

Dated: August 10, 2010

Respectfully submitted,
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**PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR LEAVE TO FILE A
SECOND AMENDED COMPLAINT**

INTRODUCTION AND RELEVANT BACKGROUND

Plaintiffs (sometimes referred to hereafter as the “Salaried Retirees”) are participants in the Delphi Retirement Program for Salaried Employees (the “Plan” or the “Salaried Plan”). In August 2009, Defendant Pension Benefit Guaranty Corporation (“PBGC”) terminated the Salaried Plan pursuant to an agreement with the Plan’s Administrator, Delphi Corporation (“Delphi”). On September 14, 2009, Plaintiffs initiated this action by filing a complaint (the “Complaint”) in this Court against the PBGC. *See* Dkt. No. 1. Counts 1-4 of the Complaint alleged that the PBGC’s termination of the Salaried Plan violated both the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1001 *et seq.*, as well as the Due Process Clause of the Fifth Amendment to the U.S. Constitution. In addition to challenging the procedural manner in which the PBGC terminated the Salaried Plan, Plaintiffs alleged that the PBGC’s termination of the Salaried Plan was politically motivated and ultimately substantively infirm.

Delphi also maintained a large defined pension benefit plan for many of its hourly employees, the Delphi Hourly-Rate Plan (the “Hourly Plan”). The Hourly Rate Plan was also terminated in August 2009, pursuant to an agreement between the PBGC and Delphi. At the time of the Hourly Plan’s termination, reports indicated that General Motors LLC (f/k/a General Motors Company and hereafter referred to as “New GM”) would provide some participants in the Hourly Plan who were represented by the United Auto Workers (“UAW”) with supplemental pension benefits (referred to as “top-up” benefits). The reports indicated that the top-up benefits were designed to make up the shortfall between the participants’ full pension benefits and the

reduced amounts they would receive from the PBGC. After Plaintiffs filed the Complaint, rumors began to circulate that New GM would provide these top-up benefits to additional Delphi retirees who were affiliated with two additional unions, the International Union of Electrical Workers (the “IUE”) and the United Steel Workers (the “USW”). On November 5, 2009, Plaintiffs filed a first amended complaint (the “First Amended Complaint”), which, in its fifth count, brings constitutional claims against Defendants U.S. Department of Treasury, Presidential Task Force on the Auto Industry, Timothy F. Geithner, Steven L. Rattner, Ron A. Bloom, and Does 1-50 (collectively the “Treasury Defendants”) and New GM. Plaintiffs allege that after investing massive amounts of political and financial capital into the fortunes of the American auto industry in general, and New GM in particular, the Treasury Defendants, for political reasons, directed New GM to provide top-up benefit payments to the participants in certain politically powerful unions. The First Amended Complaint currently is the operative complaint in this case.

On February 16, 2010, the Treasury Defendants filed a motion to dismiss the First Amended Complaint, or, in the alternative, for summary judgment (the “Treasury Defendant’s Dispositive Motion”). *See* Dkt. No. 120.

On March 1, 2010, the United States Bankruptcy Court for the Southern District of New York (the “Bankruptcy Court”) entered an Order (the March 1, 2010 Bankruptcy Court Order”) directing the Plaintiffs to immediately dismiss New GM from this action, without prejudice to Plaintiffs’ ability to seek future relief, under certain circumstances, in the Bankruptcy Court from the injunction set forth in the Modified Plan and the Plan Modification Order. On March 12, 2010, the Court entered an Order dismissing New GM from this action consistent with the March 1, 2010 Bankruptcy Court Order. *See* Dkt. No. 129.

Plaintiffs entered into a series of stipulated orders with the Treasury Defendants delaying Plaintiffs' response time to the Treasury Defendants' Dispositive Motion. *See* Dkt. Nos. 128, 133, 135, and 137. Plaintiffs entered into the first Stipulated Order to "explor[e] the effect, if any, of the [B]ankruptcy [C]ourt's order on Count Five of the [First] Amended Complaint, and whether that Count should be amended and/or supplemented." Dkt. No. 128 . Out of an abundance of caution, the Salaried Retirees then filed a motion in the Bankruptcy Court seeking an order of the Bankruptcy Court confirming that the Second Amended Complaint drafted for presentation to this Court did not run afoul of any of the Bankruptcy Court's orders and rulings, and sought additional time from this Court to allow the Bankruptcy Court to hear the Salaried Retirees' motion. *See* Dkt No. 133. Delphi filed an objection to Plaintiffs' motion in the Bankruptcy Court, however, forcing Plaintiffs to seek additional time from this Court to respond to the Treasury Defendants' Dispositive Motion in order that they could first address Delphi's objection. *See* Dkt. Nos. 135 and 137. Ultimately, the Bankruptcy Court overruled Delphi's objection and entered an order on July 30, 2010 confirming that the proposed Second Amended Complaint did not violate the Bankruptcy Court's orders and rulings (attached as Ex. B).

In light of the Bankruptcy Court's orders, the Salaried Retirees hereby seek leave from this Court to file the Second Amended Complaint. As required by the March 1, 2010 Bankruptcy Court Order, the Second Amended Complaint removes New GM from the pleadings as a Defendant. As further required, the Second Amended Complaint amends the relief being sought by Plaintiffs with respect to Count Five to reflect that Plaintiffs no longer seek any relief from New GM. More specifically, the First Amended Complaint's prayer for relief includes "Ordering [the Treasury Defendants] to direct Defendant New GM to 'top up' the Salaried Plan in the same manner as it is topping up the union affiliated plans," as well as "[o]rdering [the

Treasury Defendants] to require Defendant New GM to distribute the funds it has allocated for the top up of the union affiliated plans in equal measure with the Salaried Plan.” The Second Amended Complaint, on the other hand, makes clear that no relief is sought from New GM, either independently or at the direction of the Treasury Defendants, and all relief is sought directly from the Defendants named in the Second Amended Complaint. As to the Treasury Defendants, the Second Amended Complaint seeks an order:

- (i) declaring that the Treasury Defendants’ selective provision of top-up benefits to certain Delphi retirees on the basis of associational status violates the Constitution; and
- (ii) ordering the Treasury Defendants only (and not New GM) to extend the top-up benefits to all Salaried Plan participants.

A copy of the proposed Second Amended Complaint (as approved by the Bankruptcy Court) is attached as Ex. A, and a redline comparison of changes between the First and Second Amended Complaints is attached as Ex. C.

ARGUMENT

“Upon a plaintiff’s request for leave to amend the complaint, a district court is obliged to give leave freely ‘when justice so requires.’” *Thacker v. City of Columbus*, 328 F.3d 244, 252 (6th Cir. 2003) (quoting Fed. R. Civ. P. 15(a)); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962) (noting that Rule 15 (a)’s direction that leave to amend should “‘be freely given when justice so requires’” is a “mandate . . . to be heeded.”) (citation omitted). “Federal Rule of Civil Procedure 15 is intended to reinforce the principle that cases should be decided on their merits and not merely upon the technicalities of the pleadings.” *Thacker*, 328 F.3d at 252 (citing *Tefft v. Seward*, 689 F.2d 637, 639 (6th Cir. 1982)). Absent a showing of “apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing

party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be ‘freely given.’” *Foman*, 371 U.S. at 182.

No such apparent or declared reasons for denying the filing of the Second Amended Complaint are present here. First, no party will suffer any undue prejudice. Here, Plaintiffs seek leave to file the Second Amended Complaint to ensure that the record formally reflects the fact that New GM is no longer a defendant in the action, and consequently, that no relief is sought against New GM. *See, e.g.*, Second Am. Compl. ¶¶ 13, 61. In doing so, Plaintiffs have restated the relief requested from the Treasury Defendants in connection with Count Five, as described above. However, the legal and factual claims against the Defendants have not changed.¹ If this Court were to deny leave, in fact, that would mean that the First Amended Complaint remains operative. Thus, regardless of whether this Court grants or denies leave, the Treasury Defendants will need to defend against Count Five.²

Moreover, as described above, Plaintiffs have not been dilatory in seeking to amend the First Amended Complaint, nor have they displayed any bad faith. Plaintiffs have been at the mercy of the Bankruptcy Court’s scheduling, and have had to respond to Delphi’s objections in that forum before being able to proceed in this Court. Plaintiffs have moved with all appropriate speed in negotiating those hurdles, and have sought to keep this Court and the other parties updated throughout those proceedings.

¹ Plaintiffs note that, in addition, a few words throughout the Second Amended Complaint have been changed to either (a) reflect the passage of time (*e.g.*, ¶ 5 of the Second Amended Complaint reflects that the Plaintiffs “have lost” pension benefits, while the same paragraph of the First Amended Complaint stated that they “will lose” such benefits); or (b) to refine a word choice (*e.g.*, ¶ 62 reflecting that the government is a “significant creditor” rather than the “largest creditor” of New GM).

² Plaintiffs note that regardless of the outcome of this motion, New GM has been dismissed from the case, and Plaintiffs will not seek any relief against New GM.

The Treasury Defendants have indicated their intention to oppose this Motion. Given that the Treasury Defendants will need to defend against Count Five regardless of whether this Court grants leave -- because, if the Court denies leave, the First Amended Complaint will remain operative as to the Treasury Defendants -- it is difficult to understand what basis the Treasury Defendants have for opposing this motion. To the extent they intend to argue that the amendment of the First Amended Complaint would be futile, Plaintiffs note that there has been no finding of any legal deficiency with the First Amended Complaint; consequently, it would seem premature to oppose amendment on this ground. Plaintiffs also note that they recently filed their opposition to the Treasury Defendant's Dispositive Motion, *see* Dkt. No. 138, and Plaintiffs respectfully submit that the briefing through the vehicle of a motion to dismiss is a better forum to address such substantive questions. Indeed, in the event the Court were to grant leave to file the Second Amended Complaint, the Defendants would then have to file a response -- seemingly an answer or, more likely, renewed motions to dismiss. Given that the briefing on the earlier complaints and the preliminary injunction request has been complicated and extended over numerous documents, the subsequent briefing on the Second Amended Complaint would offer the opportunity for the parties to consolidate their arguments if necessary and inform the Court of the arguments that remain extant and viable.

CONCLUSION

By granting this Motion, the Court will have before it a Second Amended Complaint that (1) removes reference to a Defendant who has been dismissed from the action; (2) properly identifies all the Defendants from whom the Plaintiffs seek relief; and (3) provides an accurate statement of the relief sought. In addition, Plaintiffs have not been dilatory in seeking to amend the First Amended Complaint, and the Defendants will suffer no undue prejudice by such

amendment. Thus, because it will serve the interests of justice, Plaintiffs respectfully request that the Court grant their Motion for Leave to File the Second Amended Complaint.

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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