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

Dennis Black, *et al.*, Plaintiffs, v. Pension Benefit Guaranty Corporation, *et al.*, Defendants.	)	Case No. 2:09-cv-13616 Hon. Arthur J. Tarnow Magistrate Judge Mona K. Majzoub

PLAINTIFFS' BRIEF IN OPPOSITION TO TREASURY DEFENDANTS' RENEWED MOTION TO DISMISS

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STATEMENT OF ISSUE PRESENTED

Does Plaintiffs' Second Amended Complaint sufficiently state a case against the moving Defendants so as to survive a motion to dismiss at the pleadings stage?

STATEMENT OF CONTROLLING AUTHORITY

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Vistein v. Am. Registry of Radiologic Technologists, 342 Fed. Appx. 113 (6th Cir. 2009)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTRODUCTION 1

BACKGROUND 3

A. Delphi's Genesis and Its "Interdependent Relationship" with GM 4

B. Funding of the Pension Plans During Delphi's Bankruptcy 5

C. The Passage of the Emergency Economic Stabilization Act 6

D. Treasury's Takeover of Old GM 7

E. The Treasury Defendants Refuse to Allow Old GM's Assumption of the Salaried Plan and Instead Urge its Termination 8

F. Old GM's Bankruptcy and New GM's Need to Resolve Delphi's Pension Issues 10

G. The Termination of Delphi's Pension Plans and the Top-Up Agreements 15

H. GM's IPO and the TARP Repayment 16

ARGUMENT 17

I. DISMISSAL CANNOT OCCUR UNLESS THE TREASURY DEFENDANTS CAN SHOW THAT THE SALARIED RETIREES' ALLEGATIONS ARE IMPLAUSIBLE 17

II. PLAINTIFFS HAVE STANDING TO BRING THEIR EQUAL PROTECTION CLAIM AGAINST THE TREASURY DEFENDANTS 19

III. THE TREASURY DEFENDANTS ARE RESPONSIBLE FOR CHOOSING WHICH DELPHI RETIREES WOULD AND WOULD NOT RECEIVE SUPPLEMENTAL PENSION BENEFITS FROM NEW GM 23

IV. THE TREASURY DEFENDANTS' DECISION TO PROVIDE SUPPLEMENTAL PENSION BENEFITS ON THE BASIS OF POLITICAL ASSOCIATION AND SPEECH VIOLATES PLAINTIFFS' CONSTITUTIONAL RIGHTS UNDER THE FIRST AND FIFTH AMENDMENTS 33

A. The Government May Not Condition the Receipt of Pension Benefits on Affiliation with a Politically Favored Union Absent a Showing that the Governmental Action was Narrowly Tailored to Serve a Compelling Governmental Interest 34

B. Plaintiffs Have Plausibly Alleged that the Treasury Defendants' Decisions Regarding Supplemental Pension Benefits Were Made on the Basis of Associational Choices, and thus that the Decisions Impermissibly Burdened their First Amendment Rights 42

C. There Is Not Plausible "Rational Basis" for the Government's Disparate Treatment 48

V. THE COURT HAS THE AUTHORITY TO ORDER EQUITABLE RELIEF IN PLAINTIFFS' FAVOR RELATING TO THE TREASURY AND THE AUTO TASK FORCE 49

VI. PLAINTIFFS' *BIVENS* CLAIM SHOULD NOT BE DISMISSED 55

A. Plaintiffs *Bivens* Claims Are Not Precluded by the Bankruptcy Code 56

B. The Individual Defendants Have Failed to Prove That They Are Entitled to Qualified Immunity 56

CONCLUSION 58

TABLE OF AUTHORITIES

CASES

Page(s)

Alexander v. Alexander,
706 F.2d 751 (6th Cir. 1983) 56

Allen v. Wright,
468 U.S. 737 (1984) 19, 20

Ashcroft v. Iqbal,
129 S. Ct. 1937 (2009) 33

Board of County Comm'rs v. Umbehr,
518 U.S. 668 (1996) 34, 36, 37, 42, 57

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 17, 42, 44

Bell v. Hood,
327 U.S. 678 (1946) 55

Bennett v. MIS Corp.,
607 F.3d 1076 (6th Cir. 2010) 18

Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics,
403 U.S. 388 (1971) 55, 56

Blackburn v. City of Marshall,
42 F.3d 925 (5th Cir. 1995) 36

Blum v. Yaretsky,
457 U.S. 991 (1982) 24, 31

Boy Scouts of America v. Dale,
530 U.S. 640 (2000) 34

Branti v. Finkel,
445 U.S. 507 (1980) 35, 38, 39

Burton v. Wilmington Parking Auth.,
365 U.S. 715 (1961) 24, 29, 30

Camp v. Boyd,
229 U.S. 530 (1913) 50

Carter-Jones Lumber Co. v. Dixie Distrib. Co.,
166 F.3d 840 (6th Cir. 1999) 49, 50

Citizens United v. FEC,
130 S. Ct. 876 (2010) 35, 40, 57

Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby,
470 F.3d 286 (6th Cir. 2006) 19, 20, 21

Day v. Bond,
500 F.3d 1127 (10th Cir. 2007).. 19, 21, 22, 23

In re Delphi Corp, et al.,
Case No. 05-44481 (RDD) (Bankr. S.D.N.Y.) 5, 56

Elrod v. Burns,
427 U.S. 347 (1976) 34, 37, 38, 40, 42

Faughender v. City of N. Olmsted,
927 F.2d 909 (6th Cir. 1991) 35

Feathers v. Aey,
319 F.3d 843 (6th Cir. 2003) 57

First Am. Title Co. v. Devaugh,
480 F.3d 438 (6th Cir. 2007) 18

In re General Motors Corp.,
407 B.R. 463 (Bankr. S.D.N.Y. 2009) 4, 11, 14, 32, 45, 46

In re General Motors Corp.,
No. 09-50026 (REG) (Bankr. S.D.N.Y.) 4, 6, 14

Gentek Bldg. Prods. v. Sherwin-Williams Co.,
491 F.3d 320 (6th Cir. 2007) 18

Great-West Life & Annuity Ins. Co. v. Knudson,
534 U.S. 204 (2002) 54

Healy v. James,
408 U.S. 169 (1972) 35

Hecht Co. v. Bowles,
321 U.S. 321 (1944) 50

Heckler v. Mathews,
465 U.S. 728 (1984) 19, 20, 23, 50

Hoke Co. Inc., v. Tennessee Valley Auth.,
854 F.2d 820 (6th 1988) 48, 49

Jackson v. Metro. Edison Co.,
419 U.S. 345 (1974) 23, 24, 30

Kinney v. Weaver,
367 F.3d 337 (5th Cir. 2004) 36, 37

Kotch v. Bd. of River Port Pilot Comm'rs,
330 U.S. 552 (1947) 24

Laird v. Tatum,
408 U.S. 1 (1972) 36

Lambert v. Hartman,
517 F.3d 433 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 905 (2009) 18

Lansing v. City of Memphis,
202 F.3d 821 (6th Cir. 2000) 31

Longaberger Co. v. Kolt,
586 F.3d 459 (6th Cir. 2009) 54

Lucas v. Monroe County,
203 F.3d 964 (6th Cir. 2000) 36, 39

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 19

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 55

McCloud v. Testa,
97 F.3d 1536 (6th Cir. 1996) 34

McConnell v. FEC,
540 U.S. 93 (2003) 40, 41

Morrison v. Board of Trustees of Green Township,
583 F.3d 394 (6th Cir. 2009) 56

O'Bryan v. Holy See,

556 F.3d 361 (6th Cir.), *cert. denied,* 130 S. Ct. 361 (2009) 18

OPM v. Richmond,
496 U.S. 414 (1990) 51

PBGC v. LTV Corp.,
496 U.S. 633 (1990) 47

Paige v. Coyner,
614 F.3d 273 (6th Cir. 2010) 42

Perry v. Sindermann,
408 U.S. 593 (1972) 35, 36, 41, 57

Porter v. Warner Holding Co.,
328 U.S. 395 (1946) 50

Roberts v. U.S. Jaycees,
468 U.S. 609 (1984) 34, 41

Rutan v. Republican Party of Ill.,
497 U.S. 62 (1990) 37, 39, 47

Simon & Schuster, Inc., v. Members of the N.Y. State Crime Victims Bd.,
502 U.S. 105 (1991) 37

Speiser v. Randall,
357 U.S. 513 (1958) 36

Sugarland Indus. v. Comm'r,
15 B.T.A. 1265 (1929) 45

Summe v. Kenton County Clerk's Office,
604 F.3d 257 (6th Cir. 2010) 56

Vieth v. Jubelirer,
541 U.S. 267 (2004) 39, 40, 41

Vistein v. Am. Registry of Radiologic Technologists,
342 Fed. Appx. 113 (6th Cir. 2009) 24, 31, 32

Welch v. Ciampa,
542 F.3d 927 (1st Cir. 2008) 38

Welsh v. United States,
398 U.S. 333 (1970) 50

Williams v. City of River Rouge,
909 F.2d 151 (6th Cir. 1990) 35

Williams v. Mehra,
186 F.3d 685 (6th Cir. 1999) 57

Wine & Spirits Retailers, Inc. v. Rhode Island,
418 F.3d 36 (1st Cir. 2005) 20, 21

Wolotsky v. Huhn,
960 F.2d 1331 (6th Cir. 1992) 31

Zeigler v. Miskiewicz,
No. C2-07-0272, 2008 U.S. Dist. LEXIS 17025 (S.D. Ohio Mar. 5, 2008) 31

STATUTES

11 U.S.C. § 363 10

26 U.S.C. § 412 5

26 U.S.C. § 430 5

Employee Retirement Income Security Act of 1974,
29 U.S.C. §§ 1001 *et seq* 1
29 U.S.C. § 1368 5

Emergency Economic Stabilization Act of 2008
Pub. L. No. 110-343, 122 Stat. 3765 .... 6, 7, 51, 52, 53, 54

MISCELLANEOUS

Fed. R. Civ. P. 12 .... 3, 17, 18

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INTRODUCTION

Plaintiffs (sometimes referred to hereinafter as the "Salaried Retirees"), are retirees of Delphi Corporation ("Delphi") and participants in the Delphi Retirement Program for Salaried Employees (the "Salaried Plan" or the "Plan"). Delphi originally consisted of divisions and subsidiaries of General Motors Corporation ("Old GM") until its eventual spin-off in 1999, meaning that even though Plaintiffs retired from Delphi, the bulk of their careers were spent at Old GM, where they earned the bulk of their pension benefits.

In July 2009, the Pension Benefit Guarantee Corporation ("PBGC") terminated Delphi's pension plans, including both the Salaried Plan and the pension plan for Delphi's hourly employees ("Hourly Plan"), pursuant to an agreement with the Plan's administrator, Delphi.[1] Owing to the complicated and interdependent relationship between Delphi and Old GM, the ultimate resolutions of Delphi's pension plans (both the Salaried and Hourly Plans), the degree to which Old GM would financially contribute to them, and whether Old GM would resume responsibility for them was a subject of ongoing negotiations between the two companies. The issue of Delphi's pensions was also of critical importance to General Motors Co. (f/k/a General Motors LLC and hereinafter referred to as "New GM"), the Treasury-sponsored entity created to purchase the good assets of Old GM.

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[1] Plaintiffs allege, in Counts 1-4 of their Second Amended Complaint 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 allege that the PBGC's termination of the Salaried Plan was politically motivated and ultimately substantively infirm. The PBGC filed dispositive motions seeking to dismiss those claims, and on September 27, 2010, this Court denied those motions, without prejudice. *See* Dkt. No. 147.

In Count 5 of the Second Amended Complaint, Plaintiffs bring 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"). Plaintiffs allege that after investing massive amounts of political and financial capital into the fortunes of the American auto industry in general, and Old and New GM in particular, the Treasury Defendants determined that New GM would provide supplemental pension benefits to those Delphi retirees who are affiliated with three politically powerful unions who supported the Administration, while also forbidding New GM from providing those same supplemental pension benefits to Plaintiffs.

When an ERISA covered pension plan terminates with insufficient assets to pay out all promised benefits, the PBGC pays out a certain guaranteed amount. However, the PBGC's payments can often be less than what the participant was earning prior to termination, and in this case, Plaintiffs are receiving on average 35-70% less than they were otherwise entitled to under the Plan. For a retiree living on a fixed income, such a deprivation is devastating.

The similarly situated retirees who are part of Delphi's three most powerful unions, the United Auto Workers ("UAW"), the United Steel Workers ("USW") and the International Union of Electrical Workers ("IUE"), are not suffering a similar pension reduction. New GM, while it was under the influence and control of the Treasury Defendants, agreed to pay these particular retirees supplemental pension benefits designed to make up the difference lost by the termination of their pension plan. Many, including Delphi, assumed that New GM would make similar arrangements for Delphi's Salaried Retirees. However, upon taking control of GM/Delphi matters, the Treasury Defendants insisted that the Salaried Retirees get no support from New GM. Plaintiffs allege (1) that the decision about whether and to which retirees GM would and

would not provide supplemental pension benefits was made by the Treasury Defendants; (2) that the Treasury Defendants made these decisions on the basis of the recipients' associational choices and speech; and (3) that the government's decision to award supplemental pension benefits on the basis of political association and speech violates the Constitution.

The Treasury Defendants have moved pursuant to Fed. R. Civ. P. 12 to dismiss Count 5 of the Second Amended Complaint. The Court should deny their motion. The Treasury Defendants' motion has numerous flaws - among them, the assertion that despite overwhelming evidence of the Treasury Defendants' entrenched involvement in (and control over) these events, Plaintiffs have failed to allege sufficient facts in support of their claim. At the motion to dismiss stage, Plaintiffs need only show that their allegations are plausible, and the facts alleged are more than sufficient to demonstrate that Plaintiffs have stated a plausible claim. Moreover, the Treasury Defendants' motion rests on legally flawed arguments concerning standing, Plaintiffs' right to relief, Defendants' right to qualified immunity, and on the very troubling assertion that the Constitution allows the government to award or deny pension benefits on the basis of political association and speech. These arguments are unsustainable, and consequently the Treasury Defendants' motion should be dismissed, with prejudice.

BACKGROUND

The Treasury Defendants' motion to dismiss rests in part upon the acceptance of their circumscribed version of facts -- for example, their assertions that the Treasury Defendants played no role in the decision about who should receive these tax-payer funded pension top-ups, or that associational considerations had no effect upon the Treasury Defendants' actions. In support of this argument, the Treasury Defendants offer a selective recitation of facts, supported by no less than twenty-three exhibits. Of course, the Treasury Defendants' self-serving version of the facts is of no moment at this time, since (as we note in detail below, *see infra* Part I) it is

the plausibility of *Plaintiffs'* version of the facts that is relevant for dismissal purposes. The facts, as alleged by Plaintiffs, are recounted below.

A. Delphi's Genesis and Its "Interdependent Relationship" with GM

Delphi consisted of divisions and subsidiaries of General Motors Corporation (hereinafter referred to as "Old GM") until Old GM's divestiture of Delphi in 1999.[2] Consequently, Plaintiffs were originally employees of Old GM, and spent most of their careers as Old GM employees. After its spin-off in 1999, Old GM transferred to Delphi all the responsibility for maintaining the pensions the new Delphi employees, resulting in the establishment of the Salaried and Hourly Plans, sponsored and administered by Delphi.[3]

At the time of Delphi's spin-off, Old GM entered into agreements with several unions, pursuant to which Old GM agreed to pay members of those unions the difference between the amount payable under the Delphi Hourly Plan and the amount actually received by those members if Delphi experienced a "risk affecting [its] continuing financial viability" on or before October 18, 2007. Ex. B to the Treas. Defs.' Mot. To Dismiss or, for Summ. J., Item 8.01 at 2, and Sub-Ex. 99-2 at 3 (Dkt. No. 120). With the exception of the agreement with the UAW, the liabilities associated with these agreements were not assumed by New GM. *See In re General Motors Corp.*, 407 B.R. 463, 481-82 (Bankr. S.D.N.Y. 2009).

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[2] *See* the Declaration of Randall L. Pappal, filed in *In re General Motors Corp., et al.*, Case No. 09-50026 (REG) (Bankr. S.D.N.Y), in Support of Debtors' motion for Entry of Order Approving (I) Master Disposition Agreement for Purchase of Certain Assets of Delphi Corporation, (II) Related Agreements, (III) Assumption and Assignment of Executory Contracts, (IV) Agreement with Pension Benefit Guaranty Corporation, and (V) Entry into Alternative Transaction in Lieu Thereof (hereinafter referred to as "Pappal Decl.") ¶ 5. The Pappal Decl. is attached hereto as Ex. A).

[3] *See* Memo. in Support of the Renewed Motion to Dismiss of Defendants U.S. Department of the Treasury, Presidential Task Force on the Auto Industry, Timothy F. Geithner, Steven L. Rattner, and Ron A. Bloom (Dkt. No. 164 and hereinafter referred to as the" Treasury Defendants' Brief" or "Treas. Defs.' Br.") at 4.

In October 2005, Delphi (along with a number of its domestic subsidiaries) filed a voluntary petition for reorganization under chapter 11. *See In re Delphi Corporation, et al.*, Case No. 05-44481 (RDD) (Bankr. S.D.N.Y.).

B. Funding of the Pension Plans During Delphi's Bankruptcy

Under its Chapter 11 filing, Delphi paid only a portion of its scheduled required contributions to the Salaried Plan.[4] As Delphi missed contributions, the PBGC, pursuant to the Internal Revenue Code, 26 U.S.C. §§ 412, 430(k), imposed statutory liens on Delphi foreign assets in favor of the Salaried Plan (the "Funding Liens") to protect the Plan against the risk that those contributions would not be made up.[5] Because Delphi's foreign subsidiaries and affiliates did not file for bankruptcy protection, those foreign subsidiaries retained substantial assets subject to the PBGC's liens and outside the bankruptcy court's jurisdiction. By the time of the Salaried Plan's termination, the PBGC had acquired liens worth approximately $200 million against these foreign assets as a result of Delphi's missed contributions to the Salaried Plan.[6]

"GM and Delphi have a complex history arising from their interdependent relationship." Pappal Decl. ¶ 5. From the time of the Delphi spin-off up until the time of Old GM's bankruptcy filing, "Delphi [was] GM's largest component parts supplier, accounting for approximately 11.3% of GM's North American purchases and 9.6% of GM's global purchases in 2008. Delphi

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[4] *See* Administrative Record (hereinafter "AR") of the Pension Benefit Guaranty Corporation for the Delphi Retirement Program for Salaried Employees at 34. Plaintiffs have previously filed a redacted copy of this document as Ex. Z to Dkt. No. 47.

[5] In addition, under ERISA, upon a pension plan's termination, the PBGC can assert liens for potential PBGC liability for unfunded guaranteed benefits against the assets of any entity in the sponsor's "controlled group" ("Termination Liens"). 29 U.S.C. § 1368. Delphi's foreign subsidiaries were part of its controlled group. In April 2009, the Delphi controlled group assets reachable by the PBGC were valued by the PBGC at approximately $2.4 billion. AR 112.

[6] *See* Declaration of Neela Ranade, Dkt. No. 37 ¶ 7.

is a sole-source, just-in-time, supplier of many critical parts to GM, including parts that are used in essentially every GM product line in North America." *Id.* Owing to this interdependent relationship with its chief parts supplier, during the pendency of Delphi's bankruptcy, Old GM was "forced to spend billions of dollars and incur billion of dollars of additional liabilities primarily to protect its supply base by supporting Delphi."[7] These expenditures included, among other things, the assumption by Old GM of over $2 billion in net liabilities of Delphi's Hourly Plan in the fall of 2008. *Id.* While the Hourly Plan still remained massively underfunded, the PBGC responded to this liability transfer by releasing all the Funding Liens it had asserted against Delphi assets on behalf of the Hourly Plan.[8]

C. The Passage of the Emergency Economic Stabilization Act

By the fall of 2008, the country faced an unprecedented financial crisis, prompting Congress to pass the Emergency Economic Stabilization Act ("EESA"), Pub. L. No. 110-343, 122 Stat. 3765, in October 2008. Pursuant to EESA, the Secretary of the Treasury was authorized to establish the Troubled Asset Relief Program ("TARP"), "to purchase and to make and fund commitments to purchase, troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary, and in accordance with this Act and the

[7] *See* Declaration of Rick Westenberg, filed in *In re General Motors Corp., et al.*, Case No. 09-50026 (REG) (Bankr. S.D.N.Y), in Support of Debtors' motion for Entry of Order Approving (I) Master Disposition Agreement for Purchase of Certain Assets of Delphi Corporation, (II) Related Agreements, (III) Assumption and Assignment of Executory Contracts, (IV) Agreement with Pension Benefit Guaranty Corporation, and (V) Entry into Alternative Transaction in Lieu Thereof (hereinafter referred to as "Westenberg Decl." and attached hereto as Ex. B) ¶ 6.

[8] *See* PBGC Press Release, *PBGC Director Praises Pension Transfer from Delphi to GM* (Sept. 25, 2008) (noting that the transfer would result in the PBGC releasing "more than $1.2 billion in liens that we filed against Delphi's non-debtor foreign affiliates.") (attached hereto as Ex. C); AR 34 (noting that, with respect to the Hourly Plan, "there are no liens.").

policies and procedures developed and published by the Secretary." EESA, Pub. L. No. 110-343, § 101(a)(1), 122 Stat. at 3767.

In December 2008, the auto industry was also in crisis, and the leaders of Chrysler Holding LLC and Old GM appeared before Congress and "appealed for government assistance to help them remain in business, but they were unable to muster sufficient congressional support to get a rescue bill through the Senate. Unless they could raise billions of dollars in new financing from private investors, they faced bankruptcy and probable liquidation."[9] While Treasury's initial position was that TARP funds were unavailable to assist the auto industry, it ultimately reversed this position, establishing the Automotive Industry Financing Program ("AIFP") under TARP, "broaden[ing] the allocation of TARP assistance to the domestic automotive industry." 2011 Oversight Rpt. at 10-11.

D. Treasury's Takeover of Old GM

On December 19, 2008, Treasury announced that it would provide Old GM with a massive $13.4 billion bridge loan under AIFP, pursuant to certain terms and conditions, among which was a covenant whereby GM could not make any expenditure over $100 million without the express consent of the Treasury Department. Feldman Dep. at 28:10-15 (Ex. D. to Dkt. No. 120). Old GM drew the first $4 billion of that loan on December 31, 2008, an additional $5.4 billon on January 16, 2009, and the final $4 billion installment on February 17, 2009.[10]

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[9] Congressional Oversight Panel, *An Update on TARP Support for the Domestic Automotive Industry*, at 9 (Jan. 13, 2011) (attached hereto as Ex. D and hereinafter referred to as the "2011 Oversight Rpt.").

[10] Congressional Oversight Panel, *The Use of TARP Funds in the Support and Reorganization of the Domestic Automotive Industry*, at 9 (Sept. 9, 2009) (attached as Ex. I to Dkt. No. 47, and hereinafter referred to as the "Sept. 2009 Oversight Rpt.").

In addition to the Treasury's veto-power over significant expenditures, another condition of the loan agreement was that Old GM demonstrate that the TARP assistance would allow it to achieve "financial viability." Sept. 2009 Oversight Rpt. at 9. On February 15, 2009, President Obama announced the creation of the Presidential Task Force on the Auto Industry, which was charged with, among other things, reviewing Old GM's viability plan. *Id.* at 10. Defendant Geithner was named a co-chair of the Task Force, and Defendants Rattner and Bloom were both named as leaders of the Task Force. *Id.* at 10-11.

In late March 2009, Defendant Rattner, on behalf of the Auto Task Force and Treasury, fired Old GM's CEO, Rick Wagoner, and replaced him with Fritz Henderson.[11] Shortly thereafter, on March 30, 2009, the Auto Team completed its evaluation of Old GM's business plan and determined that it was unsatisfactory. Sept. 2009 Oversight Rpt. at 11. Old GM was given additional time to present a "substantially more aggressive plan," during which it was provided with another $6.36 billion in loans. *Id.* at 11,12.

E. The Treasury Defendants Refuse to Allow Old GM's Assumption of the Salaried Plan and Instead Urge its Termination

On March 20, 2009, Delphi gave a presentation entitled "Key Emergence Issues" to the its Joint Statutory Creditor's Committee, noting that the pension issue was one of only a few major issues left to resolve with Old GM, and that the "preferred" resolution remained a "consensual agreement by GM to assume Delphi's hourly and salaried pension assets and liabilities." AR358-368; AR 360; AR 366. At the same time, Delphi also set forth the option of a "negotiated termination" of the pension plans with the PBGC. Such negotiations were

[11] Steven Rattner, *Overhaul: An Insider's Account of the Obama Administration's Emergency Rescue of the Auto Industry* 91, 133-34 (2010).

complex as they would need to address: (1) resolution of "GM benefit guaranty;" (2) resolution of GM "follow-on plan issues;" and (3) release of PBGC-asserted liens on non-U.S. assets. *Id.*

In April of 2009, as Delphi was facing its own liquidity crisis, the PBGC was considering whether to initiate an involuntary termination of Delphi's pension plans. The PBGC noted that Delphi's formal position was that it could not emerge from bankruptcy with both the Salaried and Hourly Plans ongoing, instead proposing that "GM assume the [Salaried Plan] and the remainder of the [Hourly Plan]." AR 33. The PBGC also noted Old GM's contention that it could afford neither of the plans, and that owing to the covenants in its loan agreements with the Treasury, Old GM was forbidden from assuming either liability without Treasury's express consent. *Id.*

At about this same time, Matthew Feldman joined the Treasury auto team, which was charged with assisting the Auto Task Force. Feldman Dep. at 17:20-22. Mr. Feldman was, "[w]ith respect to the autos . . . the lead person at Treasury on the pension issues." *Id.* at 156:7-9. After his appointment, Mr. Feldman "acted as sort of a facilitator and intermediary between the PBGC and General Motors regarding Delphi's pensions." *Id.* at 155:23-25. On April 16, 2009, Mr. Feldman spoke to PBGC staff about Delphi's pension plans, and informed them that Old GM might assume the Hourly Plan, but not the Salaried Plan. AR 33. Notably, this was not a reflection of Old GM's position, as Mr. Feldman's first conversations with Old GM regarding the Delphi pensions only occurred in May 2009. Feldman Dep. at 156:19-22. Instead, the decision that the Salaried Plan should get no TARP-funded assistance (through the GM entities) was Treasury's, as was the corresponding decision to fund the Hourly Plan. In fact, Mr. Feldman readily admits that Treasury's goal in these discussions was "to facilitate an agreement where the

salaried plan would get terminated and taken over by the PBGC and General Motors would assume liability for the hourly plans." Feldman Dep. at 159:22- 160:2.

This contact between Treasury officials (on Old GM's behalf) and the PBGC was unusual. The PBGC is governed by a three-member board of directors consisting of the Secretaries of Labor, Commerce and Treasury.[12] This board of directors is "ultimately responsible for providing policy direction and oversight of PBGC's finances and operations." April 2010 GAO Rpt. at 10. As a result of the restructuring of Old GM, "the federal government has assumed new roles vis-à-vis the automakers as part-owner and lender, in addition to its traditional role as pension regulator." *Id.* at 42. "Recognizing the potential for interested parties to perceive conflicts," Treasury reported to the GAO that it had taken several steps to "mitigate its risk." *Id.* at 43. Among these measures, was ensuring that "in the management of its investment in GM and Chrysler, the Treasury auto team does not communicate with the IRS or PBGC." *Id.*

On April 21, 2009, the PBGC determined that the Salaried and Hourly Plans be terminated. AR 10.[13] However, the PBGC did not act on this determination, and the plans remained ongoing.

F. Old GM's Bankruptcy and New GM's Need to Resolve Delphi's Pension Issues

The Treasury Defendants developed a plan "under which 'a purchaser sponsored by [Treasury], New GM, would acquire 'the bulk of [Old GM's] assets' pursuant to a sale under

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[12] *See* General Accountability Office, *Troubled Asset Relief Program, Automaker Pension Funding and Multiple Federal Roles Pose Challenges for the Future*, at 10 (Apr. 2010), http://www.gao.gov/new.items/d10492.pdf (hereinafter referred to as the "April 2010 GAO Rpt."),

[13] Ex. T to Dkt. No. 49.

§ 363 of the Bankruptcy Code, 11 U.S.C. § 363, and assume 'some, but not all, of [Old GM's] liabilities.'"[14]

The question of which liabilities New GM would assume was a major concern of the Treasury Defendants. Beginning in May, Mr. Feldman began to have conversations with Old GM about Delphi's pension issues. In these conversations, the Treasury "assisted General Motors in their thinking and actions in connection with the Delphi Bankruptcy." Feldman Dep. at 32:24-33:2. Treasury was "able to think through with them [Old GM] and help them think through what the best resolution was from their perspective." *Id.* at 33:5-9. Mr. Feldman had "[m]aybe 70" meetings and phone calls with representatives of Old GM to discuss the Delphi bankruptcy, in which Treasury's goal was to "articulate[] certain principles that we thought General Motors should focus on." *Id.* at 35:21- 36:4.

By the end of May, there was still no resolution to the Delphi issues. This was unacceptable to Old GM officials, who considered Delphi's emergence from bankruptcy critical to the success of Old GM's own reorganization. The view that Delphi's emergence from bankruptcy was necessary to the success of New GM was well founded. Consistent with industry practice, Old GM operated on a "just-in-time" inventory delivery system, in which component parts from suppliers are typically assembled onto vehicles within a few hours of the delivery of the parts to the vehicle assembly facility. Operating on a "just-in-time" system meant that Old GM maintained little inventory, and instead depended upon frequent and regular shipments from Delphi. Pappal Decl. ¶ 7. "Consequently, if Delphi ever ceases shipping even a small fraction of production parts to GM, the GM plants relying on such shipments may run out of inventory of such parts and have to shut down within a matter of days." *Id.* Moreover, most

[14] Treas. Defs.' Br. at 8, quoting *In re Gen. Motors*, 407 B.R. [463,] 473, 496 (Bankr. S.D.N.Y. 2009).

parts that Delphi manufactured for Old GM were not readily available from an alternate source.

Id. at 8 As a result:

> [t]he shutdown of GM plants as a result of termination of deliveries of affected parts from Delphi could idle tens of thousands of GM workers, and it is estimated that GM's revenues would decrease significantly. GM would also incur costs related to expedited resourcing efforts, including, but not limited to, hundreds of millions of dollars for duplicate tooling, premiums and price increases paid to alternative suppliers, and the continued costs of maintaining idled plants (such as plant overhead and other fixed costs).
>
> Moreover, because GM purchases parts from many other automotive parts suppliers, a GM shutdown will likely affect many of its other suppliers. In the event of a shutdown of its North American facilities, GM would have no need for parts from its other suppliers and would be forced to stop purchasing all other parts used in the shut-down facilities, which include parts from over 1,500 other suppliers. Such a loss of revenue could force those suppliers to seek bankruptcy protection themselves, thus creating a broader risk to GM's and other motor vehicle manufacturers' future sources of parts supply.
>
> *In short, a prolonged cessation in the supply of parts from Delphi to GM would have a devastating effect on GM, its ability to reorganize, and the communities that depend on employment by GM and its community of parts suppliers*.

Pappal Decl. ¶¶ 9-11 (emphasis added). Clearly, as demonstrated by the preceding statements, continued access to Delphi parts was of critical importance to the GM entities. This conclusion was reiterated in the declaration of Rick Westenberg, Old GM's Director of Business Development, who noted that it was "imperative that [Old GM] immediately secure the supply of parts from Delphi in order for GM's own reorganization to succeed." Ex. B, Westenberg Decl., ¶ 7. Mr. Westenberg went on to say that "GM can only obtain confidence that its supply of Delphi's parts will not be threatened by obtaining control of certain of Delphi's assets and/or through a transfer of Delphi's assets to an entity that GM is comfortable will be a stable and well-capitalized long-term supplier of parts to GM." *Id.* This goal could only be achieved in conjunction with a resolution of Delphi's pension issues, specifically, the removal of the liens on Delphi assets:

> Delphi's hourly and salaried pension plans are currently significantly underfunded (the hourly plan has a net underfunded liability of approximately $3.2 billion and the salaried plan has a net underfunded liability of approximately $2.1 billion). The PBGC has asserted liens against the assets of Delphi's non-debtor affiliates (which include the foreign assets under the Proposed Transaction) to attempt to secure certain of the PBGC's pension-related claims against Delphi's ERISA control group. Although Delphi has disagreed that these asserted liens are valid or enforceable, *neither GM nor Parnassus (nor presumably any other potential purchaser) is willing to purchase the assets (or share in the non-debtor affiliates that own the assets) while they are subject to the threat of the PBGC liens.*

Westenberg Decl. ¶ 15 (emphasis added). Thus, those who were most familiar with the business model and reorganization efforts of Old GM believed that removing the PBGC liens on Delphi assets was critical to the success of a reorganized GM. According to the PBGC, the only liens in place on Delphi assets at the time of the Salaried and Hourly Plans' terminations were those on behalf of the Salaried Plan. *See supra* p. 6. Moreover, additional Termination Liens could have been placed upon those assets upon the termination of the Plan, and the Salaried Plan had sufficient liabilities (at least according to the PBGC) to result in the placement of liens on the entire Delphi enterprise.

As Old GM prepared to enter bankruptcy, these issues had still not been resolved. On May 26 and May 27, 2009, representatives from the PBGC, Delphi, Old GM, the Auto Task Force, the U.S. Treasury and certain labor unions participated in a sealed mediation ordered by the bankruptcy court, "seeking resolution of Delphi bankruptcy, including resolution of Delphi pension plans."[15] The next day, the PBGC conducted a telephone conference with the Treasury and Auto Task Force to discuss "settlement terms for resolving Delphi pension plan issues and

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[15] PBGC_FOIA_623, attached hereto as Ex. E. The PBGC and Treasury Defendants have produced a number of documents in response to FOIA requests made by Plaintiffs. Where the document referred to was produced by the PBGC, we have labeled it according to the following convention -- "PBGC_FOIA_xxx." Similarly, where a FOIA response has been produced by the Treasury Defendants, the convention TREAS_FOIA_xxx has been used. All the cited FOIA responses are included in Ex. E.

PBGC claims." PBGC_ FOIA_623. No representatives from Delphi or GM participated in the discussion. *Id.*

The following Monday, June 1, 2009, Old GM filed a voluntary Chapter 11 petition, *see In re General Motors Corp.*, No. 09-50026 (Bankr. S.D.N.Y.), at which time the Treasury Department committed approximately $30.1 billion of additional federal assistance from TARP to support the company's restructuring. *See* Sept. 2009 Oversight Rpt. at 29. That same day, Delphi announced a new plan to emerge from bankruptcy wherein it announced its expectation that the PBGC would seek to terminate the Salaried Plan, and anticipated that the remainder of the Hourly Plan would be assumed by Old GM. Delphi Corp. Press Release, *Delphi Reaches Agreements to Emerge from Chapter 11 Reorganization* at 3 (June 1, 2009) (attached hereto as Ex. F). By this date, "the negotiations among Old GM, other interested parties, and the Auto Task Force had produced a plan under which New GM would acquire 'the bulk of [the] assets' of Old GM and assume 'some, but only some, of [Old GM's] liabilities.'"[16] Under this plan, "[t]he liabilities that New GM would assume would include 'all employment-related obligations and liabilities [of Old GM] under any assumed employee benefit plan relating to employees that are or were covered by the UAW collective bargaining agreement' but would not include any 'employment-related obligations not otherwise assumed,'" including those with the IUE and the USW. *Id.* at 11-12, quoting *In re Gen. Motors*, 407 B.R. at 482.

On June 2, 2009, Mr. Westenberg (Old GM's director of business development, *see supra p.* 12) sent an e-mail to Mr. Feldman inquiring about the final settlement *that the Treasury had reached with the PBGC regarding Delphi's pension situation*. The email makes clear that

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[16] Treas. Defs.' Br. in Support of Its Mot. Dismiss or, in the Alternative for Summ. J. at 11 (Dkt. No. 120), quoting *In re Gen. Motors*, 407 B.R. at 473, 496 (emphasis omitted).

the negotiations had been conducted for the GM entities entirely by Treasury. "Matt, [w]e were looking to understand the details of the settlement with the PBGC regarding Delphi's hourly and salaried plans. Has it been finalized? Could you please provide an overview for how the hourly and salaried plans will be treated/addressed? Would it be appropriate/helpful to have GM involved in any discussions? Thanks, Rick." TREAS_FOIA_117 (Ex. E). Later, in the same e-mail chain, another GM official writes that, before speaking to the PBGC, he would like to have another conversation with Mr. Wilson and Mr. Feldman so that he can understand what "from the [Treasury's] perspective is expected from GM…and what isn't. We think we understand the Salaried side but want to understand the Hourly Options." TREAS_FOIA_115-16 (Ex. E). The three men then made plans to discuss Treasury's expectations the following day, June 3.

On July 5, 2009, Old GM sold its "good" assets under Section 363 of the Bankruptcy Code to New GM, a "government owned entity". Sept. 2009 Oversight Rpt. at 19. "The new company purchased substantially all of the assets of Old GM needed to implement its new, leaner viability plan." *Id.* Under the terms of the master purchase and sale agreement, Treasury received approximately 61% of the equity of New GM and $9.2 billion in debt and preferred stock. It also received the right to select 10 initial members of the New GM board of directors (out of a total 13). *Id.* at 20. Treasury provided approximately $30.1 billion of financing to support the GM entities through the expedited Chapter 11 proceeding and restructuring.

G. The Termination of Delphi's Pension Plans and the Top-Up Agreements

On July 21, 2009, the PBGC signed a settlement agreement with Delphi, pursuant to which it was anticipated that the PBGC would initiate involuntary termination procedures to terminate Delphi's pension plans, and Delphi was obligated to direct the plan administrators to agree to summary termination of Delphi's pension plans. Under the agreement, the PBGC agreed

to release all of its statutory liens against Delphi. At the same time, New GM announced that it would honor Old GM's "top-up" agreement with the UAW, such that all of Delphi's retirees affiliated with the UAW at the time of Delphi's spin-off would receive supplemental pension benefits from New GM.

In early September 2009, it was announced that New GM would top-up the pensions of the USW and IUE affiliated retirees as well.[17] New GM made this "top-up" decision despite its position that it had no obligation under any collective bargaining agreement to do so.[18]

H. GM's IPO and the TARP Repayment

Following New GM's formation, roughly $39.3 billon of Treasury's original investment was converted into common equity, resulting in a government stake representing 60.8% of New GM's common equity. 2011 Oversight Rpt. at 30. "The remaining government investment was split between $7.1 billion in debt, $2.1 billion in New GM preferred stock, and $986 million in the form of a loan to Old GM." *Id.* "In a series of payments between July 2009 and April 2010, GM repaid the $7.1 billion in debt that it owed to Treasury." *Id.* "New GM has also repurchased from Treasury the $2.1 billion in New GM preferred stock. The $986 million government loan to Old GM remains outstanding." *Id.*

Treasury officials played a significant role in the selection of a new CEO for New GM, Edward Whitacre, Jr., named to the position on December 1, 2009. *Id.* Treasury also appointed an additional four members to New GM's board of directors. *Id.* On August 12, 2010, GM announced that Mr. Whitacre would step down as CEO on September 1, 2010 and be replaced by Daniel Akerson, a Treasury-appointed member of GM's board of directors. *Id.*

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[17] *See, e.g.*, IUE-CWA Sept. 1, 2009 Press Release, attached as Ex. 2 to Dkt. No. 138.

[18] *See* Ex. R. to Dkt. No. 120.

Throughout much of 2010, New GM was preparing for an initial public offering ("IPO"), a process that promised to allow Treasury to sell its stake in New GM's common stock. *Id.* at 32. The IPO took place on November 18, 2010. *Id.* The IPO generated approximately $23.1 billion, with roughly $13.5 billion in receipts to the Treasury. *Id.* at 32-34. While Treasury sold over 412 million New GM shares in the IPO, it still holds more than 500 million, or 33.3 percent ownership of New GM. *Id.* at 34.

In total, Treasury invested $49.9 billion of TARP resources in the GM entities, and as of January 13, 2011, $27.2 billon still remains outstanding. 2011 Oversight Rpt. at 18, 34. It is impossible to predict how much of this remaining New GM debt will be repaid, but some loss is expected. *Id.* at 46-48. It is also impossible to determine whether AIFP as a whole will have a long-term financial gain or loss. *Id.* at 19. The GAO expects that the "complete disposition of Treasury's AIFP investments could take place over several years." *Id.* In total, the sales of New GM stock produced $13.5 billion in receipts to the Treasury; however, the GAO has reported that by selling stock for less than $44.59, Treasury essentially "'locked in' a loss of billions of dollars and greatly reduced the likelihood that taxpayers will ever be repaid in full." *Id.* at 4.

ARGUMENT

I. DISMISSAL CANNOT OCCUR UNLESS THE TREASURY DEFENDANTS CAN SHOW THAT THE SALARIED RETIREES' ALLEGATIONS ARE IMPLAUSIBLE

The Treasury Defendants have moved to dismiss Count Five of Plaintiffs' Second Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6). In order to avoid dismissal under Rule 12(b)(6), Plaintiffs do not need to prove their claims are true or even probable; rather, they need only present "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Because a "motion to dismiss for failure to state a claim is a test of the plaintiff's cause of action as stated in the complaint, not a challenge to the plaintiff's

factual allegations," a court must "construe the complaint in a light most favorable to [the plaintiff] and accept all of her factual allegations as true." *Lambert v. Hartman*, 517 F.3d 433, 439 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 905 (2009) (internal quotations and citations omitted). Moreover, "[i]t is well-established that defendants bear the burden of proving that plaintiffs' claims fail as a matter of law." *Bennett v. MIS Corp.*, 607 F.3d 1076, 1091 (6th Cir. 2010) (quoting *First Am. Title Co. v. Devaugh*, 480 F.3d 438, 443 (6th Cir. 2007)).

The Treasury Defendants' motion also requests relief pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. *See* Dkt. 164 at 1. "'Rule 12(b)(1) motions to dismiss for lack of subject-matter jurisdiction generally come in two varieties: a facial attack or a factual attack.'" *O'Bryan v. Holy See*, 556 F.3d 361, 375 (6th Cir.), *cert. denied,* 130 S. Ct. 361 (2009) (quoting *Gentek Bldg. Prods. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007)). The Treasury Defendants' 12(b)(1) motion is of the former variety, as the only jurisdictional challenge presented in the motion arises in the context of standing, and that goes no farther than to argue that Plaintiffs injury, as plead, fails to "meet the requirements of causation and redressability." Treas.' Def. Br. at 16. "'A facial attack on the subject-matter jurisdiction alleged in the complaint questions merely the sufficiency of the pleading.'" *Id.* at 375-76 (quoting *Gentek Bldg. Prods.*, 491 F.3d at 330). As such, the relevant pleading standard at issue is the same as under Rule 12(b)(6). *Id.* at 376 ("when reviewing a facial attack, a district court takes the allegations in the complaint as true . . . . If those allegations establish federal claims, jurisdiction exists. However, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.") (internal citations and quotations omitted).

II. PLAINTIFFS HAVE STANDING TO BRING THEIR EQUAL PROTECTION CLAIM AGAINST THE TREASURY DEFENDANTS

To demonstrate constitutional standing, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). This standard encompasses "three distinct elements":

> First, the plaintiff must have suffered an injury in fact -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be likely as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby, 470 F.3d 286, 291 (6th Cir. 2006) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The Treasury Defendants argue that Plaintiffs have failed to demonstrate the latter two elements, causation and redressability. Because Plaintiffs' allegations demonstrate that all three requirements have been satisfied, the Treasury Defendants' standing challenge must fail.

In the first place, the Supreme Court has explicitly held that unequal treatment, suffered by a person who is denied a benefit granted to a similarly situated individual, is itself an injury sufficient to confer standing on an aggrieved plaintiff. *See Heckler v. Mathews*, 465 U.S. 728, 738 (1984). And in fact, plaintiffs often challenge the distribution of benefits according to classifications that differentiate among similarly situated individuals solely on the basis of impermissible criteria; for standing purposes, such claims do not require "'a substantive right to any particular amount of benefits.'" *Day v. Bond*, 500 F.3d 1127, 1133 (10th Cir. 2007) (quoting *Mathews*, 465 U.S. at 737).

In *Mathews*, a statutory pension offset provision applied to reduce the Social Security

benefits that nondependent men could claim from their wives' accounts, but the offset provision did not apply to similarly situated nondependent women. *Mathews*, 465 U.S. at 734-35. The plaintiff -- a nondependent man -- challenged this unequal application of the offset provision on equal protection grounds. *Id.* at 735. The Supreme Court held that the plaintiff had standing to bring suit, as he had claimed

> a type of personal injury we have long recognized as judicially cognizable. He alleges that the pension offset exception subjects him to unequal treatment in the provision of his Social Security benefits solely because of his gender; specifically, as a nondependent man, he receives fewer benefits than he would if he were a similarly situated woman.

Id. at 738; *see also Allen v. Wright*, 468 U.S. 737, 755 (1984) (holding that unequal treatment accords a basis for standing when the plaintiff has been "'personally denied equal treatment by the challenged discriminatory conduct'") (citing *Mathews*, 465 U.S. at 739-40). In *Mathews*, this unequal treatment was sufficient to confer standing, which did not "depend on [the plaintiff's] ability to obtain increased Social Security payments." 465 U.S. at 737.[19]

As to the Treasury Defendants' challenge to causation, the Second Amended Complaint alleges a "causal connection between the injury and the conduct complained of." *Club Italia Soccer & Sports Org., Inc.*, 470 F.3d at 291. While Plaintiffs' injury must be fairly traceable to the Treasury Defendants' actions, the Treasury Defendants' actions need not be "the final link in the chain of events leading up to the alleged harm." *Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 45 (1st Cir. 2005). Further, the causation element encompasses injuries produced by "coercive effect upon the action of someone else." *Id.*

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[19] While *Mathews* involved a challenge to the allocation of benefits based on gender, triggering intermediate-level scrutiny of the plaintiff's underlying equal protection claim, the Court's conclusion that the plaintiff had standing was neither related to nor premised on the level of scrutiny applied to his substantive claim.

Plaintiffs have alleged that the Treasury Defendants pressured New GM to top-up the union-affiliated retirees only, and that the unequal treatment of non-union retirees was the result of "unlawful government discrimination." Second Am. Compl. ¶ 36. The Second Amended Complaint explains that, once the federal government became majority owner of New GM, the Treasury Defendants "exercised considerable control over the actions of New GM, using New GM to carry out governmental policies." *Id*. The Second Amended Complaint cites two examples of such control, both relating to decisions by the Treasury Defendants to top up union-affiliated retirees. *See id.* ¶¶ 36-37 (alleging that the decision to top up hourly workers represented by the UAW "was made at the direction of the United States, acting through the Treasury Department and the Auto Task Force"); *id.* ¶ 37 (alleging that the decision to top up additional union-affiliated retirees "was the result of significant pressure by the United States, carried out in connection with governmental policies that were politically motivated, and the result of the Treasury Department's management and control of New GM."). This satisfies the causation element. *See*, *e.g.*, *Club Italia Soccer & Sports Org., Inc.*, 470 F.3d at 291; *Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d at 45.

As for the redressability requirement, that too is met, as it is here "likely as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Club Italia Soccer & Sports Org., Inc.*, 470 F.3d at 291. Plaintiffs have asked the Court to direct the Treasury Defendants to "extend the top-up benefits to all Salaried Plan participants. Compl. ¶ 61(a). Such an order would clearly redress Plaintiffs' injury, and as discussed, *infra*, Plaintiffs are entitled to such an order.

The Treasury Defendants rely on the Tenth Circuit's decision in *Day v. Bond*, *supra*, in making their standing challenge. The comparison falls short. In *Day*, a group of students (all

out-of-state residents) brought an equal protection challenge to a Kansas statute which permitted some illegal aliens to qualify for in-state tuition rates. The students alleged that the statute unlawfully discriminated against U.S. citizens who are not Kansas residents. *See* 500 F.3d at 1130. The Tenth Circuit found that the plaintiffs lacked standing. "While it is indisputable that standing to assert an equal protection claim does not require that a plaintiff show that he *would* have obtained the benefit but for the discriminatory effects of a government-erected barrier, the plaintiff must nevertheless demonstrate that he *could* have obtained the benefit." *Id.* at 1135 (emphasis in original). Because the *Day* plaintiffs could not have satisfied other, non-discriminatory tests for in-state residency (*e.g.*, none attended Kansas high schools for at least three years as required by state statute), they failed to satisfy the causation and redressability requirements of standing.

Unlike in *Day*, it is only the Treasury Defendants' discriminatory instructions that determined which pensioners would receive supplemental pension benefits. There is no underlying impediment, statutory or otherwise, which would have rendered Plaintiffs ineligible to receive pension aid from Old or New GM. In fact, prior to interjection of the government into Old GM's decision-making, the working and "preferred" solution for the Salaried Plan was that not only would Old GM provide the Salaried Retirees with funding, but Old GM would, in fact, assume the Salaried Plan as its own. AR 366. It was only after the Treasury Defendants interjected themselves into the negotiations with Delphi and the PBGC that the idea that Old GM might assume the Salaried Plan, or provide supplemental benefits to its recipients, was taken off the table. AR 33. Because there are no non-discriminatory requirements that would have denied Plaintiffs supplemental pension benefits like those received by the favored retirees, Plaintiffs

satisfy the causation requirement. And as discussed in greater detail below, *see infra* Part V, neither do Plaintiffs' allegations fail for redressability.

Following *Mathews* and *Day*, it is clear, then, that Plaintiffs have therefore suffered a cognizable injury. *Mathews* specifically recognized standing to allege the precise injury alleged by Plaintiffs: the denial of equal treatment of similarly situated parties. The Treasury Defendants, it is alleged (and noted in further detail below) directed New GM to provide supplemental benefits to those Delphi retirees who were affiliated with politically valuable unions who had demonstrated their willingness to support the administration, and it similarly forbade the GM entities from providing those benefits to participants in the Salaried Plan, who had no such affiliation. Under these circumstances, the *Mathews* decision is controlling, and Plaintiffs have alleged injury sufficient to satisfy standing.

III. THE TREASURY DEFENDANTS ARE RESPONSIBLE FOR CHOOSING WHICH DELPHI RETIREES WOULD AND WOULD NOT RECEIVE SUPPLEMENTAL PENSION BENEFITS FROM NEW GM

The Treasury Defendants argue that Plaintiffs have "failed to plead factual matter stating a claim that the non-PBGC defendants are responsible for the existence of the Contested Commitments under any of the tests that the Supreme Court has established." Treas. Defs.' Br. at 18. To the contrary, the conclusion that the Treasury Defendants dictated the ultimate outcome with regard to these supplemental pension payments is unavoidable.

The general inquiry to determine whether the government is responsible for an action taken by a nominally private entity is the so-called "nexus test," that is, "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974). In other words, a challenged action is put to constitutional standards "when it can be said that the State is *responsible* for the specific conduct

of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (emphasis in original). A similar test employed by the Supreme Court, the so-called "state compulsion test," asks whether the State has "exercised such coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Vistein v. Am. Registry of Radiologic Technologists*, 342 Fed. Appx. 113, 127-28 (6th Cir. 2009). It is also true that "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which '[t]his Court has never attempted.'" *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (quoting *Kotch v. Bd. of River Port Pilot Comm'rs*, 330 U.S. 552, 556 (1947)). Rather, "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Id.* Regardless of the exact formula employed, it is beyond dispute that the facts and circumstances as outlined above -- and as articulated by the Treasury Defendants themselves -- demonstrate that decision about whether to provide supplemental pension benefits to Delphi retirees, and which Delphi retirees to provide them to, can "be fairly treated as that of the [government] itself." *Jackson*, 419 U.S. at 351.

In review, the United States Treasury was Old GM's creditor-of-last-resort. At a time when Old GM faced a liquidity crisis of existential proportions, the Treasury was the only creditor willing or able to provide it with the financing necessary to keep it in existence. Tapping into the hundreds of billions of dollars of TARP funds created to purchase troubled assets, Treasury directed approximately $20 billion in loans to Old GM, subject to an express ability to veto any significant proposed expenditure not meeting its approval. These circumstances rendered Old GM clearly subservient to the Treasury Defendants as a general matter, as evidenced by the Treasury Defendants' firing and replacement of Old GM's chief

executive officer at the end of March 2009. But as concerned the Delphi matter in particular, the Treasury was necessarily the primary decision-maker. Without ever consulting Old GM, the Treasury Defendants began negotiations with the PBGC on Old GM's behalf, crafting a resolution of Delphi's pension issues, whereby the Salaried Plan would be terminated and the Hourly Plan funded by New GM. While Old GM's assumption of the Salaried Plan was Delphi's "preferred solution" prior to the government takeover of Old GM, because any Old GM expenditure of this size could only be made pursuant to Treasury approval, this was the first and last word on the future of the Salaried Plan.

The Treasury Defendants' control over Old GM only increased over time. Indeed, "[o]nce the decision was made to pursue a Section 363 sale," the Treasury Defendants began to negotiate the details of the sale with multiple parties, Wilson Dep. at 15:16-22 (Ex. M. to Dkt. No. 120), negotiations in which the Treasury Defendants "considered [*themselves]* to be negotiating *for New GM*." *Id.* at 15:23 - 16:5. (emphases added). By their own admission, the Treasury Defendants were responsible for determining which liabilities of Old GM that New GM would take on. *See, e.g., id.* at 88:18-25.

It was against this backdrop that the Treasury Defendants decided which Delphi retirees would be allowed to benefit from the use of the TARP proceeds. As noted above, the Treasury Defendants took up negotiating these matters on behalf of the GM entities. After the sealed Delphi bankruptcy mediation took place at the end of May 2009, the PBGC, Treasury, and Auto Task Force all participated in a telephone conference to discuss "settlement terms for resolving Delphi pension plan issues and the PBGC's claims"; despite the fact that New GM would wind up paying significant funds in exchange for the release of the PBGC liens, no representatives from the GM entities participated in these discussions. PBGC_ FOIA_623 (Ex. E). The fact of

GM's subservience is further demonstrated by an e-mail from Old GM's director of business development to Mr. Feldman on June 2, 2009, in which he asks Mr. Feldman to explain the final settlement that the Treasury reached with the PBGC on the GM entities behalf. Mr. Westenberg wrote that he was "looking to understand the details of the settlement with the PBGC regarding Delphi's hourly and salaried plans. Has it been finalized? Could you please provide an overview for how the hourly and salaried plans will be treated/addressed? Would it be appropriate/helpful to have GM involved in any discussions? Thanks, Rick." TREAS_FOIA_117 (Ex. E). The e-mail makes clear that the decision regarding the terms of GM's settlement of pension proceeds was made by the Treasury officials. Another GM official later seeks further clarification on the settlement, asking what "from the [Treasury's] perspective is expected from GM…and what isn't. We think we understand the Salaried side but want to understand the Hourly options better." TREAS_FOIA_115-16 (Ex. E).

When Old GM was actually consulted in decision-making, the influence of the Treasury Defendants was no less pervasive. Despite the many euphemisms employed, Mr. Feldman's deposition demonstrates that GM had virtually no autonomy in matters related to Delphi. For example, Mr. Feldman admits that the Treasury Defendants "assisted General Motors in their thinking and actions in connection with the Delphi bankruptcy," and were "able to think through with [Old GM] and help them think through what the best resolution was from their perspective." Feldman Dep. at 32:19 - 33:2 (emphasis added); 33:6-9. Mr. Feldman recalled having seventy (70) meetings, phone calls, and other discussions with Old GM, on Delphi matters alone. *Id.* at 35:15-21. Moreover, as noted above, the Treasury Defendants had a clearly articulated goal in these matters: "trying to facilitate an agreement where the salaried plan would get terminated and taken over by the PBGC and General Motors would assume liability for the hourly plans." *Id.* at

159:22-160:2. And when it became clear in June that it would be infeasible for New GM to take on Delphi's Hourly Plan outright, Mr. Feldman made clear that the Treasury Defendants were instrumental in crafting the alternative that was ultimately decided upon -- the termination of the hourly plan, with New GM promising to top-up benefits for the hourly workers affiliated with certain unions:

> Q: What kind of work did you do at Treasury to understand it [*i.e.,* termination of the hourly plan and topping up of benefits]?
>
> A: You know, we went back to their business plan, we had a number of conversations with them, we asked their pension people to explain to us what the timing of payments would be for the underfunding. We wanted to compare that if they honored the top-up guarantee when those payments would be made. We wanted to understand how many employees we were talking about, where they were located, how many were retired, how many were between 62 and 65, how many were past the age of 65. So there was a fair amount of work we wanted to understand whether this made sense for General Motors in its business, what the impact would be.

Feldman Dep. at 183:18-184:10.

The Treasury Defendants power over New GM was even greater. The Treasury Defendants held a dominant 60% stake in New GM. By the end of July 2009, New GM had filled all of the positions on its 13-member board of directors, 10 of whom were appointed or reinstated by the Treasury Department.[20] Moreover, post-petition, the Treasury loans were subject to new covenants, which explicitly required Treasury's approval in making any Delphi related expenditure. "There are covenants that would require General Motors to obtain Treasury's consent again with respect to certain transactions . . . . The Delphi investment would be one in which they would need Treasury's consent." Feldman Dep. at 29:10-15.

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[20] *See* Congressional Oversight Panel, *The Use of TARP Funds in the Support and Reorganization of the Domestic Automotive Industry*, at 20 (Sept. 9, 2009) (attached as Ex. I to Dkt. 47).

Indeed, the Treasury Defendants (as well as other White House officials), by Mr. Feldman's own admission, had multiple discussions with New GM about the top-up guarantees to Delphi's hourly workers in July of 2009:

> A: Within the last few weeks, I've had conversations with General Motors about which unions they intend to honor the top-up guarantee to, and I know that others at Treasury and the White House have had conversations with them.
>
> . . .
>
> Q: With whom out at Treasury or at the White House has GM had a conversation about honoring their top-up guarantee?
>
> A: Steve Ra[t]tner has spoken to [former GM Chairman] Fritz Henderson about it. Brian Deese from the White House and I have spoken to [General Counsel] Frank Jaworski about it at General Motors.
>
> Q: And when were those conversations?
>
> A: There have been multiple conversations in the last two to three weeks.

Id. at 198:6-25.

In sum, it is impossible to divorce the Treasury Defendants from New GM's "decision" to selectively provide supplemental pension benefits to Delphi retirees. The Treasury Defendants: (1) negotiated on behalf of both GM entities; (2) were the primary and last-resort lender for Old GM; (3) were the majority owner of New GM; (4) appointed the majority of its board of directors; and (5) were actively involved in its decision-making -- including as to New GM's actions with respect to the Delphi pension plans. Mr. Feldman had approximately *70* meetings and/or discussions with Old or New GM concerning the Delphi bankruptcy, including discussions with respect to Delphi's pension plans in general, and more specifically about who New GM could and should provide supplemental pension benefits.

Further, New GM, by the explicit terms of its loan agreements with the government, could only provide supplemental pension benefits to Delphi retirees with the Treasury

Defendants' express consent. As a result, all of the "contested commitments" which New GM entered into had to be approved by the Treasury, and if the Treasury refused to grant its consent to a similar commitment to the Salaried Retirees, then New GM plainly lacked the ability to provide it. The Treasury Defendants' admission that they were actively working to facilitate a resolution of the pension situation whereby the Salaried Retirees would see their pensions terminated, whereas the Hourly Plan's participants would see their benefits paid for by New GM, takes on particular significance. Against this factual backdrop, the Treasury Defendants' arguments as to state action must fail. To say the least, there is a *plausible* case that the government is responsible for the acts here at issue. At the very least, it is plausible that the government was responsible and there is a genuine issue of material fact as to the role played by the Treasury Defendants with respect to the top-up decisions such that a dismissal for failure to state a claim must be rejected.

Faced with all this, the Treasury Defendants look to the Supreme Court's decision in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) to make their argument that, despite their manifest involvement in these decisions, there was insufficient state involvement here to satisfy the "nexus test." Treas. Defs.' Br. at 22-23. The thrust of their argument is that Plaintiffs have failed to satisfy *Burton*'s requirement that they allege a "'mutual[ly] benefi[cial]' relationship with Old GM or New GM of the sort that existed in *Burton*." *Id.* at 23 (quoting 365 U.S. at 724.). This argument likewise falls short.

First, it must be noted that the state involvement in *Burton* is incredibly modest when compared to the state involvement with the GM entities.[21] In fact, the municipal agency in

[21] For the restaurant at issue in *Burton*, these benefits included affording its guests "a convenient place to park," along with the knowledge that, because the parking facility was a tax-exempt government agency, "there is no possibility of increased taxes being passed on to it" in the event the restaurant were to make

(footnote continued on next page)

Burton was faulted not for its actions, but for its "inaction." *Id.* Contrast such inaction with the constant and overwhelming control described above, and it is impossible to not find "a sufficiently close nexus between the State and the challenged action," *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974), even if Plaintiffs alleged no mutually beneficial arrangement. For the Government, which had invested massive financial capital ($49.9 billion), and even greater political capital by becoming the company's majority shareholder, the success of New GM was (and still is) of paramount importance. The relationship between the two entities in not merely mutually beneficial, it is in fact symbiotic.

With regard to the specific decisions at issue here, *i.e.*, whether to provide supplemental pension benefits to Delphi retirees whose pension plans were terminated, and how to determine which retirees to provide them to, the mutual benefit of the unconstitutional discrimination is no less obvious. Treasury invested $49.9 billion in the GM entities through loans, of which $27.2 billion remains outstanding. 2011 Oversight Rpt. at 34. Because of the Treasury's role as both shareholder and creditor to New GM, by selectively providing pension benefits to only some retirees, the Treasury Defendants reduced the expenditure of both entities, and the "profits earned by [the] discrimination . . . contribute to . . . the financial success of [the Government]. *Burton*, 365 U.S. at 724. Thus, even assuming, *arguendo*, that the nexus test requires some demonstration of mutual benefit, that requirement is satisfied here.

(footnote continued from previous page)
improvements. 365 U.S. at 724. The benefit to the State, on the other hand, was the fact that "its convenience for diners may well provide additional demand for the [agencies] parking facilities." *Id.* And finally, the Court noted that it could not be ignored "especially in view of [the restaurant's] affirmative allegation that for it to serve Negroes would injure its business, that profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency." *Id.*

Given this symbiotic relationship, it is impossible to contend that there was not a nexus between the New GM's actions with respect to the Delphi supplemental pensions and the state. "Under the nexus test, 'the action of a private party constitutes state action when there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself.'" *Lansing v. City of Memphis*, 202 F.3d 821, 830 (6th Cir. 2000) (quoting *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992)). "Thus, the inquiry is not whether the state and the [private entity] generally have a close nexus, but whether there is a close nexus between the state and each of the [private entity's] specific action[s]." *Zeigler v. Miskiewicz*, No. C2-07-0272, 2008 U.S. Dist. LEXIS 17025, at *18 (S.D. Ohio Mar. 5, 2008). Under the nexus test, Plaintiffs need show only a "close nexus" between the Treasury Defendants and the decision to top-up the pensions of Delphi's hourly workers, but not those of its Salaried Retirees. The facts as articulated even by the Treasury Defendants of their intimate involvement in the Delphi pension issue establish such a nexus, and discovery can be expected only to further establish the point.

The Treasury Defendants arguments with regard to the "state compulsion" are equally misguided. To reiterate, "[t]he state compulsion test requires that a State has 'exercised such coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.'" *Vistein v. Am. Registry of Radiologic Technologists*, 342 Fed. Appx. 113, 127-28 (6th Cir. 2009) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). The facts outlined above plausibly suggest that the Treasury Defendants used their extraordinary power over New GM to determine that only those Delphi Retirees they favored would receive these federally funded pension top-ups.

In response, the Treasury Defendants argue that "all of the courts that have considered the issue have rejected the notion that the federal government did anything in connection with the restructuring of Old GM that constituted overreaching." Treas. Defs.' Br. at 19. In point of fact, the Treasury Defendants have not cited any authority opining on the application of the state action test to any action by New GM, and certainly not to the actions at issue here. *See, e.g. In re Gen. Motors*, 407 B.R. 463, 493-94 (Bankr. S.D.N.Y. 2009) (court engaging in analysis of whether "(i) notice has been given to all creditors and interested parties; (ii) the sale contemplates a fair and reasonable price; and (iii) the purchaser is proceeding in good faith."). The Treasury Defendants cite the bankruptcy court's conclusion that "there is no proof that [New GM] (or its U.S. and Canadian governmental assignors) showed a lack of integrity in any way" to suggest that the state compulsion test is not satisfied. Treas. Defs.' Br. at 19, quoting *In re Gen. Motors*, 407 B.R. at 494. This argument confuses the relevant inquiry. Whether the state acts with integrity or bad faith is immaterial to the state action test, which is concerned only with the question of whether a state has 'exercised such coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.'" *Vistein*, 342 Fed. Appx. at 127-28 (citation omitted). The Treasury Defendants' integrity, or lack thereof, in purchasing the assets of Old GM is simply irrelevant to the question of whether they exercised coercive power over New GM in determining which Delphi retirees would or would not receive supplemental pension benefits. And moreover, at the time the court was writing (on July 5, 2009), both the IUE and USW affiliated retirees faced the same fate as Plaintiffs, in that their pension plan was on the cusp of termination and they lacked any commitment from New GM to provide supplemental benefits. Under these facts, Plaintiffs

have plausibly alleged that the government compelled the actions at issue here, and that New GM's actions in connection thereto should be deemed those of the state.[22]

IV. THE TREASURY DEFENDANTS' DECISION TO PROVIDE SUPPLEMENTAL PENSION BENEFITS ON THE BASIS OF POLITICAL ASSOCIATION AND SPEECH VIOLATES PLAINTIFFS' CONSTITUTIONAL RIGHTS UNDER THE FIRST AND FIFTH AMENDMENTS

Plaintiffs allege that the Treasury Defendants, directed New GM to provide supplemental pension benefits to certain Delphi pensioners affiliated with three particular unions, the UAW, the IUE and the USW, and not to Plaintiffs. The Salaried Retirees allege that the decision to provide these top-up payments to these recipients was made on the basis of the associational choices of the recipients, and the political speech of those associations. This was in essence a political quid pro quo, designed to reward and/or induce the political and financial support of these unions. Second Am. Compl. ¶¶ 36-37, 59-60. They further allege that the Treasury Defendants' refusal to extend to the Salaried Retirees the same supplemental pension benefits merely because they are not affiliated with the favored political groups plainly burdens their freedom to believe and associate without government coercion. These allegations are legally sound, and more than plausible factually.

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[22] The Treasury Defendants also challenge the sufficiency of the facts alleged, arguing that "the mere fact that the government was 'the majority shareholder and a significant creditor of New GM' is insufficient to 'allow[] the court to draw the reasonable inference' that the government compelled New GM to enter into the Contested Commitments." Treas. Defs.' Br. at 20-21 (quoting 2d Am. Compl. ¶ 62; [Ashcroft v.] *Iqbal,* 129 S. Ct. [1937,] 1949 (2009)). As described earlier, however, Plaintiffs allegations go far beyond these two facts.

A. The Government May Not Condition the Receipt of Pension Benefits on Affiliation with a Politically Favored Union Absent a Showing that the Governmental Action was Narrowly Tailored to Serve a Compelling Governmental Interest

Government classifications that infringe upon rights guaranteed by the First Amendment deny equal protection unless they "serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of First Amendment freedoms." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). Where the government acts in response to political speech or affiliation, it is "required to demonstrate that its action was narrowly tailored to serve a compelling governmental interest." *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 678 (1996).

Plaintiffs' allegations, because they raise questions of political association and speech, implicate the core protections of the First Amendment. *See Elrod v. Burns*, 427 U.S. 347, 356 (1976) ("political belief and association constitute the core of those activities protected by the First Amendment."); *see also McCloud v. Testa*, 97 F.3d 1536, 1552 (6th Cir. 1996) ("[p]olitical association is at the core of the First Amendment, and even practices that only potentially threaten political association are highly suspect."). In addition, just as the government cannot condition benefits on the basis of affiliation, it similarly cannot deny benefits because of non-affiliation, as the "[f]reedom of association [] plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623; *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). Thus, providing or denying a benefit only to those who associate or do not associate is considered impermissible compulsion under the First Amendment. *Roberts*, 468 U.S. at 622 ("Government actions that may unconstitutionally infringe upon this freedom can take a number of forms. Among other things, government may seek to impose penalties or withhold benefits from

individuals because of their membership in a disfavored group."); *see also Branti v. Finkel*, 445 U.S. 507 (1980); *Healy v. James*, 408 U.S. 169, 180-84 (1972).[23]

These concerns are at the very heart of Plaintiffs' allegations. Here, Plaintiffs allege that the Treasury Defendants awarded supplemental pension benefits on the basis of the recipient's affiliation with particular political associations, and the political speech of those associations.[24] The retirees affiliated with the UAW, IUE and USW received supplemental pension benefits because those particular unions were long-standing and vocal political supporters of the administration, and the administration hoped to reward and encourage that support. Plaintiffs, on the other hand, enjoyed no such affiliation, and were consequently denied the pension top-ups.

It is equally well settled that the choice to provide a benefit on the basis of political affiliation, even a benefit that a citizen has no particular entitlement to, offends the First Amendment. "[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Of particular relevance here, the Supreme Court ruled in *Perry* that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech." *Id.* The Court has explained that the benefit in question need not be one that a citizen has a clearly established right to, because

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[23] It is also no response to say that the alleged discrimination was done for political reasons and not on the basis of party affiliation. The Sixth Circuit has made clear that this freedom of association applies broadly to "political differences of any kind, not merely differences in party membership." *See, e.g., Williams v. City of River Rouge*, 909 F.2d 151, 153 n.4 (6th Cir. 1990); *Faughender v. City of N. Olmsted*, 927 F.2d 909, 914 n.2 (6th Cir. 1991).

[24] To the extent a union engages in political expression, that expression falls within the First Amendment's ambit. *See, e.g., Citizens United v. FEC*, 130 S. Ct. 876, 904 (2010) (political contributions by corporations and unions constitutes speech protected by First Amendment).

"constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 11 (1972).

Again, Plaintiffs' allegations fall comfortably within this rubric. If, as Plaintiffs allege, the pension benefits at issue here are awarded or denied to retirees as a result of their political speech (or the speech of the associations in which they participate), then the benefits are nothing more than an indirect form of governmental coercion. "[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible." *Perry*, 408 U.S. at 597 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)); *see also Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) (noting that the government may not impose "unconstitutional conditions" upon the receipt of any benefits, such that it "'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that benefit") (quoting *Perry*, 408 U.S. at 597).

Furthermore, while true that the question of unconstitutional conditions has come up most frequently in the context of government employees, it is in fact well settled that "'[e]very citizen enjoys the First Amendment's protections against governmental interference with free speech.'" *Lucas v. Monroe County*, 203 F.3d 964, 973 (6th Cir. 2000) (quoting *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995)). The level of scrutiny a court must employ to a challenge under the "unconstitutional conditions" will depend on "the context in which the claim arose." *Kinney v. Weaver*, 367 F.3d 337, 358 (5th Cir. 2004). "As the Supreme Court

explained in *Umbehr*, the cases form a 'spectrum' ranging from, at one end, cases involving 'government employees, whose close relationship with the government requires a balancing of important free speech and government interests' and, on the other end, cases involving 'ordinary citizens whose viewpoints on matters of public concern *the government has no legitimate interest in repressing*." *Id.* at 358 (quoting *Umbehr*, 518 U.S. at 680) (emphasis added).

Here, there is no employment relationship between the state and Plaintiffs. But the consequence of this is not, as the Treasury Defendants contend, that the Salaried Retirees have no First Amendment protection from governmental interference, but rather that their First Amendment protection is analyzed under the "ordinary citizen" standard, in which the court need not weigh any governmental concerns, because "the government has no legitimate interest" to balance in such cases. *Id.*[25]

The Treasury Defendants have burdened Plaintiffs' associational rights merely with the knowledge that the right to the supplemental pension benefits paid out by the government were lost because of the associational choices they made. Compulsion is no less offensive to the First Amendment if it takes the form of providing financial benefits or burdens (like those at issue here, because of the coercive effects of such actions. *See, e.g., Simon & Schuster, Inc., v.*

[25] Even were the government employee standard to apply, where governmental interests are balanced, deprivations of the kind imposed by the Treasury Defendants have been found unconstitutional. In fact, the Supreme Court has consistently held that the government cannot treat those it employs more or less favorably on the basis of their association (or non-association) with a politically favored group. Certainly the government cannot "condition[] public employment on the provision of support for the favored political party," as that "'unquestionably inhibits protected belief and association.'" *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 69 (1990) (quoting *Elrod v. Burns*, 427 U.S. 347, 359 (1976)). And in *Elrod*, the Court noted that less direct means of coercion are similarly impermissible -- the "[p]rotection of First Amendment interests has not been limited to invalidation of conditions on government employment requiring allegiance to a particular political party. This Court's decisions have prohibited conditions on public benefits, in the form of jobs *or otherwise*, which dampen the exercise generally of First Amendment rights, however slight the inducement to the individual to forsake those rights." *Elrod,* 427 U.S. at 358 n.11 (emphasis added).

Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."). Nor do Plaintiffs need to show that the government's decision about who to favor with supplemental pension benefits was made in an effort to convince Plaintiffs to change their political affiliation. For example, in *Branti v. Finkel*, 445 U.S. 507 (1980), the Court held that the First Amendment prohibited a public defender from discharging assistant public defenders because they did not have the support of his political party. The plaintiffs did not need to show that the firings were aimed at coercing the employees to change their political party affiliation, only that they occurred because of the employees private political beliefs; what made the acts unconstitutional was "the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job." *Id.* at 516; s*ee also Welch v. Ciampa*, 542 F.3d 927, 939 (1st Cir. 2008) ("Punishing an employee for failing to support the prevailing party 'unquestionably inhibits protected belief and association.'") (quoting *Elrod*, 427 U.S. at 359).

The government's decision not to direct supplemental pension benefits to Plaintiffs because of their failure to associate with an organization that politically supports the Administration is a clear and heavy financial penalty, one which cannot help but "dampen the exercise generally of First Amendment rights." *Elrod*, 427 U.S. at 358 n.11. In this instance, the stakes are enormously high, as a significant balance of the pension promised to Delphi retirees hangs in the balance. It goes without saying that for a retiree in Michigan (or elsewhere), especially in today's economy, a full restoration of a retiree's pension benefits is not a "slight [] inducement." *Id.* On the contrary, it means the difference between being able to pay for all one's medications or not; or being able to stay in one's home, or not. And just like the

discharged public defenders in *Branti*, Plaintiffs allegations arise not from their speech against the administration, but rather from their failure to "have a sponsor in the dominant party." *Branti*, 445 U.S. at 516. Because of "the coercion of belief that necessarily flows from th[is] knowledge," the Treasury Defendants' actions are unconstitutional. *Id.* Even in those cases where a citizen's First Amendment rights must be balanced with the government's competing interest as an employer, the Supreme Court has held that "[t]he First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate." *Rutan*, 497 U.S. at 72-76 (noting that the failure to promote, transfer or recall an employee after a layoff are included among those things that a public employer cannot do on the basis of political affiliation or belief). Here, the government has no such compelling interests in influencing the association of Delphi retirees. If, as Plaintiffs allege, the decision to provide supplemental benefits to retirees affiliated with the UAW, IUE, and USW was done either to reward those unions for the political speech they had rendered to the Administration, or to secure that their future support, then the decision to provide supplemental payments to them and not others violates the Constitution.

Ignoring the well settled law that "[e]very citizen enjoys the First Amendment's protections against governmental interference with free speech," *Lucas*, 203 F.3d at 973, the Treasury Defendants demur that "the principle that government action taken for political reasons violates the First Amendment applies solely to public employees." Treas. Defs.' Br. at 30 (citing *Vieth v. Jubelirer*, 541 U.S. 267, 294 (2004) (Scalia, J.). They argue that the Supreme Court's holding in *Vieth*, in which a four Justice plurality refused to apply heightened constitutional scrutiny to a gerrymandering claim, supports their position.

On the contrary, *Vieth*'s holding was that the gerrymandering claim before the Court did not implicate a First Amendment harm. *Vieth* rejected the notion that gerrymandering could present a First Amendment claim because to do so "would render unlawful all consideration of political affiliation in districting, just as it renders unlawful all consideration of political affiliation in hiring for non-policy level government jobs." *Id.* at 294. Such a result would be untenable, because "setting out to segregate voters . . .by political affiliation is (so long as one doesn't go too far) lawful and hence ordinary." *Id.* at 293.

In contrast, the government's decision to use federal funds to award or deny pension benefits on the basis of political affiliation is neither ordinary nor lawful. If, as *Elrod* holds, it is unconstitutional for the government, when acting as an employer, to award public (*i.e.*, federally funded) benefits on the basis of political affiliation, *see* 427 U.S. at 358 n.11, it must also offend the constitution when the Government directs a government-owned entity to do so. There is no meaningful distinction between the conduct prohibited in *Elrod* and the government's conduct here, and certainly *Vieth's* conclusion that political considerations have always played into districting decisions does nothing to upset this conclusion. *Vieth* is inapposite.

The Supreme Court's holding in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), is equally unavailing for the Treasury Defendants, who cite it for the proposition that "[r]eliance on a 'generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.'" *Id.* at 910 (quoting *McConnell v. FEC*, 540 U.S. 93, 296 (2003) (Kennedy, J., concurring and dissenting). The Court's holding in *Citizen's United* was not, as the Treasury Defendants suggest, aimed at limiting the contexts in which the First Amendment's protections apply, but rather expanding them. *Citizens United* was a rejection of an attempt by the government to over-regulate the

speech of corporations and unions, not an endorsement of governmental efforts to bestow benefits to the former employees of a government owned corporation on the basis of their political support. *See e.g., id.* at 911 ("The remedies enacted by law, however, must comply with the First Amendment; and it is our law and our tradition that more speech, not less, is the governing rule."). In fact, the Court made clear in *Citizen's United* that the associational choice to affiliate with a union can indeed have First Amendment implications by reiterating that a union's political contributions are within the ambit of free speech covered by the First Amendment. *See id.* at 904.

To be clear, it is not Plaintiffs contention that the Treasury Defendants actions were constitutionally infirm because they took "politics" into account in making these decisions. Rather, it is the fact that the decisions were based on the associational choices made by Delphi retirees, and the political speech associated with those choices, that renders the top-up decisions unconstitutional. The Supreme Court has consistently held that there is a bright line rule forbidding the use of political affiliation in governmental decision-making, with *Vieth* being the exception that proves the rule as a result of the well established tradition of considering the political affiliation of voters when making districting decisions. *Vieth,* 541 U.S. at 293. There is no comparable tradition of utilizing such associational choices in the context of awarding government-funded pension benefits; to the contrary, such considerations have consistently been struck down in circumstances where governmental benefits are in issue. *See, e.g.*, *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (the government may not deny a benefit to a person because of his constitutionally protected speech or associations even if he has no right to the benefit); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (unconstitutional government actions can take many forms, including seeking to withhold benefits from individuals because of their

membership in a disfavored group); *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) (the government may not impose "unconstitutional conditions" upon the receipt of any benefits, such that it "may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit") (internal quotation omitted); *Elrod*, 427 U.S. at 358 n.11 (Court has long prohibited conditions on public benefits on the basis of associational affiliation).

For all these reasons, Plaintiffs allegations clearly implicate the First Amendment's protections. Because the Treasury Defendants have failed to "demonstrate that [the government's] action was narrowly tailored to serve a compelling governmental interest," the Treasury Defendants' motion should be denied. *Umbehr*, 518 U.S. at 678.

B. Plaintiffs Have Plausibly Alleged that the Treasury Defendants' Decisions Regarding Supplemental Pension Benefits Were Made on the Basis of Associational Choices, and thus that the Decisions Impermissibly Burdened their First Amendment Rights

To reiterate, "[i]n order to survive a Rule 12(b)(6) motion to dismiss, [a] complaint need contain only 'enough facts to state a claim to relief that is plausible on its face.'" *Paige v. Coyner*, 614 F.3d 273, 277 (6th Cir. 2010) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plaintiffs easily satisfy this standard with respect to their allegations that the Treasury Defendants have violated the Salaried Retirees' constitutional rights. The Salaried Retirees allege that the Treasury Defendants denied supplemental pension benefits to them because of their constitutionally protected associational choices -- *i.e.*, that the Salaried Retirees did not receive a top up because they were not part of a politically favored union. In support of this contention, Plaintiffs can rely not only on the allegations in their Second Amended Complaint, but also can cite documents supplied by the Treasury Defendants in their dispositive motion. The available facts at even this early stage show that Plaintiffs' view of the facts is far

more than plausible, and that the Treasury Defendants' version of events is ultimately unsustainable.

As discussed above, the Treasury Defendants have acknowledged that: (1) they were attempting to facilitate the termination of the Salaried Plan and a commitment by New GM to fund the Hourly Plan; (2) that they negotiated these issues on Old and New GM's behalf; (3) they consulted with union officials about these issues; and (4) New GM could not make a top-up decision without Treasury's approval. Moreover, it is clear from the IUE's announcement of the top-up agreement, that it had garnered the commitment to receive the same top-up as the UAW retirees were getting as a result of a massive *political* lobbying effort. In the press release announcing the agreement, the IUE notes that achieving the result had not been easy. Initially, New GM tried to walk away from the top-up agreement, but "IUE-CWA fought back hard with a series of major newspaper ads, outreach on Capitol Hill and to the Obama administration, picketing in front of the bankruptcy court and at appearances of President Obama and Vice President Joe Biden, and a massive email and phone campaign to the White House and Treasury Department." Ex. 2 at 1 to Dkt. No. 138. The clear implication of the announcement is that New GM was only persuaded to provide IUE top-up payments after the IUE applied political pressure to New GM's owner and chief lender, the United States government.

Similarly, on July 10, 2009, Leo Gerard, president of the USW, sent an e-mail to Nate Tamarin[26], a White House associate political director, letting him know that his members were "really pissed," about the fact that the UAW retirees were getting better treatment than their USW counterparts. TREAS_FOIA_74 (Ex. E). Mr. Tamarin promptly forwarded the email to

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[26] According to a March 2, 2009 New York Times article, Mr. Tamarin was charged with leading the Administration's "outreach to labor." Steven Greenhouse, *In Obama, Labor Finds Support It Expected*, N.Y. Times, Mar. 2, 2009, at B3.

Brian Dees, a member of the Auto Task Force, who then emailed Defendant Bloom to inform him that a call had been set up to discuss the issue. *Id.*

It is also no secret that the UAW and USW are among the largest political contributors in the United States. The Center for Responsive Politics reports that the UAW and USW are among the top political donors of the past decade. *See* Center for Responsive Politics, List of Top All-Time Donors, 1989-2010, http://www.opensecrets.org/orgs/list.php (last visited Feb. 24, 2011). And the vast majority of their contributions are given to Democratic candidates, the political party of the President, for whom the Treasury Defendants worked. While it may be cynical, it is not implausible to allege that it is the content of the unions' speech, the consistency with which they donated to the Administration's party, and the sheer political power of these unions that is responsible for the top-ups, particularly in light of the IUE's statement that political know-how had also secured their top-up.

Still further, the Government Accounting Office and the Office of the Special Inspector General for the Troubled Asset Relief Program both have commented that the Treasury officials administering the TARP did not have sufficient checks and balances to ensure commercially sound decision-making or to avoid conflicts of interest that could taint decision-making.[27] Against that backdrop, it is plausible to assume that improper motivations tainted the Treasury Defendants' decisions on top-ups.

Plaintiffs' allegations become all the more plausible, because the Treasury Defendants' version of the facts is insupportable. The Treasury Defendants throw up various explanations for

[27] *See* Office of the Special Inspector General for the Troubled Asset Relief Program, *Factors Affecting the Decisions of General Motors and Chrysler to Reduce Their Dealership Networks,* (July 19, 2010), http://www.sigtarp.gov; *see also* Government Accountability Office, *Troubled Asset Relief Program: Automaker Pension Funding an Multiple Federal Roles Pose Challenges for the Future* (Apr. 2010), http://www.gao.gov/new.items/d10492.pdf.

why the pension benefits of the members of the three favored unions -- and only them -- were provided with these supplemental pension benefits. As regards the UAW, the Treasury Defendants argue that "New GM had no realistic choice" but to treat the UAW preferentially (assumedly because of the its size) because, "'[a]s a matter of reality, [New GM] need[s] a properly motivated workforce to enable [it] to succeed, requiring it to enter satisfactory agreements with the UAW . . . for UAW retirees.'" Treas. Defs.' Br. at 27-28 (quoting *In re General Motors Corp*., 407 B.R. 463, 512 (Bankr. S.D.N.Y. 2009)). Because "every employer needs 'an adequate, suitable, and loyal supply of labor,'" New GM, the Treasury Defendants argue, had to provide Delphi's UAW-affiliated retirees with supplemental pension benefits. *Id.* at 28 (citing *Sugarland Indus. v. Comm'r*, 15 B.T.A. 1265, 1269 (1929).

One problem with this argument is that it does not explain a 100% top up for Delphi's UAW retirees. Moreover, given the large number of UAW retirees, of all the groups of Delphi retirees to whom New GM might extend top-up benefits, this group was likely the most expensive. The Treasury Defendants point to no evidence indicating that New GM concluded that its relationship with the UAW would be unworkable absent a 100% top up to Delphi's UAW's retirees, and that some lesser quotient would not have been the minimum necessary as a commercial necessity to achieve the necessary morale among current New GM UAW workers. A second problem is, if the agreement was necessary to secure an "adequate, suitable, and loyal supply of labor," there is no explanation for why the salaried portion of New GM and Delphi would not need similar reassurance. Surely those salaried employees have the same concerns, and are no less necessary to the continued operations of Delphi and New GM. The more plausible explanation is that the Treasury Defendants acted in response to the past and future

political contributions and support (*i.e.* speech) of the UAW, seeking simultaneously to curry favor and reward the UAW for its speech.

Next, the Treasury Defendants appear to assert that the top-ups were based on the benefit guarantees that Old GM entered into with the UAW, USW, and IUE in 1999, when it spun off Delphi. *See* Treas. Defs.' Br. at 28-29. But those guarantees were worthless and unenforceable once Old GM declared bankruptcy. *See In re General Motors*, 407 B.R. at 509-12 (overruling USW and IUE objections to sale of Old GM's assets to New GM); Ex. R at 1 to Dkt. No. 120 (". . . GMCo and MLC deny . . .that GMCo and MLC are required to . . . provide certain pension benefit guarantees in accordance with collectively bargained memorandums of understanding . . . ."). If it was commercial necessity that guided the Treasury Defendants' decision with respect to New GM, it makes no sense to have afforded any -- and certainly not 100% -- top ups to the favored unions, since there was no extant legal obligation to do so.

Last, the Treasury Defendants try to explain pension top ups for the USW and IUE as the barter for settling pending litigation against New or Old GM again stemming from the 1999 contractual benefit guarantees. Treas. Defs.' Br. at 28-29. But these guarantees were, to repeat, worthless and unenforceable due to bankruptcy, and New GM, again, even has stated its view that it had no obligation at all to these unions as a result of the 1999 benefit guarantees. *See* Ex. R at 1 to Dkt. No. 120 (". . . GMCo and MLC deny . . . that GMCo and MLC are required to . . . provide certain pension benefit guarantees in accordance with collectively bargained memorandums of understanding . . . ."). For the Treasury Defendants to support a 100% top up -- thereby giving the USW and IUE *everything* with respect to pension benefits that the two unions apparently sought in the cited litigation lacks all logic, and certainly does not comport with the supposed standard that only what was commercially necessary should be done. The

better explanation is that these top ups for these unions -- as the IUE's own press release about the top ups touts -- was politically motivated, not commercially motivated or litigation-based.

For all of these reasons, the Treasury Defendants' gloss on the factual events does not hold together, adding to the plausibility of Plaintiffs' assertions regarding the facts. And there is one other point that undermines the Treasury Defendants' take on the facts. The PBGC appears to have been surprisingly quiet regarding the appropriateness of the top ups to the favored unions. Previously, the PBGC had fought all the way up to the Supreme Court, and won, on the point that an employer may not establish a "follow on" plan to make retirees whole, once the PBGC takes over a terminated pension plan. *See PBGC v. LTV Corp.*, 496 U.S. 633, 647-48 (1990). That is almost precisely the arrangement the Treasury Defendants have accomplished - here the politically favored retirees are made whole through the federally funded supplemental pension benefits. There is some indication that the PBGC initially was "really unhappy" about the resolution of the pension issues (*see* Feldman Dep. at 189:3), but ultimately it acquiesced. For an agency that historically has zealously guarded the termination process and fought against follow-on plans, the implication is that it may have been compelled to acquiesce to the politically expedient course of action.

In short, reading all of the allegations in Plaintiffs' favor, the Salaried Retirees' Second Amended Complaint satisfies the minimal threshold of plausibility. Their assertion that the Treasury Defendants unconstitutionally distinguished between similarly situated individuals based on their affiliation with politically favored unions, and the speech of those unions, both is legally tenable under the First and Fifth Amendments and factually sufficient. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76 (1990) ("[t]he First Amendment prevents the

government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate.").

C. There Is Not Plausible "Rational Basis" for the Government's Disparate Treatment

The justification that the government has put forth for its disparate treatment is certainly not of a sufficiently compelling nature to justify burdening fundamental rights of association and speech. However, even assuming, *aguendo*, that the government's disparate treatment of retirees based on their association with politically powerful unions does not burden Plaintiffs' First Amendment rights, the government's proffered justification has no "rational basis." As the Sixth Circuit noted in *Hoke Co. Inc., v. Tennessee Valley Authority*, 854 F.2d 820 (6th 1988), in cases where no fundamental rights are implicated, a court must review an equal protection challenge to determine "whether an impartial law maker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." *Id.* at 829.

In *Hoke*, the court considered a non-union supplier's equal protection claim to a government agency's decision to award a purchase contract to a union contractor (no political affiliation allegations were made). The Sixth Circuit held that the "circumstances presented" to the court satisfied the rational basis test, but noted "in the strongest possible terms, however, that we are not ruling that a decision to favor union contractors under different circumstances would necessarily pass muster." *Id.* The relevant circumstances in that case included "the recurrence of the violence against non-union contractors, the fact that the reduced coal needs of TVA resulted in an award to only one supplier with the obvious consequence that interruptions of deliveries from only one supplier would be more critical, and the fact that the award did not result in greater cost to TVA but, rather, lower costs." *Id.* After reciting this litany of relevant

circumstances, the court cautioned that "[i]t would be the most serious of misinterpretations to read this opinion as a carte blanch authorization to favor union contractors over non-union contractors." *Id.*

Here, however, there are no such relevant circumstances. There is of course no threat of violence, given that there is not any ongoing relationship with the unions in question. And as already shown, the justification proffered by the Treasury Defendants for the distinctions among retirees it has made -- namely, commercial necessity, earlier contractual obligations about benefit guarantees, and getting rid of pending litigation -- lack logic and all rationality.

Indeed, as discussed above, the rational decision would have been to top up the Salaried Retirees. To reiterate, New GM viewed the removal of the PBGC's liens on Delphi's foreign assets as critical to its reorganization efforts. *Supra* p. 12. Funding Liens were in place on behalf of the Salaried Plan only. *See* AR34 (noting that as of January 5, 2009, the PBGC had in place $165 million in liens n Delphi assets on behalf of the Salaried Plan, and no liens in place on behalf of the Hourly Plan). As the PBGC's administrative record notes, there were no liens in place on behalf of the Hourly Plan (in part because GM agreed to make a payment reducing the underfunding of the Hourly Plan in September 2008). *See id.* Under the preferential deal engineered by the Treasury Defendants, the Salaried Plan received no quid pro quo return for its lien sacrifices attendant to the termination. Instead, notwithstanding the removal of the liens and the termination of the Salaried Plan, New GM agreed to provide top-up payments to retirees *in the Hourly Plan*. The rational thing would have been to make Salaried Retirees whole first, not hourly workers.

V. THE COURT HAS THE AUTHORITY TO ORDER EQUITABLE RELIEF IN PLAINTIFFS' FAVOR RELATING TO THE TREASURY AND THE AUTO TASK FORCE

"Federal courts are courts in law and in equity." *Carter-Jones Lumber Co. v. Dixie*

Distrib. Co., 166 F.3d 840, 846 (6th Cir. 1999) (emphasis added). The essence of the Court's equity jurisdiction is the power "to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs . . . ." *Id.* (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)) (internal quotations omitted).

The only limitations on the Court's equitable powers are those imposed by statute. *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946). Otherwise, "all the inherent equitable powers of the District Court are available for the proper and complete exercise of [equitable] jurisdiction." *Id.* at 398. A traditional aspect of the Court's equity jurisdiction is the authority "to fashion any remedy deemed necessary and appropriate to do justice in a particular case." *Carter-Jones Lumber Co.*, 166 F.3d at 846. Indeed, the Court may "give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice." *Porter*, 328 U.S. at 398 (citing *Camp v. Boyd*, 229 U.S. 530, 551-52 (1913)).

In the absence of any statutory limitations on the Court's equitable powers, the Court generally has "two remedial alternatives" in an equal protection case: it may nullify the underinclusive scheme and order that its benefits not extend to the originally intended beneficiary, or it may extend the coverage of the scheme "to include those who are aggrieved by the exclusion." *Heckler v. Mathews*, 465 U.S. 728, 738 (1984) (quoting *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring)). Ordinarily, "extension, rather than nullification, is the proper course," and that is what Plaintiffs seek. *Id.* at 739 n.5 (internal quotation marks omitted). In fact, the Supreme Court has held that "when the 'right invoked is that to equal treatment,' the appropriate remedy is a *mandate* of equal treatment." *Id.* at 740

(emphasis in original). Once the Court has determined that extension is the proper course, the Court has the power to mandate equal treatment by fashioning whatever relief is necessary to provide complete justice.

In this case, Plaintiffs seek, with respect to the Treasury and the Auto Task Force, an order compelling them prospectively to remedy the Equal Protection violation by topping up directly the pensions of the Salaried Retirees. The Treasury Defendants argue in turn that Plaintiffs are precluded from seeking this relief because the Court lacks authority to award them the payment of supplemental pension benefits. Treas. Defs.' Br. at 31. Their argument is based on the Supreme Court's holding in *OPM v. Richmond*, 496 U.S. 414, 424 (1990), that "the payment of money from the Treasury must be authorized by a statute." The Treasury Defendants argue that Plaintiffs are thus precluded from relief here because there is no statutory authorization for the relief here sought. They also argue that EESA does not provide such authorization because (1) the provision of supplemental pension benefits is not within its ambit; and (2) it has expired. The Treasury Defendants' arguments fails because Congress has authorized the relief sought here through EESA; because Treasury still has the ability to draw upon almost $60 billion in TARP resources to fund AIFP; and because Plaintiffs may be granted the relief they seek without drawing additional funds from the Treasury.

As the Treasury Defendants acknowledge, the supplemental pension payments at issue here were funded through a valid congressional appropriation. EESA authorized the Treasury to establish the TARP program to "purchase and to make and fund commitments to purchase, troubled assets from any financial institution, on such terms and condition as are determined by the Secretary, and in accordance with this Act and the policies and procedures developed and published by the Secretary." EESA, Pub. L. No. 110-343, § 101(a)(1), 122 Stat. 3765, 3767.

While Treasury's initial position was that TARP funds were unavailable to assist the auto industry, it ultimately reversed this position, establishing the Automotive Industry Financing Program ("AIFP") under TARP, "broaden[ing] the allocation of TARP assistance to the domestic automotive industry." 2011 Oversight Rpt. at 10-11. Through the AIFP program, Treasury extended $49.9 billion in TARP funds to Old and New GM through a series of loans. Plaintiffs allege that the Treasury Defendants determined that the GM entities could not use these TARP funds to fund their pension plan or provide them supplemental pension benefits, while at the same time directed and authorized New GM to provide supplemental pension benefits to the retirees who were affiliated with the UAW, IUE, and USW. It is undisputed that the supplemental pension benefits that New GM is providing to Delphi retirees are financed using these AIFP funds, and further that Treasury's consent was needed before New GM could extend these benefits. Feldman Dep. at 28:4-29:15.

Pursuant to section 119 of EESA, actions taken by Treasury in connection with TARP are subject to judicial review, and a court may order equitable relief against the Treasury "to remedy a violation of the Constitution." EESA, Pub. L. No. 110-343, § 119(a)(2)(A), 122 Stat. at 3787. Because Plaintiffs allege that the Treasury Defendants' decisions as to how to use these AIFP funds were based on associational considerations, in violation of the United States Constitution, they are authorized, by section 119 of EESA, to bring a claim for equitable relief against the Treasury Defendants.

The Treasury Defendants argue that "the payment of supplemental pension benefits" would not fall within EESA's authorization because such payments would not "involve the purchase of any 'financial instrument.'" Treas. Defs.' Br. at 32 (citing EESA §§ 3(9)(B), 101(a)(1)). In the first place, to give credence to the Treasury Defendants' argument is to

conclude that Treasury lacked the authority to approve the top-up payments to Delphi's unionized retirees in the first instance, and moreover the authority to extend any funds to the GM entities at all. EESA/TARP is a specific authorization for the release of aid to entities within its ambit, and the Executive Branch has already taken the position that it is available for top-ups to auto industry pensions (*i.e.*, the UAW, USW, and IUE). Clearly, given the express terms of Section 119, Congress expected the Executive Branch to administer TARP in accordance with the Constitution, and that is all the Court would be demanding with the equitable relief here requested by the Salaried Retirees. Second, and more importantly, Plaintiffs do not seek the relief pursuant to Section 101 of EESA, in which the Secretary is authorized to purchase troubled assets. Rather, Plaintiffs seek relief pursuant to section 119(a), which authorizes equitable relief against the Treasury for Constitutional violations of EESA. Because the express terms of EESA authorize a suit for equitable relief "to remedy a violation of the Constitution," the Appropriations Clause of the Constitution does not bar the relief requested. EESA § 1199a)(2)(A), 122 Stat. at 3787.

The Treasury Defendants acknowledge that Plaintiffs "at one time" might have relied upon EESA, but that is no longer available, because "the authority to purchase 'troubled assets' . . . expired by law on October 3, 2010." Treas. Defs.' Br. at 32. While true that the Treasury's authority to make *new investments* under TARP has expired, "dollars that have already been obligated to existing programs may still be expended . . . . When including the January 14, 2011, recapitalization of AIG, $410.1 billion had been spent and $59.7 billion still remains available to spend."[28] As such, the Treasury Defendants still have approximately $60 billion to expend

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[28] *See* Office of the Special Inspector General for the Troubled Asset Relief Program, *Quarterly Report to Congress* at 13 (Jan. 26, 2011), ("Jan. 2011 SIGTARP Rpt.") http://www.sigtarp.gov/reports/congress/2011/January2011_Quarterly_Report_to_Congress.pdf

pursuant to EESA. And, to reiterate, Plaintiffs are not asking for relief under section 119 of EESA, which has not expired.

Even were TARP no longer extant, the Court could award the relief sought without requiring an additional expenditure under EESA. The Treasury and Auto Task Force Defendants argue that the Appropriations Clause prohibits such an exercise of equity because it would result in money being drawn from the U.S. Treasury without Congressional appropriation. But the Treasury Defendants have access to funds which have already been appropriated, and which in good conscience belong to Plaintiffs. Entities that received TARP funding are constantly sending funds back to Treasury. Through just AIFP alone, Treasury has received approximately $3.4 billion in dividends and interest payments from participating companies, and approximately $22.4 billion in loan principal repayment sand share sale proceeds from New GM. Jan. 2011 SIGTARP Rpt. at 160. There are "currently $51.5 billion in TARP funds outstanding under AIFP." 2011 Oversight Rpt. at 18.[29] Because it is well settled that a plaintiff may seek restitution in equity "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession," the Court may, acting in equity, find them to be in good conscience Plaintiffs' funds. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002) (citing 1 Dan B. Dobbs, Law of Remedies § 4.3(1) (2d ed. 1993); Restatement of Restitution § 160 cmt. a (1936)); *see also Longaberger Co. v. Kolt*, 586 F.3d 459, 466-67 (6th Cir. 2009)).

Finally, Plaintiffs also seek declaratory relief as to the Treasury Defendants, specifically a

[29] These funds have not been accounted for as part of the U.S. Treasury, and because "[t]he complete disposition of Treasury's AIFP investments could take place over several years . . . it is impossible to determine whether Treasury's assistance through the AIFP will have a long-term financial cost or gain." 2011 Oversight Rpt. at 19. Defendant Rattner recently estimated that Treasury might lose approximately $10 billion on its AIFP investments. *Id*. at 47.

declaration that the Treasury and Auto Task Force have violated the Constitution and acted illegally in their disparate treatment of the Salaried Retirees. The Treasury Defendants argue that such relief is barred because it would amount to nothing more than an advisory opinion. Treas. Defs.' Br. at 31. As demonstrated above, this Court has full authority to award all the relief sought by Plaintiffs, and the Court plainly can issue a declaration, mandating in general fashion that these Defendants -- in a manner consistent with the statutes they say govern their authority -- rectify the situation through all available means.

VI. PLAINTIFFS' *BIVENS* CLAIM SHOULD NOT BE DISMISSED

Plaintiffs have alleged that the individual Defendants used the authority granted to them by virtue of their federal office to direct top-up payments to Delphi retirees affiliated with certain unions, and did so for associational reasons, in contravention of the United States Constitution. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court recognized a private right of action for damages against federal officers alleged to have violated a citizen's constitutional rights. The Court noted that "'where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.'" *Id.* at 392 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). Underlying the Court's decision was its observation that "'[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.'" *Bivens*, 403 U.S. at 397 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)). Because Plaintiffs have properly pled a *Bivens* claim against the individual Defendants that is neither precluded by statute nor barred by qualified immunity, the Treasury Defendants' arguments on this front too should be rejected.

A. Plaintiffs *Bivens* Claims Are Not Precluded by the Bankruptcy Code

The Treasury Defendants first argue that Plaintiffs' *Bivens* claim is precluded by statute, specifically the United States Bankruptcy Code. *See* Treas. Defs.' Br. at 33-34. This argument plainly fails. As an initial matter, the bankruptcy court in Delphi's reorganization has now issued an order confirming that *Bivens* claims against the remaining Defendants on Claim 5 do not violate any of its orders or proceedings. S*ee* Order granting amended motion for Order Confirming that the Second Amended Complaint does not violate the Modified Plan or the Plan Modification Order (*In re DPH Holdings Corp.*, No. 05-44481, Bankr. S.D.N.Y.) (Dkt. No. 20487, July 30, 2010) (attached as Ex. G). While suing New GM was problematic from the bankruptcy court's perspective, suing the United States and its officers was not. In addition, the Treasury Defendants have not presented any actual legal authority for their contention that bankruptcy remedies preclude *Bivens* claims, nor have they articulated what alternative remedy against the governmental parties is available under the Bankruptcy Code.

B. The Individual Defendants Have Failed to Prove That They Are Entitled to Qualified Immunity

"Qualified immunity protects government officials performing discretionary duties from 'liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Summe v. Kenton County Clerk's Office*, 604 F.3d 257, 269 (6th Cir. 2010) (quoting *Morrison v. Bd. of Trs. of Green Twp.*, 583 F.3d 394, 399 (6th Cir. 2009)). "Qualified immunity is an affirmative defense that must be pleaded and proved by the defendant." *Id.* at 269 (citation omitted); *accord Alexander v. Alexander*, 706 F.2d 751, 754 (6th Cir. 1983).

A court reviewing a defendant's defense of qualified immunity must determine whether, based on the applicable law, "the facts viewed in the light most favorable to the plaintiffs show

[first] that a constitutional violation has occurred[;] [s]econd, . . . whether the violation involved a clearly established constitutional right of which a reasonable person would have known[; and] [t]hird, . . . whether the plaintiff has offered sufficient evidence 'to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.'" *Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir. 2003) (quoting *Williams v. Mehra*, 186 F.3d 685, 691 (6th Cir. 1999) (en banc)).

The individual Defendants have failed to prove this defense. When viewed in the light most favorable to Plaintiffs, the facts show that a constitutional violation has occurred, that the constitutional right was clearly established, and that the individual Defendants' behavior was objectively unreasonable -- namely, that they directed top-up payments to the certain unions for associational reasons, and thus deprived Plaintiffs of those payments for associational reasons. As shown above, it is well settled that the government "'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that benefit." *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). It is equally well settled that political contributions by unions are speech. *Citizens United v. FEC*, 130 S. Ct. 876, 904 (2010). And reasonable government officials should realize that, in light of the law as articulated by the Supreme Court and the Sixth Circuit, it would be unreasonable to award supplemental pension benefits to retirees on the basis of their provision of political support.

CONCLUSION

The Court should deny the Treasury Defendants' renewed motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 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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