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BAD KARMA FOR FISKER AUTOMOTIVE: OF LOANS AND LAWSUITS

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By J. Wylie Donald

As if it wasn't hard enough trying to displace the internal combustion engine as the motive force of the automobile, then this happens. First the plug-in hybrid **Chevy Volt's** battery starts catching fire. Then battery-maker **Ener1** files for bankruptcy protection. Last Thursday, the electric vehicle arena acknowledged more bad news. Fisker Automotive, maker of the electric sport coupe Karma and promisor of the Nina, issued a **press release** following a set of disquieting reports from various outlets. The sour news: "As a prudent business measure, project Nina has been temporarily put on hold until financing, either from the DOE or elsewhere, can be secured."

Fisker is the high end of electric vehicles. Its "plug-in extended range" **Karma** sedan seats four and retails between \$96,000 and \$109,000. It can do 0-60 in 7.9 seconds in full electric (Stealth) mode (the plug-in part). But turn on its gasoline engine, which turns its electric generator, and you're down to 5.9 seconds (Sport Mode) (the extended range part). **Motor Trend** calls it "a sweetheart to hustle."

Nina is (was?) the more consumer-friendly version of a Fisker. It is to be (according to reports) a compact or midsize sedan, priced in the \$40,000 range (after the \$7,500 federal tax credit). It is to be built in a refurbished GM plant in Delaware, which Fisker bought out of GM's bankruptcy in 2009. Predicted production levels were 100,000 vehicles per year. That goal is currently not realizable.

Fisker has raised a lot of money. Besides over \$850 million in private financing, in 2009 "Fisker Automotive closed a **\$529 million loan arrangement** under the Department of Energy's Advanced Technology Vehicles Manufacturing Loan Program for the development and production of two lines of plug-in hybrid electric vehicles. The project is expected to create about 2,000 jobs in Wilmington, Delaware." Times change. In May, after providing \$193 million to Fisker, DOE stopped lending because various milestones in Karma sales and production had been missed. Or as Fisker put it in its recent press release: "In May 2011 Fisker Automotive opted to stop taking reimbursements from the DOE while the company entered negotiations to implement more realistic and achievable milestones."

Fisker's financial difficulties are not being kept secret. The tip of the proverbial litigation iceberg made its appearance earlier this month in the form of a lawsuit filed in California Superior Court: *Wray v. Fisker Automotive Holdings et al.* (Complaint attached below.) In the suit Mr. Wray, an investor in Fisker and various Fisker investment entities, claims he was deceived into buying Fisker securities because he was unaware that a subsequent "pay to play" offering could require him to increase his investment or lose the beneficial position he had procured by virtue of his earlier contributions.

Mr. Wray put over \$200,000 into Fisker. In return he received preferred stock with various benefits such as "conversion price discounts", "anti-dilution protection", and "liquidation preferences." While risks of investing were disclosed, nowhere, it is alleged,

did the offering memoranda inform Daniel Wray, or any other investor, that if he did not participate in future forced financing of Fisker, as Fisker and Advanced Equities [the broker/dealer] dictated, he would suffer a significant dilution of all of his earlier investments; conversion of the convertible preferred stock to common stock loss of all the rights, preferences and privileges that his ownership of preferred stock conferred, including liquidation preference, anti-dilution protection and initial public offering discounts/special conversion rights. Complaint ¶ 26.

But on January 18, 2012 the broker/dealer wrote Mr. Wray (and presumably others) seeking money: "Due to Fisker's urgent need for equity capital, the Financing now contains a "pay to play" provision that requires all holders [of certain securities] to purchase Series D-1 Preferred Stock in an amount equal to at least 40% of such holder's aggregate dollar amount invested ...". *Id.* ¶ 28. Mr. Wray had slightly over \$200,000 invested, and was now on the hook for another \$83,922.32. In his complaint, Mr. Wray alleges breach of fiduciary duty, fraud, negligent misrepresentation, and various violations of the California Corporations and Business & Professions Codes, among other things.

The **greencarreports blog** did a little investigating and is not overly sanguine about Mr. Wray's chances on the merits. We look at it from a different perspective. We are not privy to Mr. Wray's thinking but his suit may be an astute way to buy time before committing to the next \$80,000. If the DOE funding hurdles are cleared, or private sources come through, then the investment, particularly for one in preferred status, may be particularly fruitful. And if the big money is not forthcoming, then throwing good money after bad might be avoided. In that case, Mr. Wray might not find himself alone on the tip of the iceberg any longer either.

[20120207 Complaint, Wray v. Fisker Automotive Holdings, Inc..pdf \(707.64 kb\)](#)

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