

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

Dennis Black, <i>et al.</i> , Plaintiffs, v. Pension Benefit Guaranty Corporation, <i>et al.</i> , Defendants.	Case No. 2:09-cv-13616 Hon. Arthur J. Tarnow
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**PLAINTIFFS’ NOTICE OF SUPPLEMENTAL AUTHORITY
IN SUPPORT OF THEIR OPPOSITION TO THE
TREASURY DEFENDANTS’ MOTION TO DISMISS**

Plaintiffs respectfully file this notice of supplementary authority in support of their opposition to the motion to dismiss of Defendants U.S. Department of Treasury, Presidential Task Force on the Auto Industry, Timothy F. Geithner, Steven L. Rattner, and Ronald A. Bloom (collectively, “Treasury Defendants”), and in support state as follows:

The Court held its hearing concerning the Treasury Defendants’ motion to dismiss this past Wednesday, August 17. The Court was very generous in permitting the parties extensive time for oral argument, and Plaintiffs are therefore hesitant to provide still more authority for the Court to consider. However, one issue that appeared to be critical to the Court was whether Plaintiffs could further substantiate the factual allegations in their complaint with additional facts and materials presented either as part of the Treasury Defendants’ motion or Plaintiffs’ opposition to the motion, in order to demonstrate the “plausibility” of the complaint’s allegations under *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). So that the Court can better resolve that issue,

Plaintiffs seek to apprise the Court of very recent authority on point (some of the cases having been decided in just the last two weeks).

First of all, Plaintiffs of course recognize that the usual rule *when a defendant* seeks to show the insufficiency of a complaint is that *the defendant* may not rely on “matters outside the pleadings,” except in some limited circumstances. *Rodrigo v. Twp. of Richmond*, 641 F.3d 673, 680 (6th Cir. 2011). However, where *the plaintiff* seeks to defend the sufficiency of the complaint with matters outside the pleadings, the rule is different, and it is on this latter rule that Plaintiffs seek to offer the supplemental authority. Supplemental authority on the more liberal rule for plaintiffs is: *Vance v. Rumsfeld*, Nos. 10-1687 & 10-2442, 2011 U.S. App. LEXIS 16338, at *26 n.6 (7th Cir. Aug. 8, 2011) (*Bivens* action); *Reynolds v. CB Sports Bar, Inc.*, 623 F.3d 1143, 1146-47 (7th Cir. 2010); *Orton v. Johnny’s Lunch Franchise, LLC v. Calumunci*, No. 10-11013, 2010 U.S. Dist. LEXIS 72672, at *7-*12 and n. 4, n.7 (E.D. Mich. July 20, 2010); *Silverstrand Invs. v. Amag Pharms.*, no. 10-10470, 2011 U.S. Dist. LEXIS 90166, *12-*13 (D. Mass. Aug. 11, 2011); *LM Nursing Serv., Inc. v. Ferreira*, No. 09-cv-413-SJM-DLM, 2011 U.S. Dist. LEXIS 35140, at *3-4 (D.R.I. Mar. 30, 2011); and *PharMerica Chicago, Inc. v. Meisels*, No. 10 C 2741, 2011 U.S. Dist. LEXIS 15719, at *17-*20 (N.D. Ill. Feb. 16, 2011).

In these decisions, the courts determined that a plaintiff may elaborate on and supplement the complaint’s allegations with facts and materials presented in or attached to a motion to dismiss or its own opposition to the motion to dismiss (or even its appellate brief) in order to overcome an *Iqbal* challenge, “so long as the elaborations are consistent with the pleading.” *Vance*, 2011 U.S. App. LEXIS 16338, at *26 n.6; *Orton*, 2010 U.S. Dist. LEXIS 72672, at *9 (“As long as the extrinsic matters ‘simply fill [] in the contours and details of the plaintiff’s complaint,’ they may be considered by the court without converting the Rule 12(b)(6) motion to

one for summary judgment.’”) (quoting *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 445 (6th Cir. 1997)). The decisions -- all permitting a *plaintiff* to add to its complaint in order to save it in the face of an *Iqbal* attack (notwithstanding the usual rule prohibiting a *defendant* from using facts and documents outside of the complaint to *defeat* the complaint) -- make sense because (1) typically a plaintiff could in any event simply seek to amend the complaint to add the additional facts and materials, and (2) the common problem with consideration of matters outside of the record in a Rule 12(b)(6) proceeding is “generally lack of notice” to the plaintiff, a problem not present when the plaintiff seeks to use the additional materials. *Silverstrand*, 2011 U.S. Dist. LEXIS 90166, at *13 (quoting *Watterson v. Page*, 987 F.2d 1, 3-4 (1st Cir.1993)).

Dated: August 19, 2011

Respectfully submitted,

/s/ Anthony F. Shelley

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2011, I caused the foregoing electronically to be filed 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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/s/ Anthony F. Shelley_____

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