of expected return assumptions on the quality of a company's earnings, particular focus was placed on the expected return assumption of companies with very large pension plans, like GM.

52. GM's asset management group prepared a report recommending a revised expected return assumption which based its analysis on a primarily forward-looking analysis. Although its evaluation of expected returns for various asset classes was based in part on publicly available historic returns for those asset classes, the report did not address GM's actual 10 year historical average return. Based on this report, GM's CFO determined that GM would use a 9.0% expected return assumption.

K. GM's 2002 Disclosure Concerning Its Expected Return Assumption Was Misleading

53. As of December 31, 2002, GM's 10 year historical average return was 8%.

54. On January 9, 2003, GM announced at the annual auto show event "preliminary 2002 actual returns of approximately -7%," although GM did not provide its most recent 10 year historical average return.

55. In its 2002 Form 10-K filed with the Commission, GM stated:

> GM's expected return on assets assumption is derived from a detailed periodic study conducted by GM's actuaries and GM's asset management group. The study includes a review of anticipated future long-term performance of individual asset classes and consideration of the appropriate asset allocation strategy given the anticipated requirements of the respective plans to determine the average rate of earnings expected on the funds invested to provide for the pension plan benefits. While the study gives appropriate consideration to recent fund performance and historical returns, the assumption is primarily a long-term, prospective rate. Based on its recent study, GM is revising its expected long-term return assumption for its U.S. plans effective January 1, 2003 to 9%, a reduction from its previous level of 10%.

GM also disclosed the sensitivity of its expected return to an increase or decrease of 25 basis points: if the expected return assumption were increased to 9.25%, then GM's pre-tax pension expense would decrease by $170 million; if the assumption were decreased to 8.75%, then pre-tax pension expense would increase by $170 million.

56. In its 2002 Form 10-K, GM's disclosure of the basis on which it selected its 2003 expected return assumption was misleading. Although in 2002 GM had publicly stated that its 10 year historical average returns supported the reasonableness of its 2001 expected return assumption, and that it would keep investors informed as to the basis for its assumption, GM did not disclose in its Form 10-K that its most recent 10 year historical average return was below its new 2002 assumption. As a result, GM's statement that it gave "appropriate consideration to recent fund performance and historical returns" was misleading because GM omitted the material fact that its new assumption did not have the same historical support as its 2001 assumption. If GM had used an expected return consistent with its 10 year historical average, GM would have had to reduce its 2003 pre-tax earnings by $680 million.

L. GM's VRP-Avoidance Contribution Disclosure Issues

57. During the August pension call, GM's treasurer stated that GM's cash contributions required to meet its policy of avoiding VRP payments were a significant but manageable challenge. In the call, GM set forth three different assumption-driven scenarios: the best scenario included future asset returns of 10%, and the other two scenarios included an 8% future asset return. GM stated that, depending upon the scenario, GM would need to make present value contributions totaling $6 billion, $9 billion, or $12 billion. GM used varying scenarios because the economic factors impacting the timing and amount of contributions were uncertain and largely outside of GM's control.

58. During the August pension call, GM's treasurer stated that, although the contributions were large, GM had flexibility in making such contributions because they were back-loaded, such that only one-third of the total amount would be due by the end of 2004, and two-thirds due in 2005-2007.

59. Two months later, GM revised the scenarios, which showed that the timing had shifted so that about two-thirds of the total contributions would now be due by June 2004, and about 90% of the total contributions would now be due by June 2005. Moreover, the projected contributions on a present value basis had increased to $14 billion (based on future asset returns of 10%) to $16 billion (based on future asset returns of 9%) to $17 billion (based on future asset returns of 8%). GM disclosed these new contribution amounts, and the future asset return projections on which they were based, on a quarterly analyst call in mid-October 2002, and stated that it had maintained flexibility in terms of when it must make these contributions, noting that no projected contributions were required prior to 2004. However, even though the back-loaded nature of the projections had been emphasized as the basis for the flexibility during the August pension call, and that timing flexibility had now diminished, GM did not discuss this change.

60. In its Form 10-Q for the period ended September 30, 2002, GM disclosed the revised contribution amounts for the five year period, and the future asset return projections on which they were based, but did not disclose any information concerning the timing of the contributions within that five-year period, other than noting that "no contributions are required prior to 2004." Although GM referred to a five year projection, nearly all of the projected contributions would be due in the first two and a half years.

61. In light of declining asset return expectations at the time and the impact of lower asset returns on the projections used to determine cash contributions to pension plans, including VRP-

avoidance contributions, there was heightened sensitivity among analysts, investors and ratings agencies concerning GM's projected payments. Any deviation by GM from its policy to make VRP-avoidance contributions would heighten concern.

M. <u>GM's Disclosures In Its Periodic Filings Were Deficient</u>

62. GM was required to provide complete and accurate information in its periodic filings and also to identify in the MD&A section of its annual filings any known trends or uncertainties that were reasonably likely to result in its liquidity increasing or decreasing in any material way, as well as known material trends, favorable or unfavorable, in its capital resources. Item 303(a) of Regulation S-K. In addition, GM was required to identify in the MD&A section of its quarterly filings any material changes in its financial condition from the end of the preceding fiscal year or interim filing. Item 303(b) of Regulation S-K.

63. In its Form 10-Q for the period ended September 30, 2002, GM did not disclose complete and accurate information about the front-loaded timing of its projected VRP-avoidance contributions, as well as information necessary to make its disclosure not misleading.

64. GM did not disclose any information about either the timing or amount of its projected VRP-avoidance contributions in its 2002 Form 10-K or Form 10-Qs for the periods ended March 31, 2003 and June 30, 2003. Similarly, GM did not disclose in its public filings any information about the prior 10 year trend of asset returns, and the potential impact of a continuation of that trend on the various scenarios of projected VRP-avoidance contributions, which could materially impact GM's liquidity and capital resources. As a result, GM's filings were deficient.

II. PRECIOUS METALS TRANSACTION

A. Background

65. Since at least 2000, through its World Wide Purchasing ("WWP") group, GM purchased materials, such as precious metals, that it used in the production of auto parts.

66. GM bailed the precious metals, known collectively as Platinum Group Metals or "PGMs," to suppliers that prepared the PGMs for inclusion in auto parts, and then sold the processed PGMs to other suppliers that produced the auto parts. GM recorded the costs of the PGMs in its books and records as inventory until GM sold the PGMs to the suppliers that produced the auto parts.

67. In late 2000, GM's policy was to maintain a several month inventory supply of PGMs, which was worth several hundred million dollars. At that time, senior GM officials discussed whether GM's PGM inventory levels should be reduced to increase and accelerate GM's cash flow.

B. Events Leading up to the PGM Transaction

68. On or about December 8, 2000, the Group Vice President of WWP ("WWP Vice President") called the employee in WWP who managed the PGMs ("PGM Manager") and asked if there was any inventory that could be sold at a profit.

69. The PGM Manager determined that WWP had excess palladium and discussed with two investment banks the possibility of selling 100,000 troy ounces of palladium. The investment banks both told the PGM Manager that the market was not liquid enough to sell that much palladium without affecting the price and suggested an offsetting transaction in which GM would repurchase the palladium.

70. The PGM Manager subsequently told the WWP Vice President that WWP had approximately 100,000 troy ounces of excess palladium, but that there was insufficient liquidity in

the market to sell that much palladium. Consequently, if WWP wanted to sell the palladium, WWP would have to buy the palladium back through forward purchase contracts. The PGM Manager also said that GM needed the PGMs to meet future production needs.

71. On or about December 13 and 14, 2000, the PGM Manager discussed the PGM transaction with several senior GM executives, who approved the transaction.

72. On or about December 14, 2000, the PGM Manager discussed the accounting for the PGM transaction with the head of the unit that records PGM transactions, Corporate Material Brokering. Corporate Material Brokering's personnel and computer system considered multiple transactions, such as the PGM transaction, to be separate trades, and booked the trades separately rather than linking them. Consequently, the head of Corporate Material Brokering told the PGM Manager that the sale would be recognized in December and the forward purchase contracts would be recognized each month as they occurred.

73. Corporate Material Brokering did not have the expertise or responsibility to provide accounting guidance, and GM's accountants in Corporate Financial Planning and Reporting ("CFPR") were not asked about the accounting guidance for the PGM transaction, including the effect of GM simultaneously entering into forward contracts to repurchase the PGMs.

74. On December 15, 2000, GM sold to an investment bank 104,000 troy ounces of palladium, at a fair market spot price, totaling approximately $97 million. Simultaneously, GM entered into a series of forward purchase contracts to repurchase the palladium from the investment bank. The forward purchase contracts matured each month from January through June 2001 at prices equal to the sale price plus a finance charge based upon the London Interbank Offered Rate, or LIBOR. The finance charges amounted to $1,715,820, or approximately 1.77% of the price for

which GM sold the PGMs. Thus, in effect, GM paid a fee to have the investment bank temporarily buy the palladium.

75. The PGM Manager immediately notified senior GM executives about the executed transaction, including that GM would book a pre-tax gain of $26.9 million in December.

C. GM's Misstated Financial Statements

76. GM's consolidated net income of $89 million for the fourth quarter of 2000 included an after-tax profit of $16.7 million from the PGM transaction.

77. Pursuant to GAAP, an inventory sale, such as the PGM transaction, must be treated as a product financing and not a sale where an entity, such as GM, "sells the [inventory] to another entity...and in a related transaction agrees to repurchase the product," and where the repurchase price is not subject to change except, as necessary, to recover substantially all fluctuations due to finance and holding costs. Financial Accounting Standards No. 49, "Accounting for Product Financing Arrangements." In this instance, the repurchase price, set by the parties, was designed to cover the counterparty's costs and provide a profit.

78. In its 2004 Form 10-K/A, filed on March 28, 2006, GM restated its accounting for the PGM transaction. By improperly accounting for the PGM transaction as a sale of inventory, rather than a financing of the inventory, GM inappropriately recognized approximately $97 million in cash flow from operations and, consequently, materially overstated its reported net income for the fourth quarter of 2000 by 19%.

D. GM's Inadequate Internal Controls

79. Corporate Material Brokering recorded commodity transactions in GM's accounting system without regard to the technical accounting implications of certain related commodity transactions. Thus, a sale and simultaneous repurchase of commodities was entered as separate

trades without consideration of the underlying relationship. GM accounted for these related commodity transactions as separate transactions. Corporate Material Brokering's approach to recording such entries in GM's accounting records reflected the inadequate accounting experience or training of their personnel to properly evaluate how to record these types of transactions.

80. GM's internal structure and division of responsibilities caused confusion among GM employees about which group within GM was responsible for accounting for certain transactions. GM's internal structure and division of responsibilities also resulted in operations personnel knowing information about GM's transactions but not the applicable accounting guidance, and accounting personnel knowing the applicable accounting guidance but not sufficient information about GM's transactions. In addition, GM did not have any specific procedures about the circumstances in which personnel had to seek accounting guidance from persons with appropriate accounting expertise.

81. GM also did not have any policies and authorization procedures for sales of PGMs.

III. RAILROAD TRANSPORTATION CONTRACT SIGNING BONUS

A. Railroad Transportation Contract

82. In the summer of 2001, GM, through WWP, negotiated with a railroad company an exclusive contract that would require GM to use the railroad company to transport most of GM's materials and vehicles for eight years. Pursuant to the terms of the contract, the railroad company would pay GM a $100 million signing bonus. The proposed contract was silent about whether the signing bonus would be refundable.

83. During the last week of July 2001, the WWP employee overseeing the contract sought guidance on how to account for the signing bonus from CFPR because WWP did not have a person responsible for technical accounting issues.

84. A CFPR Manager questioned the WWP employee about the contract, including whether there were any circumstances under which GM would be required to refund the signing bonus. Although the WWP employee did not indicate any such circumstances, the CFPR Manager should have known that GM would be required to refund the signing bonus if it did not perform the contract. The CFPR Manager advised the WWP employee that the signing bonus could be immediately recognized, thereby immediately reducing transportation expenses. Subsequently, the CFPR Manager consulted with GM's CAO about the signing bonus.

85. On July 30, 2001, the WWP employee asked the CAO whether he had spoken with the CFPR Manager about her accounting advice. The WWP employee also briefly summarized the discussions he had had with the CFPR Manager. The CAO affirmed that if the bonus was not contingent on a future event, the bonus could be immediately recognized in income.

86. On July 31, 2001, GM and the railroad company executed the contract, including a side letter that provided for a $100 million signing bonus.

87. Even though GM could be required to refund the signing bonus if it did not perform the contract, on August 1, 2001, the CFPR Manager instructed that certain accounting entries be made so that the $100 million signing bonus was immediately recognized as a reduction to transportation expenses.

B. <u>GM's Misstated Financial Statements</u>

88. In its Form 10-Q for the period ended September 30, 2001, GM recognized the entire $100 million signing bonus as a reduction of transportation expenses instead of allocating it proportionally over the period covered by the contract.

89. Under GAAP, a pre-requisite for revenue recognition is that the amount be fixed and determinable. Statement of Financial Accounting Standards ("SFAS") No. 48. Moreover, "revenues

are considered to have been earned when the entity has substantially accomplished what it must do to be entitled to the benefits represented by the revenues." SFAS Concept Statement No. 5. Refundable fees should initially be recorded as a liability to reflect the customer's outstanding claim on that amount. Thereafter the refundable fee represents a contingent gain that is not recognized until the customer's claim has been extinguished (e.g., the conditions permitting refund have expired).

90. In its 2004 Form 10-K/A, filed on March 28, 2006, GM restated for the signing bonus recognized in 2001. By improperly accounting for the signing bonus as a fully earned, non-contingent fee, GM prematurely recognized $100 million in income from operations and, consequently, materially understated its reported net loss for the third quarter of 2001 by 17% and materially overstated its reported net income for the 2001 fiscal year by 10%.

C. GM's Inadequate Internal Controls

91. Prior to 2005, GM did not have a formal policy for accounting for supplier credits, such as the signing bonus. GM's general practice was to immediately include supplier credits in income if the supplier credits were not explicitly refundable.

IV. DERIVATIVES

A. Canadian Dollar Mirror Hedge Strategy

1. Background

92. The functional currency of General Motors of Canada Limited ("GMCL"), GM's Canadian subsidiary, was in U.S. dollars, but some of its monetary assets and many of its monetary liabilities were denominated in Canadian dollars. Accordingly, GMCL usually had a net Canadian dollar liability at least since 2001. Each quarter, GM re-measured GMCL's Canadian dollar-

denominated monetary assets and liabilities from Canadian dollars to U.S. dollars and recognized any foreign exchange gain or loss resulting from that measurement in its income statement.

93. These unrealized accounting gains and losses, resulting from changes in the Canadian dollar-U.S. dollar exchange rate, caused volatility in GM's reported earnings.

2. Events Leading up to the Canadian Dollar Mirror Hedge Strategy

94. To reduce the volatility in its earnings resulting from changes in the Canadian dollar-U.S. dollar exchange rate, GM initiated the Canadian dollar mirror hedge strategy in late 2002.

95. To implement that strategy, GM entered into a series of "long" forward contracts to buy Canadian dollars that matured each quarter over two-year cycles. Each quarter, GM marked-to-market these forward contracts and recognized in earnings the gains or losses on them. These gains or losses offset a large portion of the gains and losses recorded due to GM's quarterly re-measurement of GMCL's net Canadian dollar liability.

96. These long forward contracts created an economic risk for GM because they likely would require cash settlement in periods and at exchange rates different from the settlement periods and rates of GMCL's Canadian dollar liabilities. To eliminate the risk, GM entered into exactly offsetting, "short" forward contracts to sell Canadian dollars for the same amounts and periods as the long contracts. These "short" forward contracts were documented as a hedge of forecasted Canadian dollar receivables, although hedging those receivables in the absence of a net asset exposure was inconsistent with GM's hedging policies and lacked a substantive business purpose.

97. These long and short forward contract pairs, or mirror hedges, were entered into with the same financial counterparty at no transactional cost to GM.

98. GM accounted for the short forward contracts as a financial hedge for which gains and losses were deferred and accumulated as a component of stockholders' equity. See SFAS No.

133, "Accounting for Derivatives and Hedging." GM did not recognize gains and losses on the short forward contracts in its income until they were realized upon each contract's maturity. As a result, the Canadian mirror hedge strategy had no economic effect, but produced a "smoothing benefit" for financial reporting purposes.

99. Pursuant to GAAP, derivative pairs must be treated as a unit, rather than as separate contracts in certain circumstances, and GM's mirror strategy fell within those circumstances. SFAS No. 133 Implementation Guidance, Issue No. F6, "Fair Value Hedges: Concurrent Offsetting Matching Swaps and Use of One as Hedging Instrument." Nevertheless, GM recognized the gains and losses from the long forward contracts each quarter, but GM recognized the gains and losses from the offsetting short forward contracts only as each contract matured.

100. GM continuously renewed the Canadian dollar mirror hedge strategy through the third quarter of 2006, by which time the outstanding derivatives had grown to 4 billion Canadian dollars.

3. GM's Misstated Financial Statements

101. In its 2006 Form 10-K, GM restated its results of operations, in part, because of the improper accounting of the Canadian dollar mirror hedge strategy and other derivatives transactions for the years 2002 through 2005 and the first three quarters of 2006.

102. By accounting for the derivative pairs separately, rather than as a unit, GM improperly overstated or understated its earnings in each quarter that it used the Canadian dollar mirror hedge strategy. In 2004, this improper accounting caused GM's annual pre-tax income from continuing operations to be materially overstated by $121.7 million, or about 10% of the amount GM originally reported.

B. Derivative Contracts Treated as "Normal Purchase Normal Sale" Arrangements

1. Background

103. GM entered into contracts with suppliers to ensure a supply of commodities that it used in the production of vehicles. Some contracts had fixed prices, while other contracts were derivatives with variable prices.

104. GM elected to treat these derivative contracts as falling within the normal purchase and normal sale ("NPNS") exception to GAAP. Pursuant to GAAP, a manufacturing company may elect to designate a derivative supply contract as NPNS if, among other criteria, the goods purchased are expected to be used by the manufacturing company, or sold to its suppliers for incorporation into products purchased by the manufacturing company, over a reasonable period in the normal course of business. SFAS No. 133, ¶ 10.b. As a result of treating these derivative contracts as NPNS, GM did not mark-to-market these contracts and did not record the gains or losses at quarter's end, as GAAP otherwise would require for derivative contracts.

2. The NPNS Arrangements

105. GM designated two of its long-term aluminum supply contracts as NPNS arrangements. When GM entered into the contracts in 1998 and 2000, it had budgeted for increased aluminum usage. By 2004, however, forecasted aluminum requirements had declined significantly. At the same time, one of the suppliers exercised its contractual right to require GM to buy during 2003 a large portion of the overall volume contemplated by the contract.

106. Consequently, GM resold its excess aluminum but continued to account for the aluminum contracts as NPNS arrangements.

107. During the same period, GM also elected to treat certain long-term supply contracts for PGMs as NPNS. Similar to its aluminum contracts, GM sold some of the PGMs but continued to account for the PGM contracts as NPNS.

3. GM's Misstated Financial Statements

108. In its 2006 Form 10-K, GM restated for these contracts. GM concluded that the contracts should have been marked-to-market because GM's resales of excess commodities rather than the usage of all of the purchased commodities in its manufacturing business, demonstrated that GM had not reasonably expected that the entire quantities of purchased commodities would be used by GM over a reasonable period in the normal course of business. By improperly accounting for the contracts as NPNS, GM materially understated its 2004 annual pre-tax income from continuing operations by $64.7 million, or about 5% of the amount GM originally had reported.

4. GM's Inadequate Internal Controls Relating to Derivatives

109. GM accounting personnel lacked necessary accounting expertise with respect to the accounting for derivatives. To provide its employees with broad exposure to financial and accounting activities, GM often rotated employees through departments. GM did not ensure that its accounting employees gained the necessary technical expertise for each new area. As a result, certain GM accountants did not recognize and appropriately apply guidance relating to these derivative transactions.

110. GM infrequently updated and insufficiently observed written policies. GM did not adequately monitor compliance with policies, such as documenting hedge strategies and testing the effectiveness of hedges.

111. GM also failed to adequately document at the inception of the Canadian dollar mirror hedge strategy the hedging relationship and the strategy of the short contract. Thereafter, GM failed

to adequately document the effectiveness of the hedge and its association with a hedged item, as required by SFAS No. 133.

CLAIMS FOR RELIEF

FIRST CLAIM

Violations of Section 13(a) of the Exchange Act

112. Paragraphs 1-111 are realleged and incorporated by reference as if set forth fully herein.

113. GM made materially misleading disclosures and failed to disclose material information in its 2002 Form 10-K required to be filed with the Commission concerning the pension discount rate and expected rate of return on pension assets that GM had selected.

114. GM failed to disclose material information necessary to make its disclosures in its Q3 2002 Form 10-Q not misleading, and failed to disclose material information in its 2002 Form 10-K and in its Q1 and Q2 2003 Forms 10-Q, regarding its VRP-avoidance contributions.

115. GM materially misstated its financial results in its 2000 Form 10-K, 2001 Form 10-K, Q3 2001 10-Q, and 2004 10-K, all of them required to be filed with the Commission, because its accounting did not conform with GAAP with respect to transactions involving precious metals, a signing bonus, and two types of derivatives. GM has since re-stated its financial results to address these accounting violations.

116. By engaging in the foregoing conduct, GM violated Section 13(a) of the Exchange Act, and Rules 12b-20, 13a-1 and 13a-13 thereunder.

SECOND CLAIM

Violation of Section 13(b)(2)(A) of the Exchange Act

117. Paragraphs 1- 116 are realleged and incorporated by reference as if set forth fully herein.

118. GM failed to make and keep books and records, which, in reasonable detail, would accurately and fairly reflect its transactions involving precious metals, a signing bonus, and two types of derivatives.

119. By failing to make and keep such books and records, GM violated Section 13(b)(2)(A) of the Exchange Act.

THIRD CLAIM

Violations of Section 13(b)(2)(B) of the Exchange Act

120. Paragraphs 1- 119 are realleged and incorporated by reference as if set forth fully herein.

121. GM failed to devise and maintain a system of internal controls in all of the areas addressed in this Complaint that provided reasonable assurance that its transactions would be recorded as necessary to permit preparation of financial statements in compliance with GAAP.

122. By failing to devise and maintain a system of internal controls as required, GM violated Section 13(b)(2)(B) of the Exchange Act.

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests that this Court:

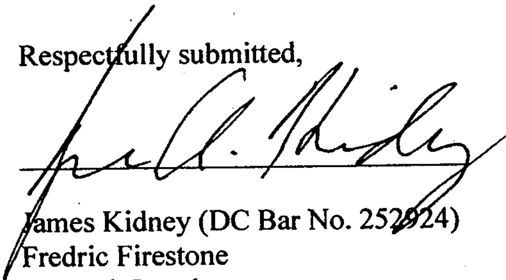
A. Permanently enjoin GM and its agents, servants, employees, attorneys, assigns and all those persons in active concert or participation with GM who receive actual notice of the injunction

by personal service or otherwise, from directly or indirectly engaging in violations of Section 13(a) and 13(b) of the Exchange Act and Rules 12b-20, 13a-1 and 13a-13 thereunder;

B. Grant such other and further relief as this Court deems necessary and appropriate under the circumstances.

Dated: 1/22/09

Respectfully submitted,



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